HOW COURTS TREAT VULNERABILITY IN CASES OF SLAVERY AND HUMAN TRAFFICKING

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Introduction

I have been asked to introduce an important and sensitive subject. Sensitive, because although we have been talking since this morning of how the law treats human trafficking and modern slavery, this afternoon's topic asks us to look more closely at the judge's role in dealing with these phenomena, and the vulnerability of the individual victims. In such a context, the judge has a special role to play, partly because his primary task is to ensure that justice applies to all, and that everyone can exercise their legal rights, but also because a judge, whatever issue with which he is presented, is the guardian of 'judicial ritual',[2] in the course of which, conflicting points of view are presented and explanations given, with the aims of revealing the truth, disposing of the case, but also of soothing the parties. Now, in order that judicial ritual should succeed and catharsis work, the judge must keep in mind the specific facts of the case before him, and in particular, the vulnerability of the parties. Such vulnerability is often reflected in difficulties both in bringing the matter before the court and in the vulnerable party presenting their case effectively, once the proceedings have begun. From that, situations can arise where, by reason of the vulnerability of one of the parties, the legal process is distorted, and the effectiveness of that party's rights diminished. That is why it is up to the judge to act in a way which goes beyond the adversarial process.

This differentiated approach is particularly necessary when dealing with victims of trafficking or slavery, who are often reduced to slavery going beyond the physical and extending to coercive control. When such persons appear before a judge, either as witnesses or victims, they are particularly affected by the violence they have suffered, such that their fear and the internalisation of certain behaviours can place them at a disadvantage in seeking justice. A criminal judge knows something of this, dealing as he does every day with confrontations between victims and their alleged attackers. But, although an administrative judge may be less expert on that particular subject, he or she is in the habit of dealing with vulnerable people – asylum seekers, detainees, and individuals who are socially or economically precarious – and consequently, he or she will have developed a balanced approach, taking account of the normal requirements in the exercise of the right to a fair trial and of the fragility of the individual, so as to guarantee effective access to justice.

Without resorting to equity, two responses are open to a judge dealing with vulnerable litigants: the first is to ensure that the legal provision in question, and its interpretation, guarantees the effectiveness of the legal rights of vulnerable persons (see below); the second is less obvious to the untrained eye, but is just as important, if not more so: the

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[2] Antoine Garapon, *Bien juger: essai sur le rituel judiciaire* (Odile Jacob 1997) (Good judging : an essay on the 'judicial ritual').

judge must ensure that the procedure followed allows vulnerable persons to exercise their legal rights effectively. These two responses are linked, but not identical: the first aims to ensure that the legal categories are adapted to processing vulnerability issues; the second aims to take account of the particular fragility of individuals engaged in judicial proceedings. Neither option is specific to victims of trafficking or slavery, but each, for these individuals, has been the subject of specific provision with which I will deal below.

The first responsibility of a judge dealing with victims of trafficking or slavery is to ensure that the application of the relevant law guarantees the effectiveness of their legal rights.

In France, two specific provisions ensure the protection of victims of human trafficking when they decide to escape from the network which is exploiting them. And, in either case, the work of the judge to ensure the effectiveness of these remedies will be decisive.

Both the right to asylum and the ordinary laws regarding foreigners lead to a right of protection for victims of human trafficking.

The primary position is that the law in France makes it possible for victims of human trafficking to be granted asylum. While normal asylum protection is aimed at protection from persecution by the States themselves, this protection has been enlarged to include victims of criminal networks or persecution perpetrated by non-state agents,[3] particularly by reason of their gender[4] or their sexual orientation.[5] On that basis, the possibility of benefiting from asylum protection has been opened up to victims of human trafficking or slavery. Although for a time it preferred to grant subsidiary protection,[6] the Cour nationale du droit d'asile (CNDA) has since developed its reasoning, recognising that victims of trafficking or slavery can rely on membership of a particular social group and on that basis, benefit from normal asylum.[7] In so recognising, the CNDA has shown a certain flexibility, because under the Geneva Convention, the existence of such a social group was not obvious. But in a reasoned legal decision, the CNDA accepted that women under the control of a sex trafficking network belonged to a particular social group, having regard to the exploitation of which they were the object, the stigma and persecution to which they would be exposed in their countries of origin, and their wish to escape the said network.[8] However, the question is not settled definitively, because it is the subject of an appeal and will be examined by the Conseil d'Etat next autumn.

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[3] This approach diverges significantly from that of the Spanish judiciary. In a decision of 21 July 2015, the Spanish Supreme Court decided that a Nigerian citizen who had been the victim of sexual exploitation could not benefit from asylum protection because the persecution was the work of non-state agents (n° 3651/2015). See S.T.S., Jul. 21, 2015 (Spain).

[4] CNDA, 12 March 2009, *Mme D.*, n° 638891 dealing with the practice of female genital mutilation, or Commission de recours des réfugiés (CRR), 29 July 2005, *Mlle T.*, n° 519803 dealing with forced marriage.

[5] CRR, 12 May 1999, *D.*, n° 328310.

[6] Article L. 712-1 of the Code l'entrée et du séjour des étrangers et du droit d'asile (the Foreigners and Asylum Code): 'The benefit of subsidiary protection is granted to any person who does not meet the conditions for recognition as a refugee but for whom there exist serious and proven reasons to believe that in their country of origin there is a real risk of one of the following types of serious harm (a) the death penalty or execution; (b) torture or inhuman or degrading treatment; or (c) in the case of a civilian, a grave and individual threat to his life or person, arising from violence capable of extending to people regardless of their personal circumstances, resulting from a situation of internal or international armed conflict'.

[7] CNDA, 15 March 2012, *Mme O.*, n° 11017758.

[8] CNDA, 15 March 2012, *Mme O.*, n° 11017758 ; CNDA, 24 March 2015, *Mme E.*, n° 10012810.

The second route open to victims of sex trafficking networks or of human trafficking arises out of the ordinary law regarding leave to remain for foreigners. Created by a law of 18 March 2003, Article L. 316-1 of the Code l'entrée et du séjour des étrangers et du droit d'asile (the Foreigners and Asylum Code) provides for the granting of a temporary *carte de séjour* to a foreigner who files a complaint, or is a witness, against a person who is accused of having taken part in human trafficking or sex trafficking. The issue of a *carte de séjour* gives such a foreigner the right to work and, if the judicial process results in a final conviction, the foreigner will obtain a residence card in their own right. This legal provision is unique in Europe and rests on a 'win-win' logic, both as to the national interest in identifying the perpetrators of such illegal actions and punishing their conduct, and the protection of victims and witnesses.[9] As well as being able to regularise their leave to remain, such persons may benefit from police protection during the proceedings[10] and will receive the social rights which attach to lawful residence in France.[11] On the other hand, where criminal proceedings are not envisaged, Article L. 316-1-1 of the Code, created by the law of 13 April 2016,[12] allows the Prefect to give leave to remain to individuals who have ceased to work in prostitution and wish to reintegrate themselves in society.

On both hypotheses, the judge – whether an asylum or an administrative judge – plays a determinative role in assuring the effectiveness of the protection granted by the substantive law.

Where the judge is aware that these provisions are the fruits of legislative will or are Convention obligations, he or she must ensure that the rights which they guarantee are respected in the cases which arise. But where the state of the law at a particular time does not allow the judge to take into account the particular vulnerability of an individual, he or she must suggest an adaptation or evolution. In reality, this is no more than the natural consequence of the jurisprudence of the European Court of Human Rights (ECtHR), which imposes on States positive obligations to guarantee the effectiveness of the rights protected by the European Convention of Human Rights (ECHR),[13] not just to criminalise and prosecute – a power which belongs to the legislator and the executive – but also to suppress and to protect effectively – an obligation which falls on the judicial authorities.[14] This applies to persons under the control of the State – I mean detainees – and also to victims of human trafficking and slavery, who are protected under Article 4 of the ECHR, which prohibits slavery, servitude, and forced labour.[15]

In the case of victims of trafficking or slavery, the judge is required to take account of their vulnerability. Both an asylum judge and the administrative judge are thus required to have regard to psychological control, the fear experienced and the threats made, and not to apply the statutory provisions too strictly. Some conditions for the grant of refugee status

[9] Guillaume Dujardin, 'La protection par le droit des étrangers des victimes de proxénétisme: deux fondements pour un seul régime', (2016) 2 Revue de droit public 467 [Protection for the victims of sex trafficking through the law relating to foreigners: two foundations for the same regime].
[10] Article R. 316-7 of the Code l'entrée et du séjour des étrangers et du droit d'asile (Foreigners and Asylum Code).
[11] ibid.
[12] Law 2016-444 du 13 avril 2016 visant à renforcer la lutte contre le système prostitutionnel et à accompagner les personnes prostituées (Law of 13 April 2016 to reinforce the struggle against the system of prostitution and support prostituted persons).
[13] *Siliadin c. France* App No 73316/01 (ECHR, 26 July 2005) para 89.
[14] *C.N. et V. c. France* App No 67724/09 (ECHR, 11 October 2012), para 104.
[15] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Article 4. '1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour'.

have been interpreted fairly flexibly where proving them could be defeated by the psychological vulnerability of the asylum seeker. For example, membership of the particular social group, 'victims of human trafficking', requires an applicant to demonstrate their intention to free themselves from the network. However, the assessment of such emancipation is complicated when dealing with people who may have been recruited with the backing of their families, and who do not always know what awaits them. The CNDA has therefore adopted a flexible approach. In particular, the Court has accepted that a person who has been enslaved from birth may take some time to become aware of their enslaved condition and that the will to free themselves can only be gradual, without that taking anything away from their determination to be free.[16] Equally, the Court has shown itself willing to be flexible as to the requirement for a criminal complaint to be filed, considering that such action is not indispensable for refugee recognition, because of the psychological fragility and fear of reprisals, which can justify the refusal to file a complaint or to seek protection from the police.[17] In the same way, requirements for review of asylum applications have been relaxed, having regard to the vulnerability of asylum seekers, which could justify lies or discrepancies in the original application. Fear for one's own life, or for that of one's family, or pressure exercised by their pimps to make an asylum application are now regarded as cases of force majeure which are capable of excusing errors in the asylum account.[18]

Turning to the ordinary law of leave to remain for foreigners, the Conseil d'Etat has developed its jurisprudence to adapt it to the specific circumstances of trafficking. In particular, it reminded itself that Article L. 316-1, which I have already mentioned, requires police forces to inform victims of trafficking of the existence of this provision, and to give them a period for reflection, sufficient to allow them to exercise their legal rights and to file a complaint, if required. The Conseil d'Etat held that a removal decision taken when the person had not been given any opportunity to consider seeking the protection of the judicial authorities was unlawful for disregarding these provisions.[19] In so doing, the Conseil d'Etat establishes, very early in the proceedings, that the victim need not have already filed a complaint in order to benefit from a period of reflection; it is enough that the police are made aware of the possibility of human trafficking for them to be required to inform the putative victim, and to give them the option of exercising their legal rights. In keeping with this jurisprudence, the Conseil d'Etat further accepted that where a victim does not reveal certain facts until faced with removal, that does not necessarily indicate a wish to obstruct removal, but may be the result of the person's vulnerability and the fear of reprisals which they harbour.[20]

In the second place, the judge is charged with ensuring that the judicial process does not disadvantage victims.

This requirement is not specific only to procedures involving victims of human trafficking or slavery, as litigation procedure is used to having regard to the vulnerability of some applicants. Financial vulnerability is, of course, taken into account by providing legal aid[21]

[16] CNDA, 9 March 2011, *M. S.*, n° 09023872; CNDA, 10 April 2018, *M. T.*, n° 17035868.
[17] CNDA, 15 March 2012, *Mme O.*, n° 11017758.
[18] See in particular CNDA, 17 October 2011, *Mlle O*, n° 10016980.
[19] CE, 15 June 2012, *Mlle Shankar*, n° 339209.
[20] ibid.
[21] In France, such legal aid is provided for by Loi 1991-647 du 10 July 1991 relative à l'aide juridique (Law 1991-647 of 10 July 1991 relative to legal aid).

which allows those who are eligible to receive the help of a lawyer without charge. However, here we are, above all, considering the treatment of social or psychological vulnerability.

One of the main difficulties, as such, is in access to the courts.

Because of their psychological fragility, their isolation, or their precarious socio-economic situation, some vulnerable people have difficulty even in understanding what legal recourse is open to them and how to access the court. It is therefore necessary to adapt some rules of procedure, to make access to the courts easier, and to guarantee effective legal recourse. Litigation concerning social help and benefits gives an example of such adaptation. In that jurisdiction, an application may not be rejected for inadequate grounds until the judge has informed the applicant of their role and of the necessity to submit an arguable case.[22] Some jurisdictions have even established specific forms designed to guide applicants as to how to apply to the tribunal. Applicants are not required to produce their own bundles, which must be provided by the administration, to avoid omissions or placing too heavy a burden on the applicant.[23] This is a departure from the ordinary rules of procedure, which require the applicant to an administrative court to provide a written, reasoned application, accompanied by all relevant documents.

At the same time, administrative courts have defined the conditions under which human rights groups can intervene to support an applicant. Previously, in order to intervene to support proceedings, particularly in asylum claims, an intervener was required to establish a direct claim of its own, which the decision under consideration might affect. For an organisation whose sole object was to support the legal rights of certain categories of person, this hurdle proved particularly difficult to surmount. By a judgment of 25 July 2013 regarding an asylum claim, the Conseil d'Etat unified the admissibility conditions, the sole criterion now being that the proposed intervener could 'demonstrate sufficient interest having regard to the nature and objective of the litigation'.[24] Thus, organisations for the defence of the rights of victims of trafficking or sex trafficking networks, who are often very active in the emancipation and reintegration of the victim, can now intervene in legal proceedings. This development is more than cosmetic, since it promotes a better structured and supported legal argument, and the provision of evidence which the victims themselves could not provide. In discrimination cases, this goes even further, because trade unions can bring class actions,[25] their interest being to facilitate legal recourse and access to the courts in technical proceedings for which the evidence is sometimes difficult to assemble.

At the same time, the judge's role is to ensure that rules of procedure do not place the victim applicants in a disadvantageous position which would prevent them from having their rights recognised.

The first step is to manage the burden of proof, a frequent problem in litigation embarked on by vulnerable persons. Thus, applicants who claim to be victims of discrimination[26] or of harassment[27] need only make their argument by submitting to the Court factual elements

[22] Article R. 772-6 of the Administrative Justice Code.
[23] Article R. 772-8 of the Administrative Justice Code.
[24] CE Sect., 25 July 2013, *OFPRA c. Mme E.F.*, no. 350661.
[25] Article 86 of loi 2016-1547 du 18 Novembre 2016 de modernisation de la justice du XXIe siècle (law 2016-1547 of 18 November 2016 on modernisation of justice in the 21st century).
[26] CE Ass., 30 October 2009, *Mme Perreux*, no. 298348.
[27] CE Sect., 11 July 2011, *Mme Montaut*, no. 321225.

which are capable of giving rise to a presumption of disregard of the principle of equality. It is then for the administration to produce all the facts in its possession to establish that the decision attacked rests on objective facts detached from any element of discrimination. In cases of human trafficking or slavery, this type of approach is particularly useful. Having regard to their often chaotic history and their psychological fragility, such applicants may encounter difficulty in demonstrating both past ill-treatment and the risk they run if returned. In addition, in many cases – particularly slavery in certain African regions or sex trafficking in Nigeria – the culture of silence and acceptance makes it very difficult to obtain, not just evidence, but even the testimony of the victim themselves.[28] The judge must therefore listen particularly carefully, and consider applying a different burden of proof or adapting the standard of proof. For example, in asylum cases, the main question is often that of the credibility of the evidence of the applicant. In that regard, the ECtHR has held that 'owing to the special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof'.[29] In line with this jurisprudence, the Conseil d'Etat has required the CNDA to adopt a more flexible approach in considering medical certificates evidencing ill treatment.[30]

At the same time, judges must conduct an in-depth review and adapt their behaviour in the hearing, having regard to the vulnerability of those appearing before them. On the one hand, the role of the judge in these proceedings is often one of complete rehearing, with wider powers: he may substitute his own decision for that of the administration, rather than simply quashing it, and may take into account the facts as they are at the date of judgment, and not just at the date of the decision under challenge. That is the case in asylum claims.[31] On the other hand, in many cases, hearings involving vulnerable persons rely heavily on oral argument, which differs from the normal procedure before the French administrative judge. Thus, in social entitlement litigation, an investigation by a judge is not complete until the end of the hearing, to allow the applicant to make all his arguments, especially arguments of fact, orally at the hearing.[32] Equally, a judge will encourage oral evidence, asking the applicants questions, both to clarify certain elements of their situation which are unclear in the written pleadings, but also to verify the credibility and genuineness of what they are saying. In addition, foreigners must have access to interpreter assistance in order to understand, and to be understood. The Conseil d'Etat recently held that those with hearing difficulties have the right to be assisted by someone 'expert in a language or a method allowing communication with deaf persons'.[33]

All of this together makes litigation more accessible for vulnerable persons, helping them to exercise their rights and guaranteeing an effective remedy. François Fénelon told us that: 'one dishonours justice when it is not accompanied by gentleness and respect (…); that is doing the right thing wrongly'.[34] I believe, in fact, that if our justice were not equitable justice, but was composed of individual decisions without legal or ordinary jurisprudential

[28] Diane Roman, 'The asylum law for the vitims of female genital mutilation' (2016) 21 Dallz Collection 1215. (Diane Roman, 'Le droit d'asile pour les victimes de mutilations génitales féminines' (2016) 21 Recueil Dalloz 1215.
[29] *F.G. v Sweden* App No 43611/11 (ECHR, 23 March 2016) para 113.
[30] CE, 10 April 2015, *M. Balasingam*, n° 372864. In this case, the Conseil d'Etat quashed a decision of the CNDA rejecting a medical certificate as having no bearing on the facts, without taking the trouble to analyse it in detail, nor to research whether the medical evidence was capable of demonstrating risks for the asylum seeker.
[31] CE Sect., 8 January 1982, *Aldana Barrena*, n° 24948 ; CE, 27 February2015, *OFPRA c. M. Z.*, n° 380489. This is also the case for most social entitlement litigation (CE, 12 April 2013, *Mme F.*, n° 364239 for the recognition of the status of disabled worker).
[32] Article R. 772-9 of the Administrative Justice Code.
[33] CE, 15 March 2019, *M. S.*, n° 414751.
[34] Letter from François Fénelon, 6 December 1712, in *Œuvres de Fénelon* (T.3, Firmin Didot Frères 1843) 716.

foundation, we could not accept a legal system which transmitted or perpetuated the imbalances we see in real life. On the contrary, the role of the judge, and of litigation, is to breathe back equality where the position of some persons with respect to others had led to it being erased. This is particularly true in the case of human trafficking and slavery which, by definition, extinguishes for certain people, all dignity, autonomy and free will, making them particularly vulnerable and less equipped to defend themselves. Having regard to national history and practice, judges' responses to such inequality takes multiple forms in one or the other of the two routes, which I have just described. But it is essential, in any case, that the judge knows how to listen out for the expectations and needs of the most vulnerable; not that they will always succeed, because the law should not be endlessly flexible or expandable, but because that listening itself is a source of healing.