

Neutral Citation No. [2014] NIQB 15

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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

RE's Application [2014] NIQB 15

IN THE MATTER OF AN APPLICATION BY RE FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] This is a challenge to a decision of the United Kingdom Border Agency ("the UKBA")/the Competent Authority ("the CA") whereby the UKBA determined that, on the balance of probabilities, the applicant had not been the victim of human trafficking. This was a decision under the "Conclusive Grounds" test.

Background

[2] The applicant is a Nigerian National. She claims that she was trafficked from Nigeria to Portugal under the false pretence of legitimate work in Portugal. This was arranged by a friend of the family known to the applicant as 'P'.

[3] The applicant left Nigeria in and around December 2003. Upon arrival in Portugal the applicant claims she was taken to a brothel and told she would be working as a prostitute. She claims that she escaped her captors in Portugal and fled to Spain in 2006 where she claimed asylum, however the Spanish authorities did not deal with her claim immediately and she was left with no accommodation for several days.

[4] The applicant then claims that she phoned another lady she had lived and worked with as a prostitute under P in Spain. This lady, S, told her that their captors had organised an assassin to harm the applicant's family back in Nigeria. Because of this the applicant then returned to Portugal and to her captors. A further escape attempt was made in 2009.

[5] The applicant arrived in Dublin with a false passport and attempted to use the passport to fly to Canada. She was detected and detained in prison for having false documents between December 2009 and February 2010. She tried to claim asylum in Ireland. She was returned to Spain in February 2010. Upon arrival in Spain she fell back into the hands of her captors and again began working as a prostitute in Madrid.

[6] Soon thereafter another individual named 'K' assisted the applicant to fly to Ireland again. She was detected by immigration and immediately returned to Spain. The applicant claims that at this stage she again reported her situation to the Spanish authorities but they made fun of her and did not listen to her before showing her out.

[7] K again helped the applicant to get to Ireland around summer 2010. She arrived at Shannon airport where the Immigration Officers told her that they would try to investigate her case.

[8] In October 2010 the applicant met an associate of P named 'T' in a Primark store in Dublin. The applicant claims that T told the applicant that she had nowhere to go and nowhere to hide. The applicant fled to Belfast. In March 2011 the applicant presented herself to Alliance Party Offices. Also in March 2011, through the help of the Belfast City Mission, the applicant instructed a solicitor. Belfast City Mission also took the applicant to the police to report human trafficking.

[9] On 15 June the applicant's fingerprints were matched to a person who had claimed asylum in Spain on 10 June 2008. On 20 June 2011 the applicant was interviewed with regards to her travel history since she claimed asylum in Spain and on 27 June 2011 she was interviewed with regard to her trafficking claim.

[10] On 29 June 2011 the Home Office made a formal request to the Spanish authorities asking them to accept responsibility for the consideration of the claimant's asylum application under Article 16.1 of the Dublin Regulation and on 7 July 2011 the respondent made a finding that there were reasonable grounds to suspect that the applicant had been a victim of human trafficking and she was granted a 45 day reflection period.

[11] On 8 July 2011 the Spanish authorities accepted responsibility for the applicant's asylum application.

[12] On 19 August 2011 the respondent issued a Conclusive Grounds decision wherein it was decided that on the balance of probabilities the applicant had not been the victim of trafficking in human beings. She was released on 14 September 2011.

[13] On 26 August 2011 the applicant lodged a Judicial Review application which was stayed pending the outcome of the case brought by Xia Xia Weng.

Order 53 Statement

[14] The applicant sought the following relief:

“(a) An order of certiorari quashing the decision of the Competent Authority of 19th August 2011.

(b) An Order of mandamus to compel the Competent Authority to reconsider the victim status of the applicant in accordance with any judgement, order or direction.

(c) A declaration that the decision was ultra vires and of no force or effect.

(d) A declaration that the decision was unlawful as contrary to s6 of the Human Rights Act 1998 as in breach of Article 4 of the European Convention on Human Rights.

(e) A declaration that the decision was unlawful as in breach of Article 10(1) of the Trafficking Convention
...”

[15] The grounds upon which relief was claimed included:

(a) The decision was irrational as amounting to an unlawful fettering of the Competent Authority’s discretion to seek further evidence and information in the determination of the applicant’s victim claim from police, medical professionals or other relevant persons.

(b) The decision was irrational as the Competent Authority had failed to investigate the claim properly and failed to discharge the duty of reasonable inquiry by failing to request further information from police, medical professionals or other relevant persons.

(c) The decision was procedurally unfair by reason of the Competent Authority’s failure to disclose material considered by them in reaching the impugned decision to the applicant and by reason of the failure to allow the applicant an opportunity to

rebut or respond to the same in advance of refusing the victim status claim. These failures are in breach of the principle of equality of arms.

(d) The decision was procedurally unfair by the competent Authority's apparent bias in so far as they are not independent of the Home Office or the UK Border Agency.

(e) The decision is unlawful as contrary to s6 Human Rights Act 1998 in so far as it is in breach of Article 4 of the European Convention on Human Rights. Article 4 imposes a positive obligation that the state must be able to effectively investigate and identify people who have been subjected to trafficking. The absence of any adequate procedural safeguards in the determination of the applicant's trafficking claim, specifically the absence of adequate disclosure of material documents considered by the Competent Authority in refusing that claim, is in breach of the positive obligation imposed by Article 4.

(f) The decision is unlawful the identification procedure adopted by the Competent Authority did not take into account the special situation of women victims, contrary to Article 10 (1) of the Trafficking Convention, in breach of the applicant's legitimate expectation that the procedure would take her gender into account.

(g) The decision is unlawful the identification procedure adopted by the Competent Authority did not take into account the special situation of women victims contrary to Article 10(1) of the Trafficking Convention and therefore constituted a misdirection in law in circumstances where the Competent Authority has sought to make its decision in accordance with that procedural requirement."

Relevant Law

Arguments

Applicant's Arguments

Justiciability

[16] The applicant argued that the CA/Secretary of State have misdirected themselves in law by making a decision which is not in accordance with the specific provisions of the Convention, in circumstances in which they clearly intended to operate a policy in accordance with those provisions. The applicant relies on R(Y) v Secretary of State for the Home Department [2012] EWHC 1075 to claim that an analogous situation in England allowed the English courts to consider directly the meaning of provisions of the Convention and urges that the court follow suit in the instant case. The applicant submits that where a public body states that it has complied with, or taken into account, an international legal obligation when making a decision, the court has jurisdiction to review the decision to assess compliance with the obligation under orthodox principles of public law.

[17] The applicant argued that the decision of the Court of Appeal was in breach of the applicant's rights under Article 4 ECHR in light of a failure to comply with the Convention. Basing the argument on Rantsev v Cyprus App 25965/04 the applicant submitted that it was decided there that the Convention is relevant when considering the positive obligations imposed by Article 4. The duty to provide protection can arise not merely as a consequence of what the authorities are actually aware of; it can arise as a consequence of what they ought to be aware of. The approach in Rantsev implies that the Trafficking Convention is relevant to whether a state has taken adequate steps to ensure that it has properly informed itself of all matters that it needs to have considered.

Failure to Investigate

[18] A decision maker must ensure he or she is properly informed. The applicant's claim was rejected on credibility grounds. Because of the Convention guidance, the national guidance and the position of other jurisdictions regarding why victims of trafficking may return to their captors both demonstrate the necessity to fully investigate the applicant's account to assess whether there was an adequate explanation for her behaviour. Fairness required the applicant to be given an opportunity to comment on matters that were relied on as adverse to her credibility.

Procedural Fairness

[19] The decision was procedurally flawed as the applicant was not afforded the opportunity to know the case against her. This failure was all the more serious given that the claim was refused on the basis of credibility, which is an issue that any person should have the opportunity to respond to in the interests of fairness. A decision maker should not rely on potentially influential material that is withheld from the individual affected.

[20] Given the potential vulnerability of trafficking victims, the serious nature of the subject matter and the potential significance of the outcome for applicants, the

applicant submitted that the context in this case imposed relatively rigorous standards of procedural fairness.

[21] The applicant argued that she has been given no adequate opportunity to meet the case against her. The absence of any such opportunity is exacerbated by the absence of any other basic procedural safeguards, such as a right of appeal or to attend an oral hearing.

Apparent Bias

[22] The applicant submitted that the UKBA has a vested interest in minimising the number of recognised victims of human trafficking in the UK. An instance of trafficking is necessarily contrary to UK immigration law and thereby represents an implicit failing on the part of UKBA to prevent such breaches from occurring in the first place. A confirmed victim of trafficking represents, at some level, an institutional failure on the part of UKBA.

[23] Because of this, the applicant submitted that a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Court of Appeal was biased when refusing victim status because of their lack of independence from the UKBA. This tension is more so in the instant case because the Court of Appeal in this case was not a 'separate' UKBA Court of Appeal whose only role is to determine victim status claims but was a Court of Appeal within the Third Country Unit (TCA). The TCA is the body which decided that the applicant had to return to Spain to pursue her asylum claim there under Dublin II. The Court of Appeal determined the applicant's trafficking claim at a time when it had already decided that she should be removed to Spain. It will be more difficult for a decision maker to approach the applicant's claim with an open mind if it has already decided that she should be removed.

Article 4 ECHR

[24] The applicant argued that the impugned decision is contrary to Section 6 of the Human Rights Act 1998 ("the HRA") because the decision is in breach of the positive obligation imposed by Article 4 ECHR because of the absence of adequate procedural fairness. In this contention the applicant relied on the principles enumerated in Rantsev which are:

- (a) Article 4 makes no provision for exceptions and no derogation from it is permissible.
- (b) National legislative safeguards must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking.

- (c) The duty on the state is to penalise and prosecute trafficking, to prevent trafficking and to protect victims. The extent of the positive obligations must be considered within this broader context.
- (d) Article 4 may in some circumstances require a state to take operational measures to protect victims or potential victims of trafficking.
- (e) In order for a positive obligation to arise, it must be demonstrated that the state authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of Article 4(a) of the Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of Article 4 where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation of risk.
- (f) The positive obligation must not impose an impossible or disproportionate burden on the authorities.
- (g) Article 4 entails a procedural obligation to investigate situations of potential trafficking.
- (h) For such an investigation to be effective, it must be capable of leading to the identification and punishment of individuals responsible, an obligation not of result but of means. There is a requirement of promptness and reasonable expedition but where the possibility of removing the individual from the harmful situation is available the investigation must be undertaken as a matter of urgency. The victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

[25] The applicant argued that the impugned decision breached this procedural obligation in the following ways:

- (a) The applicant was denied an adequate and effective investigation into her claim.
- (b) The investigation was not capable of leading to the identification of the individuals responsible.
- (c) Most importantly, the applicant was not involved in the investigative process to the extent necessary to safeguard her legitimate interests.

[26] The applicant relied on the developed jurisprudence of Article 2 & 3 of the ECHR.

[27] Fundamental to the operation of the procedural obligations of Article 4 is the proper identification of victims of trafficking. If a process cannot fairly determine who is and who is not a victim then whatever other safeguards exist are null and void in terms of the procedural obligations imposed under Article 4. The applicant has an obvious legitimate interest in the impugned decision as it represents the 'gateway' decision which she must pass through before any other obligations under Article 4 take effect. In order to safeguard that interest that decision making process must be fair and for the reasons outlined it was submitted that it was not so.

[28] The European Court has recognised the importance of seeking corroboration where credibility is in issue. The failure to carry out further inquiries breached that principle.

[29] In relation to Weng the applicant submitted that the role of the Court of Appeal cannot be artificially separated from the wider investigative context (of the police) as decisions of the Court of Appeal will have implications for any police investigation and the prospects of a prosecution. Further, in relation to Weng, the applicant submitted that it is clear from a range of instruments that states may owe duties to an individual whether or not the Article 4 protective duty arises. That is primarily because a prosecution may be facilitated by a grant of leave. This is consistent with the broader principle that effective suppression of trafficking requires a combination of prosecution and protection. All of this implies that the role of the Court of Appeal should not be regarded as separate to the need to prosecute. Although the Court of Appeal is primarily concerned with protection, there is an overlap. To that extent the judgment of Treacy J is clearly wrong and should be revisited.

[30] In the alternative, Weng No 2 recognised that the duty to protect arises where the state ought to have been aware of a risk of persecution. That implies the need for an effective investigation otherwise there will be a risk that the state will have breached Article 4 by failing to take account of matters that it should have taken account of.

Breach of Legitimate Expectation or existence of a Misdirection in law as the Court of Appeal did not take into account the 'special situation of women victims' contrary to Article 10(1) of the Trafficking Convention

[31] There has been no adequate consideration of the applicant's status as a woman. Her claim was rejected as incredible and no consideration was given in assessing credibility to the potential impact of this treatment on her mental health, taking into account her gender and the claimed abuse that she had suffered for a number of years. In these circumstances it was all the more important to allow the applicant to comment specifically on the credibility concerns.

[32] For the above reasons the applicant submitted that the respondent acted in breach of her procedural legitimate expectation that the respondent would take her gender properly into account as required by Article 10 of the Trafficking Convention.

[33] Alternatively, the applicant submitted that the respondent has misdirected itself in law in a situation where it has agreed to be bound by the requirements of the Convention and, by failing to give effect to the requirements of Article 10 when required to do so by its own direction, the respondent has misdirected itself in law.

Trafficking Directive

[34] The Trafficking Directive makes it clear that the determination of victim status in this context now comes within the scope of EU law. The applicant argued that she was denied any adequate disclosure and was further denied any adequate hearing in respect of the impugned decision. This amounts to a violation of the standards imposed by EU law. The applicant accepted that the Trafficking Directive was not directly enforceable at the material time, however, she submitted that common law procedural standards and/or the obligations imposed by Article 4 reflect the Trafficking Directive. The common law in particular develops to reflect the UK's international obligations.

Impact of Atamewan on the instant case

[35] In Atamewan [2013] EWHC 2727 (Admin) the Divisional Court was content to construe and apply provisions of the Trafficking Convention directly. Atamewan concluded that there is nothing in Article 4 which indicates that someone may be a 'victim' for certain purposes but not for others at any particular stage when his case is being considered. In arriving at this conclusion the court held that the Home Office guidance was based on a misinterpretation of Article 4 of the Trafficking Convention. The concept of a 'historic' victim of trafficking who is not recognised as a victim under the Trafficking Convention because of the passage of time is not one that can be justified from the text of the Trafficking Convention itself. The court found that the explanatory guidance wrongly interpreted Articles 4 and 10(2).

Respondent's Arguments

[36] The respondent argued that the court should adopt the approach in Weng and dismiss this application; that the issue is now academic and the Salem principle applies; that the court can exercise its discretion and dismiss the application because of the incredible factual scenario; that there is no indication of what representations could have actually been made in relation to the adverse credibility finding; and that at the relevant time the applicant was not a victim.

Article 4 Argument

[37] The respondent submitted that it has not breached the specific prohibitions in Article 4 and submitted that the applicant relies on the 'positive obligations' of Article 4 derived from Siliadin v France [2005] 43 EHRR 287.

[38] In response to the applicant's argument that Article 4 imposes a positive obligation to effectively investigate and identify people who have been subjected to human trafficking, the respondent submitted that:

- (a) No such obligation appears in Article 4;
- (b) No such obligation can be derived from Siliadin; and
- (c) Any obligation to investigate instances of trafficking is directed at identifying perpetrators of credible current cases of trafficking, not at verifying historic accounts.

[39] In relation to the argument based on Rantsev v Cyprus & Russia App 25965/04 the respondent submitted that any positive obligation is contingent on the state being aware of a 'real and immediate' risk of trafficking or exploitation. This requires the identification of an objectively verified, present and continuing risk. The element of immediacy is clearly lacking in the instant case.

[40] In the alternative, the national authorities have made provision for appropriate investigations in cases where they have been made aware of a real and immediate risk of exploitation. Moreover, any procedural obligations that do arise pursuant to Article 4 are obligations of means and not ends.

[41] Rantsev did not engage any casual reading across of the principles in Article 2 adjectival obligations to Article 4 as the applicant sought to do in this case.

[42] The respondent argued that the true focus of the investigative obligation in Article 4 is not the duty to investigate whether the complainant is a victim of trafficking (as contended by the applicant) but rather on the identification and apprehension of the perpetrators of trafficking.

Justiciability

[43] The respondent argued that the terms of the Trafficking Convention are not justiciable in domestic Law. The only circumstances in which determination of an international treaty's scope would be a 'remarkable thing' the Respondent submits that it would be all the more remarkable if a court were to embark on an exercise of extending the scope of application of an unincorporated international treaty in circumstances where there was no factual basis upon which to ground any such exercise. The respondent submits that the policy steps taken by the sovereign

government to implement a supra-national treaty are simply not the province of the High Court exercising supervisory jurisdiction over administrative actions.

[44] The respondent submitted that the present application involves an analysis of the disputed meaning of a provision of the Trafficking Convention which is an unincorporated international treaty. Secondly, the contested issue arises in an area where there is no developed jurisprudence internationally. In Corner House [2008] UKHL 60 Lord Brown stated that interpreting an international treaty in this context would be a 'remarkable thing, not to be countenanced save for compelling reasons'. The respondent submitted that there were no such compelling reasons in the present case.

Reasonable Inquiry

[45] The respondent argued that any such failure must be examined in the light of the fact that the appellant failed to approach the authorities in the UK when she made her various escapes. This failure to promptly approach the authorities highlights the opportunistic nature of the claim. The applicant's actions have reduced the ability of the Court of Appeal to conduct a timeous investigation into the alleged facts. It is the primary impairment to the discharge of any duty of reasonable inquiry.

Procedural Fairness

[46] The claim for procedural fairness ignores the fact that the international obligations in the Convention involve the implementation of a national referral mechanism to ensure that potential victims of trafficking are identified and that bogus and unmeritorious claims are promptly screened out. The imposition of a procedural infrastructure such as that suggested by the applicants would run counter to the policy objective of ensuring that persons who have been rescued from traffickers are properly and promptly treated.

Apparent Bias

[47] A decision on whether a person is a victim of trafficking is not an 'immigration decision' subject to the rules and appeal mechanisms of the immigration system. The Court of Appeal's association with the UKBA does not suggest a conflict of interest. The applicant has provided no evidential basis for the contention that the fair minded observer would consider that UKBA involvement in the national referral mechanism involved an obvious conflict of interest.

Impact of Atemawan

[48] The respondent submitted that Atemawan did not address the justiciability of the Convention on Trafficking and that the court in the present case should follow the earlier ruling in W. Further, the respondent accepted that public law obligations

could arise as a result of policy documents and guidance developed in light of the CAT however, the CAT is not justiciable *per se*.

[49] The respondent submitted that the challenge in Atemawan was in relation to the 'reasonable grounds' stage of the process and it held that the guidance misinterpreted Articles 4 and 10 in relation to this stage. This part of the process is not an issue in the instant case. That part of the policy is not directly applicable to the concluded grounds stage of the process. In Atemawan there was little factual dispute about the history presented by the claimant. The account given was amenable to objective verification and investigation. In the instant case the account was fantastical. The concluded grounds decision in the applicant's case did not turn on the question of whether or not she was a historical victim of trafficking but rather that her story was unworthy of belief. If this is accepted then Atemawan is of no assistance to the applicant.

Discussion

Justiciability

[50] The decision of 19 August 2011 reads as follows:

"Your case has been carefully considered by a Competent Authority following the decision that there were reasonable grounds to believe that you could be a victim of human trafficking. However, as a result of further investigations into your case, the Competent Authority has concluded that on the balance of probabilities you have not been trafficked.

Although initially it appeared that there were reasonable grounds to believe that you may have been trafficked, subsequent information sought and provided to the Competent Authority has supplied no further evidence to support your assertion that you have been trafficked.

It is found that there were notable credibility factors in your account that led the Competent Authority to conclude that these were sufficient to undermine your whole claim. It is not found credible that after you escaped from [P], your trafficker, you sought out her associate, [S], knowing that she was likely to lead [P] to you, and that you did this knowing that [P] was well known for her brutality according to the account you gave to the Irish Police. You state that you were beaten by [P]'s men when she found you, yet upon

your return to Spain from Ireland some years later you again phoned [S] and again [P] came and found you and you were beaten. It is not considered credible that you would make contact with Sandra and allow yourself to be re-captured when there are organisations in Spain that could have helped you had you sought them out.

You further claim that 2 men, [F] and [K], both separately were offering to assist in taking you to Dublin. This coincidence is also not considered credible, nor is your claim that you saw a friend of [P] in a shop in Dublin, and fled the Republic for Northern Ireland.

As you do not have existing permission to be in the UK you will be liable for removal.

..."

[51] It is clear that this decision is a finding of fact, not of interpretation, with the key evidence leading to the finding being:

- (a) Further investigations/further information which provide no further evidence to support the trafficking claim.
- (b) Credibility factors considered sufficient to undermine the trafficking claim.

[52] The Court of Appeal had to decide upon the question: 'On the balance of probabilities was the applicant a victim of human trafficking?' Whatever definition of victim was used was irrelevant as it was concluded as a matter of fact that the applicant's story was incredible and insufficient to satisfy any definition of 'victim of human trafficking'.

[53] For these reasons there is no question of the justiciability of provisions of the Trafficking Convention as there was no interpretation of those provisions in the impugned decision.

Failure to Investigate

[54] In order to meet its international obligations as a signatory of the Trafficking Convention the state has adopted a National Referral Mechanism ("the NRM"). The NRM is now an internal UK policy. Under the NRM Court of Appeal are to make decisions about a claimant's victim status. Guidance has been produced for the Court of Appeal to assist with the determination of such claims. There are two

stages to determining any such claim; the reasonable grounds stage and the conclusive decision stage.

[55] A decision maker must consider all relevant considerations when coming to a decision. In order to do this the decision maker must ensure that he is fully apprised of the relevant considerations by conducting appropriate investigations. This principle is summarised in Secretary of State For Education and Science v Tameside Metropolitan Borough Council [1977] 1 AC 1014:

'To my mind, if a statute gives a minister power to take drastic action if he is 'satisfied'... then the minister should obey all the elementary rules of fairness before he finds that the local authority is guilty or before he takes drastic action overruling them. He should give the party affected notice of the charge of impropriety or unreasonableness and a fair opportunity of dealing with it.... In addition... the minister must direct himself properly in law. He must call his own attention to the matters he is bound to consider. He must exclude from his consideration matters which are irrelevant to that which he has to consider and the decision to which he comes must be one which is reasonable in this sense: that it is, or can be, supported with good reasons or at any rate is a decision which a reasonable person might reasonably reach'.

[56] In the guidance provided to the Court of Appeal for making these decisions there are various important points of policy which I set out in full below. On p13 of the guidance in the section 'Myths about human trafficking' the following is set out:

"Myth: The person did not take opportunities to escape so is not being coerced.
Reality: Remaining in an exploitative situation could indicate a willingness to remain there and / or an absence of coercion. But there are many reasons why someone may choose not to escape an exploitative situation: e.g. fear of reprisal, vulnerability, Stockholm Syndrome (psychological dependency on the person exploiting them), lack of knowledge of environment."

[57] There is also a section on assessing credibility (this is included in the Reasonable Grounds consideration section, but is equally applicable and relevant to the Conclusive Grounds consideration). This section reads:

'The nature of trafficking and the trauma it can cause should lead decision makers to be cautious in discounting potential victims due to lack of co-operation or initial reluctance to disclose the full facts of their case. Moreover, as a result of trauma, victims in some cases might not be able to recall concrete dates and facts and in some cases their initial account might contradict their later statement. This is often connected to their traumatic experience. However, the need to be sensitive does not remove the need to assess all information critically and objectively. This includes considering the credibility of a case.

In assessing the credibility of the case of a potential victim of trafficking decision makers must assess the credibility of material facts about past and present events that go to the core of the decision that an individual is a victim of trafficking. Credibility findings should be focused upon material facts that are serious and significant in nature...

Assessing a claim's credibility inevitably involves an element of subjectivity on the decision maker's part. The danger is that a decision maker's subjective interpretation of a claim can lead to unfounded assumptions based not on objective information but on the individuals own experiences and beliefs, undermining the balance and fairness of an assessment....'

[58] The guidance then goes on to consider specific considerations which may be of relevance when assessing credibility, for example, the level of detail provided and mitigating circumstances such as mental, psychological or emotional trauma, inability to articulate, mistrust of authorities, feelings of shame, painful memories and PTSD.

[59] When reaching the Conclusive Decision, the Court of Appeal 'must' consult with relevant agencies such as police and support providers in reaching the final decision. 'Due weight should also be given to reports submitted by recognised support providers... The Court of Appeal should also take into account any medical reports submitted...' The Court of Appeal should also interview the claimant if this is necessary on the evidence available.

[60] Having amassed all relevant information the Court of Appeal must then decide whether, on the balance of probabilities trafficking occurred. The test is

whether ‘trafficking as defined by the Convention is more likely than not to have happened’.

“... They will need to consider the entire trafficking process, which comprises of a number of interrelated actions rather than whether a single act has taken place at a given time.”

[61] There is no evidence in the decision letter that there has been any consideration of possible reasons for the lack of credibility as mandated by the guidance, there is just a bare assertion that the applicant’s claims are considered to be incredible. As there is no ‘weighing up’ of these considerations in the decision letter the decision is unsafe either for failing to properly investigate, or for failing to take into account relevant considerations.

Procedural Fairness

[62] In operating what is now an internal policy, the UKBA must operate it fairly. The demands of fairness are summarised in Secretary of State for the Home Department, ex Parte Doody [1994] 1 AC 531 at 560:

“What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that: -

1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.
3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.
4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and

administrative system within which the decision is taken.

5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.

6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

[63] Given the weight of what was at stake for the applicant in the instant case, including the denial of all the protections of Article 4 when the determination was made that she was not a victim of trafficking, I agree with the applicant that a fairly rigorous standard of fairness must apply in these decisions. For this reason I agree that the applicant should have had the opportunity to know the gist of the case against her and been given the opportunity to rebut the suggestion of incredibility.

[64] The respondent has given no convincing reasons why this would be impossible or undesirable and the guidance to the Court of Appeal clearly envisages a comprehensive evidence gathering procedure in advance of making a Conclusive Decision. Including in this information gathering procedure representations from the affected claimant, given the important interests that are at stake, cannot be jettisoned on the grounds of expedition, especially where there exists a mandate for a comprehensive evidence gathering procedure.

Article 4 ECHR

[65] The state has a duty to investigate allegations of trafficking. However, it has no specific Article 4 obligations to any particular person unless it is aware or ought to be aware of circumstances giving rise to a credible suspicion that that individual had been, or was at a real and immediate risk of being, trafficked or exploited. In making the impugned decision the state was ascertaining whether or not it had further positive obligations to the victim. The decision made was unfair, as above, however the applicant has been able to avail herself of these judicial review proceedings in order to ensure that her rights are vindicated. As such the state has not **yet** breached its Article 4 obligations, and provided that the ultimate process upon which the ultimate decision is made is fair, there will have been no breach of the applicant's Article 4 rights, as the state's obligations are of means and not of results and as long as the state fairly pursues all reasonable avenues to protect the applicant's rights it cannot have failed in its positive obligations under Article 4.

Conclusion

[66] For these reasons I allow the application.