

The victim of human trafficking as offender: A combination with grave consequences

A reflection on the criminal, immigration and labour law procedures involving a victim of human trafficking in the Dutch Mehak case

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Abstract

For years, S., originally from India, was trafficked and exploited for labour in an Indian household in the Netherlands. At the same time, S. was convicted for the manslaughter of a baby that was also part of the household, which occurred during the human trafficking experience. The case raises important questions about the role of the non-punishment principle in cases where trafficking victims also become the perpetrator. What is more, in this exceptional case the question took central stage as to whether this principle can also be applied when the offence committed falls in the homicide category. This article focuses on these questions and also aims to demonstrate the influence that convictions of trafficking victims can have on other decisions they are subject to.

I. Introduction

This article is devoted to the case of S., a national of India who was trafficked for labour exploitation and worked as a housekeeper for an Indian couple in The Hague (from 1999 to 2006). The couple, consisting of R. and

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P., were convicted of trafficking in human beings in 2007, an offence currently criminalised in Article 273f of the Dutch Criminal Code (DCC).¹

During the period that S. was exploited in the household, the Indian couple also requested S. to abuse Mehak, a baby girl who also living in the house. These abuses were, according to R. and P., necessary in order to fight the negative consequences of the curse that had taken possession of Mehak. Eventually, the repeated assaults on the life of the baby led to her death. S. thereby became not only a victim of human trafficking, but also faced criminal charges (manslaughter) because of her role in the death of Mehak.

This article reviews some aspects of this exceptional case.² First, it will go into more detail about the facts of the case and the precise context in which S. had to perform her work for the Indian couple. Secondly, specific attention is paid to the role of the non-punishment principle in this case and the question as to whether this principle can also be applied in cases where the victim committed manslaughter. In the rest of the article the other legal procedures in which S. played a role are highlighted, such as her asylum procedure and the civil procedure to secure her salary. Thereby this article also focuses on the different legal domains that victims of human trafficking can be confronted with.

2. S. and the Mehak case

S. was born in India on 25 December 1986³ and was around thirteen years of age when she came to the Netherlands at the end of 1999. She

¹ This article consists, in Article 273f paragraph 1, subsection 1 of an almost literal translation of the definition of trafficking in human beings in the United Nations Trafficking in Persons Protocol.

² This was in fact the first case in the Netherlands that led to a conviction for trafficking in human beings for labour exploitation. Since 1 January 2005, also 'non-sexual' forms of human trafficking are criminalised.

³ There is some debate about S.'s date of birth. During her trial in first instance and on appeal it was assumed to be 20 January 1981. However, the Court of Appeal was not certain of this and found as follows in its grounds for sentencing: 'The suspect arrived in the Netherlands at the end 1999 at a young age (according to herself, just 13 years of age)'. The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9410, under 'Grounds for sentencing'. In *civilibus*, when S. filed a claim for back pay, her date of birth was taken to be 25 December 1986, which means that she would indeed have been around 13 years of age when she came to the Netherlands. In the civil action against her exploiters, this age was not disputed in first instance or on appeal; the respondents agreed that this date of birth should be assumed. This assumption was based on a statement made by S.'s father, and witnessed by a civil-law notary in Delhi, India, that his daughter was born 25 December 1986. Accordingly, this is taken to be her date of birth in the remainder of this article.

For the civil proceedings, see The Hague District Court 21 April 2010 (unpublished) and The Hague Court of Appeal 9 October 2012, ECLI:NL:GHSGR:2012:BX9769 and The Hague Court

moved in with the family of R. and his wife P., who were also originally from India and had been living for some time in the Netherlands with their two children.⁴ R. and P. made an agreement with S.'s father that S. would live in their home in The Hague and perform domestic work in the household. In consideration for these services, R. and P. had agreed with S.'s father (who remained in India) that she would earn 3000 rupees (roughly 50 euro) a month.⁵

Five years later, in August 2004, three others joined S.: an Indian couple who also worked as domestic workers and their five-month-old daughter, Mehak. S. worked from early in the morning until late at night performing various household tasks, including preparing meals for each individual member of R. and P.'s family, which the Court of Appeal described in R.'s trial as a 'full day's work'.⁶ Besides preparing meals, S. cleaned the house, did the shopping, got the children ready for school and laid out the clothes for R. and P every day. The other housekeeper made a statement that she and S. got up at five o'clock every morning. The Court of Appeal's judgment referred to working days of twenty hours.

R. and P. were prosecuted and convicted for human trafficking, first by the District Court in The Hague, later by the Court of Appeal.⁷ In the Court of Appeal's opinion, 'the working days had been (excessively) long, during which the individuals concerned had to be available for work at any moment'.⁸ The Court of Appeal found that S. had not been paid, or had been paid very little, for the work – in any case, far less than she should have received according to Dutch standards. S. had no bed of her own, but often had to sleep on a sheet on the ground. She had no money of her own, and what she did receive, she had to spend on groceries for the family. At the same time, she was in a position of multiple dependence on R. and P, and she had no valid residence permit for the Netherlands. Furthermore, S. was physically assaulted by R. Every week she was beaten, sometimes with a stick or a whip. She was sometimes ordered by R. to beat other members of the household staff and was also beaten by them. R. also ordered the housekeepers to report to her if anyone in the household spoke badly about her. The Court of Appeal found as follows:

of Appeal 5 February 2013, ECLI:NL:GHSGR:2013:BZ5998. In the civil action, the date of birth of 25 December 1986 did not in fact work in S.'s favour, since for persons below the age of 23, the younger they are, the lower the minimum wage is.

4 These facts are taken from the findings on the evidence in the appeal in the criminal case against S. – The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9410 – and in the appeals in the cases against her exploiters: The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9406 (the case against R.) and The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9372 (the case against P.).

5 The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9406, under 4.2.

6 *Ibid.*

7 The prosecutor as well as the defence appealed against the decision by the District Court.

8 *Ibid.*

‘The victims were in a totally dependent position in relation to the suspects [R. and P.]; they were living illegally in the country, did not speak Dutch, had no financial resources of their own and had (very) little contact with the outside world. The defendant [R.] was therefore guilty of a serious criminal offence by putting her own financial gain and personal comfort first, with no regard for the victims’ physical and mental integrity. Experience shows that the victims will continue to suffer psychological and emotional harm from this for a long time to come.’⁹

Mehak

In addition to human trafficking, this case also involved charges stemming from the death of Mehak, the daughter of the other couple that worked and lived in R. and P.’s house. When Mehak’s mother told her that she had killed a snake in India, R. believed that Mehak was possessed by a spirit or was bewitched. From that moment on, Mehak was neglected and systematically mistreated on the instructions of R. On 28 January 2006, R.’s son was competing in a chess tournament. R. blamed Mehak for the games her son was losing at the tournament and instructed S. by telephone to assault Mehak in order to ‘secure a victory’. Mehak was tied up and locked in her room. She was seriously assaulted. Her mother beat her on the forehead and cheeks with her fist. Mehak was also beaten with a stick. She was taken to the hospital in the evening, where she died the same night.¹⁰ Mehak was 22 months old.

The prosecution of S.

S. was prosecuted for her part in the assault of Mehak. After she had been convicted in first instance,¹¹ the Court of Appeal upheld her conviction for co-perpetration of manslaughter (with respect to the events on 28 January 2006), repeated premeditated assault (with respect to the assaults committed before 28 January 2006) and perjury.¹² With respect to manslaughter,

⁹ The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9406, under ‘Grounds for sentencing’. The court said the same thing in its grounds for sentencing in the case against P.

¹⁰ Doctors in the hospital found various (old) bone fractures and abrasions on Mehak. This was the reason why a criminal investigation was launched into what actually happened.

¹¹ S. was convicted of co-perpetration of premeditated gross maltreatment leading to death and perjury. In first instance, the District Court found that (conditional) intent in relation to the death of Mehak had not been proven. The Hague District Court 14 December 2007, cause-list numbers 09/900379-06; 09/655328-07 (unpublished).

¹² The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9410. S. initially made a false statement to the examining magistrate regarding the events in the house on 28 January 2006. A week later she voluntarily decided to tell the truth. S. admitted that the first statement was untrue. In the appeal in the trial of R. and P., the Court of Appeal declared that it had been proven that they had intentionally addressed S. with the clear intention of affecting her freedom to make a statement as a witness (criminalised in Article 285a DCC).

the Court of Appeal found that it had been proven that S. had repeatedly answered the phone when R. called and passed on instructions, that she herself had beaten Mehak with a stick and that she smeared *sambal* on the baby's lips.¹³ The Court of Appeal sentenced S. to a term of imprisonment of five years.¹⁴ The other housekeepers were also convicted for their roles in Mehak's death: her parents were sentenced to six years' imprisonment. In addition to the human trafficking conviction, R. and P. were also convicted of assault. R. was sentenced to eight years in prison: P. (who was found by the Court of Appeal to have played a smaller role in the events) received a two-year prison sentence. R. and P. did not serve their sentences; when the order for their pre-trial detention was lifted, they fled to India.

The role of the non-punishment principle

The question that takes centre stage in this case concerns the criminal liability of S.: should she be punished for the manslaughter of Mehak? It was apparent that in this case nothing would stand in the way of a prosecution. The complicating factor lies in S.'s victim status and how to take that status into account when making a decision on prosecution or punishment.

In order to motivate states to provide for a possibility of non-punishment in situations where offences were committed by a human trafficking victim in a human trafficking context, multiple legal documents form a so-called non-punishment principle.¹⁵ In short, the non-punishment principle prescribes that states must provide for the possibility not to prosecute or punish victims for illegal or criminal activities that have been carried out in a human trafficking context.¹⁶ The Anti-Trafficking Directive of the EU speaks of not imposing penalties on victims of trafficking in human beings 'for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2' (Article

¹³ The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9410.

¹⁴ In first instance, S. was sentenced to a term of imprisonment of three years. On appeal, S. was found to have played a more active role in the maltreatment of Mehak on 28 January 2006. In first instance, the District Court found that S. had given Mehak's mother a stick and passed on instructions issued by R. on the telephone to the mother.

¹⁵ See for an extensive treatise of this subject Schloenhardt/Markley-Tower, 'Non-Criminalisation of Victims of Trafficking in Persons – Principles, Promises and Perspectives', *Groningen Journal of International Law* 4(1) (2016); Hoshi, 'The Trafficking Defence: A Proposed Model for the Non-Criminalisation of Trafficked Persons in International Law', *Groningen Journal for International Law* 1(2) (2013); and Piotrowicz/Sorrentino, 'Human Trafficking and the Emergence of the Non-Punishment Principle', *Human Rights Law Review* 16 (2016), pp. 669-699.

¹⁶ Only the Anti-Trafficking Directive does, in Article 8, specifically mentions the opportunity not to *prosecute*. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

2 contains of the human trafficking definition).¹⁷ A central element in this provision is the requirement of compulsion; in order for it to be applicable, a causal link should exist between the crimes committed and the human trafficking context a victim found himself in.

The non-punishment principle in the Anti-Trafficking Directive, as well as the Trafficking Convention of the Council of Europe,¹⁸ and the 2014 ILO Protocol on Forced Labour,¹⁹ only stipulate the obligation to create the *possibility* of non-prosecution²⁰ or non-punishment, but does not extend to its actual application.²¹ In countries where the criminal justice system consists of a so-called ‘opportunity principle’, which grants the prosecutor discretionary powers when deciding on prosecution, this obligation will be implemented rather easily. In the Netherlands, which has such an opportunity principle, a judge also has considerable freedom when making sentencing decisions and also has the option not to punish at all if he deems that advisable by reason of the lack of gravity of the offence, the character of the offender or the circumstances under which the offence was committed.²² In addition to the discretionary powers of prosecutors and judges, an appeal to the non-punishment principle could also be embedded in the existing system of defences.²³ Primarily the duress defence comes to mind here. The disadvantage of this route, however, is that, in addition to the requirements of the non-punishment principle, a case should also meet the criteria of the defences concerned, which consequently results in a ‘double test’.²⁴

In the case of S., an appeal on the non-punishment principle was made in two ways. First, the defence argued that S. was under duress, which can be applied in the Netherlands if there was an ‘external force to which the accused could not and would not reasonably stand’.²⁵ The Court of Appeal ruled the duress defence inapplicable. The serious consequences of S.’s behavior were the overriding factor for the Court. The ruling stated that ‘based on the

¹⁷ Article 8, Anti-Trafficking Directive.

¹⁸ Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197.

¹⁹ Protocol of 2014 to the Forced Labour Convention, 1930, C029. The Protocol entries into force on 9 November 2016.

²⁰ Again, only the Anti-Trafficking Directive specifically mentions non-prosecution.

²¹ See also Jovanovic, ‘The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance’, *Journal of Trafficking and Human Exploitation* 1 (2017), paragraph 3.

²² The so-called ‘judicial pardon’, laid down in Article 9a DCC.

²³ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (Vienna: OSCE, 2013), 28. See also Hoshi, ‘The Trafficking Defence’ 2013 (n. 15).

²⁴ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations* 2013 (n. 23), 28.

²⁵ Supreme Court 9 October 2012, ECLI:NL:HR:2012:BX6734.

breaching of the less than two year-old toddler's (internationally recognised) absolute right to life, S. could be reasonably expected to have sought a possibility of sparing the health and the life of this victim by defying the anger of [R. and P.].²⁶ Aside from the defence's appeal to pay attention to the non-punishment principle in the context of duress, the judge was also asked to take the non-punishment principle into account in his sentencing decision and to consider not to punish S. The judge also rejected this:

'The Court rules that the systematic mistreatments of [Mehak] before 28 January 2006 and the manslaughter of [victim] on 28 January 2006 cannot directly be linked to the accused's forced work in the context of the exploitation by R and P. In light of that, and of the gravity of the offences concerned, the non-punishment principle should not be applied'.²⁷

The question that arises in this case is whether it should be possible to apply the non-punishment principle even in cases where the victim committed manslaughter. Aside from the possibility, it is also a question of whether it is desirable and if so, whether this should bear consequences for the severity of the criteria that have to be met when applying the principle. As for the question on the possibility of applying the principle in cases where human trafficking victims have committed manslaughter, people have sought for answers in international and European law documents in vain. For instance, neither the Anti-Trafficking Directive nor the Trafficking Convention elaborate upon the offences to which the non-punishment principle applies. The Convention fails to address which crimes the non-punishment principle concerns. Consideration 14 of the Directive seems to merely call the status-offences.²⁸ In sum, states are left to decide to which crimes the principle is applicable and if it is, whether it extends to manslaughter. In other words, the discussion is not whether the individual states can extend the principle to manslaughter, but whether this is deemed desirable on a national level.²⁹

Prima facie there seems to be no principal difference between the application of the non-punishment principle in the case of manslaughter and the 'non-

²⁶ The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9410.

²⁷ The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9410.

²⁸ See also Jovanovic, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance', *Journal of Trafficking and Human Exploitation* 1 (2017), paragraph 4.2.

²⁹ For more information on the freedom given to states to fill in obligations from international law documents regarding human trafficking see L.B. Esser/C.E. Dettmeijer-Vermeulen, 'The Prominent Role of National Judges in Interpreting the International Definition of Human Trafficking', *Anti-Trafficking Review* 6 (2016).

punishment' that can be achieved via already existing defences such as duress.³⁰ Or, as the OSCE has put it, the principle of non-punishment extends to 'any offence so long as the necessary link with trafficking is established'.³¹ But the question automatically arises as to what criteria should apply when the non-punishment principle is being invoked in manslaughter cases and how strong the necessary link with human trafficking should be. Intuitively, one would say that the threshold for applying the principle in these cases should be high, thereby doing justice to the seriousness and gravity of the underlying offence. Whether it is desirable to make the application of the non-punishment principle depend on the type of the crime committed is a question that has been explored by Jovanovic³² in her article in this issue. She³³ differentiates between three categories of crimes and believes that each of those categories should apply to different requirements with regard to the 'nexus of compulsion'.³⁴ When it comes to the third category – that of the 'secondary offences' – the author seems to assume that the highest requirements should be set. Secondary offences concern crimes '[...] seemingly detached from the original trafficking situation'.³⁵ According to the author these crimes have in common the absence of an 'obvious connection' with the human trafficking experience of the victim. Therefore, she concludes, that the 'analysis of compulsion in these broadly diverse circumstances ought to be different'.³⁶ And: 'Arguably, the more distant the offence is from the experience of trafficking, the requirement of compulsion will be stricter, reaching close to the standards required for the defences of duress or necessity'.³⁷

³⁰ At least in systems where the defence of duress is applicable to *all* criminal offences. In the Netherlands duress is part of the 'general part' of the criminal code and thereby extends to all criminal offences.

³¹ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations* 2013 (n. 23), 23.

³² See also Jovanovic, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance', *Journal of Trafficking and Human Exploitation* 1 (2017), paragraph 4.2.

³³ See also Jovanovic, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance', *Journal of Trafficking and Human Exploitation* 1 (2017), paragraph 5.

³⁴ See also Jovanovic, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance', *Journal of Trafficking and Human Exploitation* 1 (2017), paragraph 4.2.

³⁵ See also Jovanovic, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance', *Journal of Trafficking and Human Exploitation* 1 (2017), paragraph 4.1.

³⁶ See also Jovanovic, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance', *Journal of Trafficking and Human Exploitation* 1 (2017), paragraph 4.2.

³⁷ See also Jovanovic, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance', *Journal of Trafficking and Human Exploitation* 1 (2017), paragraph 4.2.

Can the manslaughter by S. be framed as a secondary offence? First, it cannot be said that the distance between the offences committed by S. and her human trafficking experience are far apart from a temporal point of view. On the contrary, the assaults on Mehak were committed by S. while being trafficked and exploited for labour. Therefore it is not so much the temporal distance here that explains the absence of an ‘obvious connection’ with S.’s human trafficking experience, but rather the typological distance between the manslaughter and the human trafficking context.

However, it is undeniable that the human trafficking context in this case – which continued for years – put pressure on S.’s capacity to act. Not without reason the Court of Appeal in the case against her traffickers ruled that S. found herself in a totally dependent position in relation to her traffickers. This, in combination with the fact that S. started working for the Indian couple as a minor and the duration of the human trafficking experience, justifies the question whether the non-punishment principle could also apply to cases in which there seems to be a typological distance between the human trafficking situation and the crimes committed.

A principal starting point should be, in exceptional cases like these, that the manslaughter could reasonably be explained out of the human trafficking context. It therefore seems appropriate to require the existence of a temporal overlap between the human trafficking experience and the manslaughter, i.e. only that manslaughter can be excluded from punishment that was committed by the trafficking victim *during* the human trafficking experience. With regard to the level of compulsion required in these cases, the mere presence of the means established in the case against the traffickers is not enough to justify the application of the non-punishment principle.³⁸ Whereas the gravity of the means used by a trafficker can play a role in the assessment of the application of the principle, it must also be said that there were no subjective or objective alternative options for the human trafficking victim to act differently. In line with this it seems reasonable to place the burden of proof on the side of the defence. Possible factors that are eligible to take into account when assessing the compulsion element within the non-punishment principle are primarily the severity, duration and frequency of the human trafficking committed against a victim-offender. Another important factor that should play a role is the person of the victim; age can play a role as well as someone’s mental state. It is conceivable that years of pressuring someone in a human trafficking context, for instance via (threats of) force and violence or having to be continuously available for work, can ultimately lead to a situation of nearly total serfdom. In these

³⁸ Means form an essential element of the human trafficking definition, at least when the victim was an adult. See inter alia Article 3(a) of the Trafficking Protocol and Article 2 of the Anti-Trafficking Directive.

situations, it seems at least reasonable to consider the application of the non-punishment principle.

The case of S. demonstrates the practical implementation of the non-punishment principle to a homicide crime like manslaughter. Even though S. committed serious crimes, the years of serfdom and the Court's determination that S. has been in a 'completely dependent position' make it difficult to determine how she could have defied the anger of her human traffickers. The question remains as to whether the unexpected was expected of S.

3. The immigration law procedure

S. not granted B9 status

The convictions of her traffickers, R. and P., by The Hague District Court on 14 December 2007³⁹ meant that S. was acknowledged as a victim of human trafficking. Pursuant to Article 3.48 of the Aliens Decree 2000, aliens who are victims of human trafficking are entitled to facilities under the B9 regulation.⁴⁰ Briefly, the regulation provides that aliens who are (possible) victims of or witnesses to human trafficking can remain legally in the Netherlands during the investigation and prosecution of the offence in first instance.⁴¹ In addition to the temporary legal residence, the B9 regulation also gives victims the right to facilities such as shelter and accommodation, medical assistance, legal aid and special allowances to support themselves. Thus, even before the individual's status as a victim has been declared proven in a court of law, a person can derive rights from the B9 regulation on the basis of indications that

³⁹ The Hague District Court 14 December 2007, ECLI:NL:RBSGR:2007:BC1761 (case against P.).

⁴⁰ With the entry into force of the Modern Migration Policy Act on 1 June 2013, the rules for victims and witnesses who report human trafficking are laid down in chapter B8/3 of the Aliens Act Implementation Guidelines 2000. Decision of the Secretary of State for Security and Justice of 28 March 2013, no. WBV 2013/5, containing an amendment of the Aliens Act Implementation Guidelines 2000. Available at <https://zoek.officielebekendmakingen.nl/stcrt-2013-8389.html> (last accessed on 21 September 2016). Because this case occurred before this law entered into force, the remainder of this article is only concerned with the old regime.

⁴¹ Three cumulative conditions that are set out in section 2 of the B9 regulation do have to be met, however. The residence permit for a definite period can be granted if the alien is a victim of human trafficking; if the alien has reported the offence or has otherwise cooperated with a criminal investigation or a trial at first instance of the suspect of a criminal offence as referred to in Article 273f DCC; and if there is a criminal investigation into or trial at first instance of the suspect of the criminal offence reported by the alien or with which the alien has otherwise cooperated. For more information about the B9 regulation, see National Rapporteur on Trafficking in Human Beings, *Trafficking in Human Beings. Seventh Report of the National Rapporteur* (The Hague: BNRM, 2009), Chapter 5 (B9 and continued residence (B16/7)). See also National Rapporteur on Trafficking in Human Beings, *Trafficking in Human Beings: Ten years of independent monitoring. Eighth Report of the National Rapporteur* (The Hague: BNRM, 2010), 51 et seq.

he is a victim. The policy rules further state that the police must advise a possible victim, if there is even the slightest evidence of human trafficking, of the possibility of reporting the offence or otherwise cooperating with an investigation by the police or the prosecutor into human trafficking. Possible victims are also entitled to a reflection period of up to three months, during which they can consider whether to report an offence and/or cooperate with an investigation.

The Mehak case was a complex criminal case involving a lengthy investigation. Suspects and witnesses in the case made partially false statements to the police and colluded with one another on their statements to law enforcement. The first statement made by S. was also untrue, for which she was convicted in first instance and on appeal (for perjury, under Article 207 DCC).⁴² Her later statements, which were partially incriminating, eventually played a significant role in the subsequent convictions for human trafficking and the assaults on Mehak in this case. In its judgment, the District Court found: ‘The suspect was [...] the only person who at a certain point started cooperating fully with the investigation and accepted responsibility for her actions.’⁴³ The Court of Appeal found that S. was ‘the first person to provide any insight into the events that had occurred on 28 January [the date on which Mehak died] and the reasons for them, whereby she also incriminated herself.’⁴⁴

Despite the *proven* fact that she was a trafficking victim and the essential cooperation that S. provided for the criminal investigation in the context of the prosecution of R. and P. for human trafficking, she was denied a temporary residence permit under the B9 regulation, notwithstanding repeated requests to be granted one.⁴⁵ Nor was any such offer made in March 2008, when she was released after serving the sentence imposed on her in first instance. On 17 March 2008, the day before her release, S. was declared an undesirable alien on the grounds of Article 67 (1) (c) of the Aliens Act 2000.⁴⁶ According to the Secretary of State for Security and Justice, S. formed a threat to public policy, since she had been convicted of serious offences. Pursuant to Article 67 (3) of the Aliens Act 2000, being declared an undesirable alien, by definition, precludes the possibility of legal residence. The result was that by virtue of Article 10 of the Aliens Act 2000, S. was not entitled to any allowances, facilities or benefits. During this period, she was also not granted a B9 residence permit and was also denied shelter by the Central Agency for the Shelter of Asylum Seekers (COA), since one of the criteria to qualify for shelter is that a person

⁴² See the remarks on this subject in footnote 11.

⁴³ The Hague District Court 14 December 2007, 09/900379-06 and 09/655328-07 (unpublished).

⁴⁴ The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9410.

⁴⁵ What the actual reasons were for not permitting S. a temporary residence permit could not be traced.

⁴⁶ Decision of the Secretary of State for Security and Justice of 17 March 2008. BNRM is in possession of this letter.

must be living in the country legally.⁴⁷ Because she had been declared an undesirable alien, S. had to leave the Netherlands within 24 hours.

Declaration as undesirable alien

The decision declaring S. an undesirable alien was suspended by the preliminary relief judge of the District Court in The Hague on 24 July 2008.⁴⁸ The judge found that the decision had completely failed to address the fact that S. was a victim of human trafficking. The judge found that, in reaching a decision to declare her an undesirable alien, the Secretary of State was required to explicitly consider the interests of S. as a victim of human trafficking and the interests of the Dutch state in combating human trafficking. In the decision on the objection to the declaration as an undesirable alien, in that context it was argued that S. had again been convicted on appeal, and in fact sentenced to an unconditional prison sentence of five years, and that the Court of Appeal had declared the non-punishment principle inapplicable.⁴⁹ In the minister's opinion, therefore, the fact that she was a victim of human trafficking did not compel a different decision on her status as an undesirable alien. Nor could this situation lead to the application of Article 4:84 of the General Administrative Law Act, by virtue of which the minister can depart from a policy rule if the application of that rule could have consequences for the interested party that, due to exceptional circumstances, would be disproportionate in relation to the objectives served by that rule. It is noteworthy that the considerations in the decision only referred to the Court of Appeal decision on the non-punishment principle. It was however the status as victim that, in the view of the preliminary relief judge, had to be considered in the decision to declare S. an undesirable alien. That requirement was not met with a reference only to the non-applicability of the non-punishment principle. It is also remarkable that no reference was made to the rights S. should have enjoyed under the B9 regulation as a victim of human trafficking. Furthermore, the decision on the objection failed to consider evidence that S. was traumatised by the circumstances under which she had to work for R. and P. and by the events of 28 January 2006 or the finding that there was little chance of recidivism on her part. In her judgment, the preliminary relief judge had explicitly found that those circumstances must be considered in the decision to declare her an undesirable alien.⁵⁰ In short, the context

⁴⁷ Letter from the Central Agency for the Reception of Asylum Seekers of 24 September 2008.

⁴⁸ The Hague District Court (preliminary relief judge) 24 July 2008, AWB 08/11247 BEPTDN (unpublished).

⁴⁹ Decision of the Minister of Justice of 21 September 2010.

⁵⁰ The Hague District Court (preliminary relief judge) 24 July 2008, AWB 08/11247 BEPTDN, consideration 6.

in which the events of this case took place, as described here, does not seem to have been considered adequately in the decision.

Asylum procedure

On 21 March 2008, S. was released after serving the sentence imposed on her in first instance. On the same day, she made an application for a residence permit on the grounds of asylum pursuant to Article 28 of the Aliens Act 2000. The application was rejected, however, since, on 17 March 2008, S. had already been declared an undesirable alien.⁵¹ By virtue of Article 67 (3) of the Aliens Act 2000, this makes lawful residence impossible, and consequently also the granting of an application for asylum (Article 10 of the Aliens Act 2000). The Minister of Justice felt that there were no circumstances that would make S.'s repatriation contrary to provisions of international law. In the earlier preliminary decision, 'no credibility whatever' was attached to the fact that S. feared reprisals from R. and P., who had fled to India.⁵² In the minister's opinion, the statements she had made on this subject were scant and unclear,⁵³ even though it had become clear in the trial of R. and P. that there had been contact between them and her father before S. came to the Netherlands and that R. and P. belonged to a higher caste.⁵⁴ It is also noteworthy that, in another procedure under immigration law (the application for continued residence after a B9 procedure⁵⁵), it is generally assumed that there are risks attached to repatriating victims of human trafficking if their cooperation with the criminal case has led to a conviction.⁵⁶

In the preliminary decision to reject the asylum application, another argument used against S. was that she had not, immediately on her arrival in the Netherlands in 1999, reported as an immigrant to an official charged with

⁵¹ The Secretary of State for Security and Justice's preliminary decision to reject the asylum application dated 25 September 2009. The final decision by the Minister of Justice rejecting the asylum application dates from 24 September 2010. The decision contains some of the grounds mentioned in the preliminary decision.

⁵² Preliminary decision to reject the asylum application of 25 September 2009, p. 6.

⁵³ Decision to reject the asylum application of 24 September 2010, p. 3.

⁵⁴ The Hague Court of Appeal 19 January 2010, *LJN BK9406*, under 4.2; The Hague District Court 14 December 2007, *ECLI:NL:RBSGR:2010:BC1761*.

⁵⁵ This is the so-called B16/4.5 procedure based on Article 3.52 of the Aliens Decree 2000 in conjunction with Chapter B16/4.5 of the Alien Act Implementation Guidelines 2000. To qualify for this arrangement, the individual concerned must have been admitted to the B9 regulation.

⁵⁶ Chapter B16/4.5 under a, Aliens Act Implementation Guidelines 2000. Following the entry into force of the Modern Migration Policy Act on 1 June 2013, the continued residence scheme is included in Chapter 9/9 of the Aliens Act Implementation Guidelines 2000.

border control or the supervision of aliens.⁵⁷ S. only reported as an immigrant on 21 March 2008. The human trafficking situation in which S. found herself was not considered in this finding, nor was the fact that she was probably only thirteen years of age when she entered the Netherlands.⁵⁸

4. The labour law procedure

In 2010, to secure the salary she had not yet received, S. brought an action to recover back pay from R. and P. If an employment contract has an international component, the question arises as to which country's law is applicable to it. In the Netherlands, this issue is primarily governed by European law, specifically by the 1980 Convention on the law applicable to contractual obligations (the Rome Convention).⁵⁹ In the absence of a choice of law by the parties, Article 6 (2) of the Rome Convention provides that, in principle, the applicable law is the law of the country in which the employee habitually carries out the work (the 'place of habitual employment' criterion), unless it appears from the circumstances as a whole that the contract of employment is more closely connected with another country (the so-called 'exception clause'). Although S. performed her work exclusively in the Netherlands, the sub-District Court reached the conclusion that the employment contract 'was so embedded in the Indian culture and legal sphere, and consequently so much more closely connected with India than with the Netherlands, that Indian law is applicable to it'.⁶⁰ In other words, in this decision, the context of human trafficking in which the work was performed was taken into account, but the conclusion was to S.'s disadvantage, since the declaration that Indian law was applicable had serious consequences for the amount to which S. was entitled. The Court based its decision on the agreed sum of 3000 rupees (50 euro) a month. Because S. had worked excessively long hours, the number of hours she worked was fixed at twice the number that had been agreed. Consequently, in the court's opinion, S. was owed 144,000 rupees for the two years she had worked excessively long hours. That sum is the equivalent of approximately 2,020 euro.⁶¹

⁵⁷ Pursuant to Article 31 of the Aliens Act 2000.

⁵⁸ See the remarks regarding S.'s age in footnote 3.

⁵⁹ Convention on the law applicable to obligations arising from contracts (OJ L 266). The Rome Convention has since been succeeded by Regulation (EU) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ 2008, L 177/6), the so-called Rome I Regulation. The Rome Convention remains applicable to contracts that were concluded before 17 December 2009 (see, after rectification, Article 28 of the Rome I Regulation).

⁶⁰ The Hague District Court 21 April 2010 (unpublished).

⁶¹ Converted using the website www.valuta.nl (last accessed on 21 September 2016).

That judgment was set aside on appeal. The Court of Appeal in The Hague found that Dutch law was applicable since S. habitually carried out the work in the Netherlands.⁶² The court ruled that S. had worked 80 hours a week and was entitled to payment for those hours for the period from 1 February 2004 until 1 February 2006, including holiday pay and a statutory interest for the failure to pay within the legally prescribed deadline. The Court of Appeal has since rendered a final judgment in this case and awarded S., in accordance with these principles, a sum of approximately 30,000 euro.⁶³

This judgment is to be welcomed from the perspective of the protection of the rights of employees and victims of labour exploitation. It also concurs with the rationale of Article 6 of the Rome Convention, which is aimed first and foremost at providing appropriate protection for employees.⁶⁴ In principle, the applicable law is the law of the country where the work is carried out, in order to prevent any discrepancy between terms of employment in the same territory.⁶⁵ This is the rationale that has prompted the European Court of Justice to interpret the principle of the country where the work is habitually performed broadly in its case law and not to allow it to be easily thwarted by the exception clause.⁶⁶ The decision rendered in first instance by the sub-District Court in this case is difficult to reconcile with that approach. The judgment of the Court of Appeal is also to be welcomed from the perspective of legal uniformity and the principle

⁶² The Hague Court of Appeal 9 October 2012, ECLI:NL:GHSGR:2010:BX9769.

⁶³ The Hague Court of Appeal 5 February 2013, ECLI:NL:GHSGR:2010:BZ5998. In fact, it is unlikely that S. will actually be able to collect the wages claimed since R. and P. have fled to India. With the insertion of a new Article 36f (6) on 1 January 2011, the Dutch Criminal Code now provides for the possibility of the state paying the amount to the victim (the so-called advance rule). This is, however, conditional on the claim being dealt with during the criminal proceedings and being awarded by means of an order to pay compensation, which did not happen in this case. Because human trafficking is regarded as a violent or sexual offence, the amount that can be awarded to victims is not subject to a maximum.

⁶⁴ European Court of Justice 15 March 2011, C-29/10 (*Koelzsch/Luxemburg*), consideration 42: 'It follows that, in so far as the objective of Article 6 of the Rome Convention is to guarantee adequate protection of the employee, that provision must be understood as guaranteeing the applicability of the law of the State in which he carries out his working activities rather than that of the State in which the employer is established. It is in the former State that the employee performs his economic and social duties and, as was noted by the Advocate General in point 50 of her Opinion, it is there that the business and political environment affects employment activities. Therefore, compliance with the employment protection rules provided for by the law of that country must, so far as is possible, be guaranteed.' See V. van den Eeckhout, 'Navigeren door artikel 6 EVO-Verdrag c.q. artikel 8 Rome I-Verordening: mogelijkheden tot sturing van toepasselijk arbeidsrecht', *Arbeidsrechtelijke Annotaties* 9 (2010), 49-64.

⁶⁵ Referred to by Bertrams and Krusinga as the 'equal work, equal rules' principle. They also refer to the 'dominant role' of the *lex loci laboris*. R.I.V.F. Bertrams/S.A. Krusinga, *Overeenkomsten in het internationaal privaatrecht en het Weens Koopverdrag* (Deventer: Kluwer, 2007), 161.

⁶⁶ European Court of Justice 15 March 2011, C-29/10 (*Koelzsch/Luxemburg*), consideration 43. See E.K.W. van Kampen, 'De bijzondere collisieregels van art. 6 lid 2 EVO respectievelijk art. 8, leden 2 tot en met 4, Rome I', *Tijdschrift Arbeidsrechtpraktijk* 8 (November 2012), 366-373.

of equality. In criminal law, the Supreme Court ruled in 2009 that, in assessing whether a labour situation involves exploitation within the meaning of Article 273f of the DCC, the frame of reference must be the standards that apply in the Netherlands.⁶⁷ The cultural context of the labour situation does not alter that, thus preventing one situation being declared proven as exploitation and another not, depending on the cultural setting.⁶⁸ Exploitation has, as it were, been objectified and whether it exists must always be assessed according to Dutch standards. Although this case involved a different legal issue, the cultural context in which the labour was performed should also be put into perspective in this case. A different approach could too easily lead to different terms of employment applying in the Netherlands. It goes without saying that such a situation would impair the protection of employees under labour law, particularly for domestic staff who work under a construction similar to that in which S. was employed in this case. It is precisely the private setting that reinforced the Indian influence in this case, since the relationship with the Dutch labour market disappeared, making her vulnerable to exploitation. Such a situation does not work to the advantage of the employer in criminal law, and should also not do so in the domain of labour law. It is therefore good to see that the Court of Appeal did not uphold the decision of the sub-District Court.

5. Current situation

At the time a Dutch version of this article went to press,⁶⁹ S. was in detention serving the sentence imposed on her by the Court of Appeal.⁷⁰ She is ineligible for conditional release.⁷¹ The director of the penitentiary where she is being held rejected an application for her release under the system of general leave for prisoners because she does not have valid identity papers. This decision was upheld following an objection and, on appeal, the Council for the Administration of Criminal Justice and the Protection of Juveniles endorsed the decision. The appeal in S.'s asylum case resumed in March 2013. In the same proceedings, an appeal was also made concerning the declaration of S.

⁶⁷ Supreme Court 27 October 2009, ECLI:NL:HR:2009:BI7097;BI7099 (*Chinese restaurant case*).

⁶⁸ For more information about the influence of cultural factors in cases of exploitation outside the sex industry: A. Bogaerts/H. De Jonge van Ellemeet/J. van der Leun, 'Slavernij-achtige uitbuiting in Nederland en de rol van cultuur', *Proces* 88(5) (2009), 263-278.

⁶⁹ The middle of May 2013.

⁷⁰ According to information from the Immigration and Naturalisation Service (IND), S. is expected to remain in detention until 16 August 2013. Letter from the Secretary of State for Security and Justice to the Immigration Chamber in Den Bosch of 5 March 2013.

⁷¹ Since 1 April 2012, aliens who are not lawfully resident in the Netherlands are no longer eligible for conditional release.

as an undesirable alien, with a request to suspend that decision.⁷² At the beginning of March 2013, it was announced that the Secretary of State for Security and Justice was revoking the decision made on 21 September 2010 on the objection to the declaration that S. was an undesirable alien⁷³ with a view to making a new decision on the objection. At the same time, the Secretary of State announced his intention of imposing an entry ban on S. The entry ban is the ‘successor’ to the declaration as an undesirable alien following the implementation of EU Return Directive on 31 December 2011.⁷⁴ Because of S.’s involvement in a violent crime, the intention is to impose an entry ban for a period of ten years rather than the customary five years. The Secretary of State does not feel there are any humanitarian or other reasons for not issuing the entry ban or reducing its duration. According to the Secretary of State, even the arguments put forward in the context of the declaration as an undesirable alien provide no pretext for doing so.⁷⁵ Reservations about the decision on the objection to that declaration have already been discussed above.

6. Resumé

In 2007 and 2010, S. was convicted for her role in the assault on and eventual death of the infant girl Mehak on 28 January 2006. In the period when the acts she was charged with occurred, she was in a situation of exploitation. The Court of Appeal found that she was exploited by R. and P. from the time she arrived in the Netherlands in 1999 until the date on which Mehak died. Although she was acknowledged to be a victim of human trafficking, she was never offered the B9 regulation. Requests to be granted a B9 residence permit were repeatedly denied.

The judgment in first instance in the trial of S., and later on appeal, formed the basis for a series of decisions that were made in her case. It can be seen from the case file that the conviction laid the basis for her being declared an undesirable alien and that that declaration, in turn, formed the basis for the *a priori* rejection of her asylum application. Consequently, S. was never granted the rights she was entitled to as a victim of human trafficking. Furthermore, the decision of the Court of Appeal regarding the application of the non-punishment principle seems to have served as confirmation for the government

⁷² Information from S.’s lawyer, mr. B.D.W. Martens in The Hague.

⁷³ Letter from the Secretary of State for Security and Justice of 5 March 2013.

⁷⁴ For a general discussion of the concurrence of the declaration as an undesirable alien and the entry ban, see The Hague District Court, sitting in Amsterdam, 1 March 2012, ECLI:NL:RBSGR:2012:BV8687.

⁷⁵ Letter from the Secretary of State for Security and Justice of 8 March 2013.

members responsible in this case that the declaration of S. as an undesirable alien was well-founded and that the asylum application had been correctly rejected. Furthermore, in various decisions little or no consideration was given to the fact that S. was a victim of human trafficking. For example, in the decision on the objection to the declaration of S. as an undesirable alien, the Minister of Justice merely mentioned that the non-punishment principle had not been applied with regard to S. However, that does not detract from the fact that she was a victim and disregards her status as a victim and any rights endowed from that status.

At the end of February 2013, the Secretary of State for Security and Justice stressed that the care of victims is a priority of the current Dutch government and remarked that he regarded care and attention for victims as a ‘core value of our rule of law’.⁷⁶ The new EU Directive on Human Trafficking⁷⁷ is also clear about the protection due to victims of human trafficking: an integrated, holistic and human rights-based approach⁷⁸ that ensures that victims are protected to the greatest extent possible.⁷⁹ One of the pillars of that protection is preventing *secondary victimisation*, which, to quote Van Dijk et al., is the situation where victims ‘through the actions of persons or institutions in the judicial chain have the feeling that they are being victimised for a second time’.⁸⁰ In view of the above, the question is whether that protection was provided in S.’s case.

⁷⁶ Letter from the Secretary of State for Security and Justice of 22 February 2013 (*Visie op slachtoffers*), p. 8. Available at www.rijksoverheid.nl/nieuws/2013/02/22/teeven-ontvouw-t-visie-op-slachtofferbeleid.html (last accessed on 21 September 2016).

⁷⁷ Parliament approved the implementation of this Directive on 2 April 2013.

⁷⁸ Cf. consideration 7 of the Anti-Trafficking Directive.

⁷⁹ This also ensues from the case law of the European Court of Human Rights. Pursuant to the *Rantsev* judgment, the Member States of the Council of Europe have a duty to adopt national legislation that is adequate to provide practical and effective protection of the rights of (possible) victims. European Court of Human Rights 7 January 2010, No. 25965/04 (*Rantsev/Cyprus and Russia*). See also National Rapporteur on Trafficking in Human Beings, *Trafficking in Human Beings* 2010 (n. 39), 38 and M. Boot-Matthijssen, ‘Artikel 4 en de aanpak van mensenhandel’, *NJCM-Bulletin* 35 (5) (2010), 501-519.

⁸⁰ J.J.M van Dijk/M.S. Groenhuijsen/F.W. Winkel, ‘Victimologie; voorgeschiedenis en stand van zaken’, *Justitiële verkenningen* 3 (2007), 9-29.