

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

W's Application and X's Application (Leave Stage) [2011] NIQB 76

IN THE MATTER OF AN APPLICATION BY W
FOR JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY X
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] The Court heard the above named matters together as both concern the application of the Council of Europe Convention on Action against Trafficking in Human Beings (the "Trafficking Convention"). X has not been granted leave to apply for judicial review but her application has proceeded by way of a "rolled up" hearing given that it raised virtually identical issues to those which appeared in W application.

[2] The applicants each challenge the actual decisions of the Competent Authority refusing them victim status under the terms of the Trafficking Convention. There is also a broader policy challenge in respect of the substance and operation of the National Referral Mechanism policy ("NRM policy") under which the relevant impugned decisions were determined.

Grounds of challenge

[3] The grounds of challenge have been elaborately pleaded and many of the grounds give rise to a common preliminary issue regarding the justiciability of the Trafficking Convention in this judicial review. Much of the argument, written and oral was focussed on this preliminary issue. The actual decisions were also challenged in other grounds to which I shall return later. Given the centrality of the preliminary issue I propose to address it first and

in some detail but before I do so I should set out some of the factual background.

Factual background in respect of W

[4] W is a Chinese national. She deposed that her adoptive parents had both died by the time she was seventeen years old and that she then left her family home as she did not have a good relationship with her half-brother. She claimed that she found it difficult to find employment.

[5] She made enquiries about leaving China and, around September 2002 at nineteen years of age, made arrangements to leave with the assistance of a "Snakehead" gang member. She gave him her passport and a month later secured some form of travel permit to allow her to travel to Africa.

[6] As instructed by the gang member she went to Beijing where she met another man. She stayed in Beijing for about ten days and while there agreed to work as a house cleaner in the United Kingdom for two years in order to travel and pay off her "debt". The only other option given to her was to work as a prostitute in the United Kingdom for six months. She claims to have believed she would be free after completing two years' work.

[7] From Beijing, W travelled with a large group of other young women to Africa. A Chinese lady, who was part of the group of people who met them at the airport, held her passport and told the women they would be travelling to the United Kingdom in two weeks. However, she avers she then spent some eleven months travelling around Africa to perhaps four different countries and was working and staying in various different brothels during that time. Her role was to cook and clean for the women working as prostitutes in the brothels. W claims she was not physically or sexually assaulted during this time although she was subjected to verbal abuse and felt she had no freedom. She was not allowed to make phone calls or to leave the houses where she stayed. She avers that men were employed to guard the doors of the brothels to ensure the women, including herself, could not leave.

[8] During her time in Africa, W states she made a number of attempts to travel to the United Kingdom using fake Korean or Japanese passports which were provided by her keepers. On her sixth attempt she was successful and departed for London around 3 August 2003. She was met at Gatwick airport by two Chinese men. At this time, her original passport was still retained by the Chinese lady.

[9] After approximately one week, W states she was taken to work in a brothel where, again, her duties were to cook and clean for the prostitutes working there. She was not allowed to leave the house. She deposes that her keepers threatened that she was in the country illegally and she would get in

trouble if she tried to escape. She spent a total of six months in this first brothel. She was then moved to another brothel where she worked for approximately twelve months. After this she was taken to a third brothel where she worked for another six months. She was then asked to leave but was told she would first have to work for another four months. After working for these four months, she was released in December 2005.

[10] W avers that the conditions in each brothel were the same - she was not paid and could not leave of her own free will. She deposed that she was “very frightened” when working in the brothels.

[11] She spent approximately a period of three years and three months working under the conditions described, from departing China to go to Africa in September 2002 to her eventual release in the United Kingdom around December 2005. This amounted to approximately one year and three months additional work beyond the two years she agreed to work to pay her “debt”.

[12] Upon her release, W travelled to London where she stayed with a friend. She met her partner, A, in April 2006. The couple moved to Cardiff around July 2006 where their daughter was born in 2008. Then her partner moved to Northern Ireland as he had secured employment here. In June 2008 she and her child moved to Northern Ireland to join him. She and her partner were arrested in June 2008 in connection with the alleged production of cannabis. W was remanded in custody but was released in February 2009 when all charges against her were withdrawn. During this time, she was interviewed by a Detective Constable Pamela Simpson who then made a Potential Victim of Trafficking referral to the competent authority on 8 August 2009.

[13] On 1 July 2009 the competent authority determined that there were no reasonable grounds to believe W had been a victim of trafficking. This is the decision under challenge in the present application for judicial review.

[14] She sought asylum in the United Kingdom and the Secretary of State for the Home Department refused this claim on 22 March 2010. The appeal of this decision was dismissed on 18 May 2010.

“National Referral Mechanism for potential (adult) victims of Trafficking Report to competent authority for decision”

[15] This form is completed for adults where trafficking is suspected or claimed. It is a means for a first-responder to provide as much information as possible to the competent authority to enable a decision to be reached as to whether the subject has reasonable grounds for being treated a victim of trafficking. Section B of the form includes fifteen general indicators but is not a definitive list. Section B is described as working in combination with Sections C (indicators of forced labour), D (indicators of domestic servitude)

and E (indicators of sexual exploitation) to provide a fuller picture of the person's circumstances.

[16] Section B of the referral form in respect of W provides that the general indicators present were "[p]assport or documents held by someone else"; "[p]erception of being bonded by debt"; "[t]hreat of being handed over to authorities"; and "[b]eing placed in a dependency situation". In addition, section D provides the indicators of domestic servitude present were: "[n]o proper sleeping place or sleeping in a shared space e.g. living room"; "[n]o private space"; "[f]orced to work in excess of normal working hours or being 'on-call' 24 hours per day"; and "[n]ever leaving the house without employer".

[17] Section F includes evidence to support the reasons for referral. In respect of W, this appears to be a very brief outline of her factual background. It should be noted that W avers in her second affidavit dated 27 May 2010 that some of the details recorded in section F by Detective Constable Simpson are inaccurate.

The impugned decision in respect of W

[18] The relevant sections of the competent authority's impugned decision on 1 July 2009 in respect of W are set out below:

"Despite information sought and provided to the Competent Authority, there is insufficient information to support that your case has reached the standard of 'reasonable grounds to believe'.

You have not provided any evidence to suggest that you were trafficked to the UK. There is no evidence to suggest that you came to the UK against your will. Furthermore you state that you voluntarily entered into an agreement regarding your working conditions. According to your evidence you arrived in 2003 and worked for 2 years, since then you have been living in the UK illegally with your boyfriend. You made your trafficking claim after your arrest during a drug operation in Northern Ireland.

It is therefore considered that there is insufficient information to support your claim that you have been trafficked to the UK".

Factual background in respect of X

[19] The following background facts have been gleaned from X's grounding affidavit dated 10 May 2010 and from her skeleton argument.

[20] X is a Chinese national. Her real name is otherwise than the name she has been using, although she has used her current name since 2003 as this is the name under which she has been living in the United Kingdom and has used in all correspondence and applications regarding her immigration status in the United Kingdom.

[21] X avers that she comes from a poor family in China and when she was approximately sixteen years old she was offered work with a company in England through a family friend. This company would pay for her travel which she would pay back over time out of her wages. She states she travelled, first, to Moscow around November 2002 and then, after spending around a month in Moscow with approximately ten other girls and young women, she was told they would have to travel by car to England. After about three months of travel she arrived in Germany. She claims she was forced to work as a prostitute for the men who brought her to Germany and that she was later moved to Belgium where, she deposes, she was, again, forced to work as a prostitute.

[22] Around six months after her departure from China, X was rescued during a police raid on a brothel in Belgium and taken to a protection centre for minors. She avers that the man who was second in command in the brothel in Belgium arranged for her family in China to be threatened; her family advised her of the threats; and she absconded from the protection centre to the custody of her traffickers. She states that arrangements were then made for her to travel to England in a container truck. She was detected on arrival and placed in immigration detention around May 2003. X deposes that the trafficking 'boss' then arranged for the services of a lawyer who secured her release from immigration detention. She was then taken back into the custody of the traffickers but when they did not meet her as planned she decided to travel to London. She states she managed to make contact with her family and met with a family friend who happened to be in London. This friend helped her find work and accommodation and she has from such time been free from those who trafficked her to the United Kingdom.

[23] In May 2003 X claimed asylum in England but this was refused. She did not appeal the refusal decision.

[24] She started working in various Chinese takeaways around June 2003 and did not report as per the conditions of her release from immigration detention. She met B around September 2007 and on 8 January 2008 they got

married in a Chinese ceremony. They lived together in Birmingham from September 2007 to February 2008.

[25] X moved to Northern Ireland around April 2008 to be with B who moved here in February 2008. It was their aim to set up a Chinese takeaway business. However, they became involved in the production of cannabis. X was arrested on 4 June 2008 and charged with being concerned in the production of cannabis with others, money laundering and three counts of possession of false identity documents. She was remanded in custody and pleaded guilty to these offences. On 4 December 2009 she was sentenced to a total of thirty-six months imprisonment. Whilst in custody her daughter was born. Her husband was also convicted of cannabis related offences and sentenced to thirty-six months imprisonment on 4 December 2009. After completing his sentence around 6 December 2009, he was detained under immigration legislation and transferred on 23 January 2010 to Dungavel Immigration Removal Centre in Scotland.

[26] X was released from prison on 4 December 2009 and granted temporary admission on 9 December 2009. She was released to a Women's Aid Hostel with her daughter. She was also provided support by Social Services since 11 December 2009 and eventually moved into a house in Belfast.

[27] She made a claim for victim status under the Trafficking Convention by way of a letter from her solicitor dated 14 December 2010 along with a detailed statement in connection with earlier criminal proceedings. Around 5 February 2010 her solicitor received a phone call from the United Kingdom Border Agency (the "UKBA") in Glasgow advising that the claim could only be referred to the competent authority by an authorised first-responder rather than coming directly from X via her solicitor. Her solicitor then made attempts to progress the matter through the local police. It seems attempts were made to arrange an interview with the police but by April 2010 no date had been provided. On 8 April 2010, X's solicitor received an email from the police containing the decision of the competent authority which provided it had made a negative reasonable grounds decision.

[28] No further reasons were given at that stage; appropriate pre-action correspondence did not produce a response; and then judicial review proceedings were issued. After judicial review proceedings had issued, a decision letter dated 12 May 2010 was received from the competent authority refusing victim status along with other documentation regarding X's proposed deportation.

The impugned decision in respect of X

[29] The competent authority's decision dated 12 May 2010 determined that there were no reasonable grounds to believe X had been a victim of trafficking. It provided that victim status was refused because there was "insufficient information" to support that her case reached the standard of "reasonable grounds to believe" for the following reasons:

- (i) X did not make a trafficking claim upon arriving clandestinely in the United Kingdom;
- (ii) It is considered her intention was to facilitate illegal entry into the United Kingdom with the intention of obtaining better paid employment;
- (iii) She failed to take advantage of the protections available to her in Belgium or it was open to her to return to China;
- (iv) While in the United Kingdom X was not accompanied by her claimed traffickers on arrival; she was not confined by them; and she was not provided work by them. She claimed she worked for her traffickers as a prostitute in Germany and Belgium and returned to her traffickers in Belgium due to threat of harm to her family in China. It is pointed out that, presumably, such a threat would also apply in the United Kingdom if she failed to obey her traffickers yet she did not return to the traffickers when she was in the United Kingdom.
- (v) She was not under the influence of a trafficker at the time she was arrested and had opportunities to seek assistance while free to move around the United Kingdom; and
- (vi) Reference is made to a number of factual discrepancies and inconsistencies which damaged the credibility of her claim.

The Trafficking Convention

[30] Article 4(a) of the Trafficking Convention defines "trafficking in human beings", as follows:

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

forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

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

[31] Article 4(e) of the Trafficking Convention defines “victim” as follows:

““Victim” shall mean any natural person who is subject to trafficking in human beings as defined in this article”.

[32] Article 10 of the Trafficking Convention provides the concept of the competent authority as the main body charged with identifying potential victims. Article 10(2) provides:

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

[33] Article 13 of the Trafficking Convention provides for a recovery and reflection period for victims of trafficking:

“1. Each party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on co-operating with the competent authorities. During

this period it shall not be possible to enforce any expulsion order against him or her...

...

3. The Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly”.

[34] Chapter VII of the Trafficking Convention makes provision for a **monitoring mechanism** where Article 36 establishes a Group of Experts against trafficking in human beings (GRETA) and Article 37 establishes a more political grouping called the Committee of the Parties. In carrying out its role of investigating how the Trafficking Convention has been implemented in each ratifying state, GRETA provides a report and its conclusions concerning the measures taken by the relevant party to implement the provisions of the Trafficking Convention to both the relevant party and the Committee of Parties. The Committee of Parties may choose to adopt GRETA’s recommendations and may set a date by which the relevant party must comply with those recommendations. The Committee of Parties is, therefore, responsible for bringing political pressure to bear on those member states who have failed to implement parts of the Trafficking Convention.

The Trafficking Convention’s explanatory report

[35] The explanatory report sets out the background to the Trafficking Convention, provides interpretative guidance and explains the purpose of its main provisions.

[36] Paragraph 7 of the explanatory report refers to the importance of distinguishing trafficking in human beings from the smuggling of migrants:

“The Palermo Protocol contains the first agreed, internationally binding definition (taken over into the Council of Europe convention) of the term “Trafficking in persons” (see, below, the comments on Article 4 of the Convention). It is important to stress at this point that trafficking in human beings is to be distinguished from smuggling of migrants. The latter is the subject of a separate protocol to the *United Nations Convention against Transnational Organized Crime (Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime)*. While the aim of smuggling of migrants is the unlawful cross-border transport in order to obtain, directly or indirectly, a financial or other material benefit, the purpose of trafficking in

human beings is exploitation. Furthermore, trafficking in human beings does not necessarily involve a transnational element; it can exist at national level”.

[37] Paragraph 74 of the explanatory report states that the definition “trafficking in human beings” consists in a combination of three basic components: (i) the action of “recruitment, transportation, transfer, harbouring or receipt of persons”; (ii) by means of “the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person” and (iii) for the purpose of exploitation, which includes “at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal or organs”.

[38] Paragraph 76 continues:

“For there to be trafficking in human beings ingredients from each of the three categories (action, means, purpose) must be present together...”.

[39] Paragraph 83 explains what may constitute abuse of a position of vulnerability:

“83. By abuse of a position of vulnerability is meant abuse of any situation in which the person involved has no real and acceptable alternative to submitting to the abuse. The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim’s administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce”.

[40] Paragraph 84 provides that a wide range of means has to be contemplated:

“84. A wide range of means therefore has to be contemplated: abduction of women for sexual

exploitation, enticement of children for use in paedophile or prostitution rings, violence by pimps to keep prostitutes under their thumb, taking advantage of an adolescent's or adult's vulnerability, whether or not resulting from sexual assault, or abusing the economic insecurity or poverty of an adult hoping to better their own and their family's lot. However, these various cases reflect differences of degree rather than any difference in the nature of the phenomenon, which in each case can be classed as trafficking and is based on use of such methods".

[41] Paragraphs 70 - 100 provide further assistance in understanding Article 4 of the Trafficking Convention. For the present purposes, a number of these paragraphs have been specifically set out below:

"70. It was understood by the drafters that, under the Convention, Parties would not be obliged to copy *verbatim* into their domestic law the concepts in Article 4, provided that domestic law covered the concepts in a manner consistent with the principles of the Convention and offered an equivalent framework for implementing it.

...

77. Thus trafficking means much more than mere organised movement of persons for profit. The critical additional factors that distinguish trafficking from migrant smuggling are use of one of the means listed (force, deception, abuse of a situation of vulnerability and so on) throughout or at some stage in the process, and use of that means for the purpose of exploitation.

78. The actions the Convention is concerned with are "recruitment, transportation, transfer, harbouring or receipt of persons". The definition endeavours to encompass the whole sequence of actions that leads to exploitation of the victim.

...

87. Under the definition, it is not necessary that someone have been exploited for there to be trafficking in human beings. It is enough that they have been subjected to one of the actions referred to in the definition and by one of the means

specified “for the purpose of” exploitation. Trafficking in human beings is consequently present before the victim’s actual exploitation.

...

99. There are many references in the Convention to the victim, and the drafters felt it was essential to define the concept. In particular the measures provided for in Chapter III are intended to apply to persons who are victims within the meaning of the Convention.

100. The Convention defines “victim” as “any natural person who is subjected to trafficking in human beings as defined in this Article”. As explained above, a victim is anyone subjected to a combination of elements (action - means - purpose) specified in Article 4(a) of the Convention...”.

[42] Paragraph 172 *et seq* sets out the purpose of an Article 13 claim for a recovery and reflection period. In particular, paragraph 173 provides:

“173. Article 13(1) accordingly introduces a recovery and reflection period for illegally present victims during which they are not to be removed from the Party’s territory. The Convention contains a provision requiring Parties to provide in their internal law for this period to last at least 30 days. This minimum period constitutes an important guarantee for victims and serves a number of purposes. One of the purposes of this period is to allow victims to recover and escape the influence of traffickers. Victim’s recovery implies, for example, healing of the wounds and recovery from the physical assault which they have suffered. That also implies that they have recovered a minimum of psychological stability. Paragraph 3 of Article 13, allows Parties not to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly. This provision aims to guarantee that victims’ status will not be illegitimately used”.

The Supplementary Guidance for deciding if an individual is eligible for the provisions of the Council of Europe Convention on Action against Trafficking in Human Beings

[43] Paragraph 2 describes this guidance as being provided for *“the consideration of the ‘reasonable grounds’ threshold... as to whether the person referred is a victim of trafficking according to the purposes of the Convention”*. The same paragraph continues:

“This guidance will aid Competent Authorities in the consideration of cases where the exploitation element of the trafficking is remote either through time or geography”.

[44] Paragraph 3 provides that it is necessary to consider whether the person meets the definition of “victim” in Article 4(e) of the Trafficking Convention *“at the point the case was referred to you to make your decision”*.

[45] Paragraph 6 states a number of factors may be relevant in considering whether the three constituent elements of trafficking are present and whether the person can therefore be considered to be a victim *“at the point that the case was referred to you for a decision”*.

[46] Paragraph 7 explains the purpose of the Trafficking Convention is to protect from traffickers and provide assistance to *“persons who are victims of trafficking”*. Under the heading *“What are the relevant factors to consider determining whether a person is a victim?”*, paragraphs 8 and 9 provide:

“8. The Convention and explanatory report are vague as to the application of timeframes and the geographical location of the constituent elements of trafficking when considering eligibility. It is usual policy and practice for the provision of services for victims of crime to be based on an assessment of individual need. Therefore as the primary aim of the Convention is to offer protection to victims it may be appropriate to consider if the elements of human trafficking continue to apply at the time that the person presents themselves to you or at the time that the referral is made.

9. Based on an assessment of the individual circumstances of the case it may be reasonable to conclude that where a person’s circumstances do not require protection or assistance at the time of that assessment, the person is unlikely to be a victim for the purposes of the Convention. Some

support for this approach is provided by considering the rationale for the provision of a recovery and reflection period for victims as set out in Article 13 of the Convention and as expanded on in the explanatory report to the Convention”.

[47] Paragraph 10 provides that it is relevant to consider when and where the constituent elements of trafficking occurred. It sets out an illustrative list of factors:

**“I. the person was under the influence (either directly or indirectly) of traffickers at the point at which they came to your attention;
II. the person requires a period to recover from the influence of traffickers;
III. the person has suffered physical or emotional wounds from the trafficking experience and requires time to recover;
IV. the person requires a period of time in which to decide whether to co-operate with the authorities in respect of a trafficking related criminal investigation”.**

[48] Paragraph 11 of the guidance confirms the above list of factors is not exhaustive and that it will be necessary to consider all the person’s circumstances *“at the time a case is referred to make a decision”*.

[49] Paragraphs 13 - 16 of the guidance set out a number of example scenarios. Scenario 2, arguably the most relevant to the present applications, provides:

“15. The individual may have been trafficked into the UK at some point in the past. However, the person managed to escape the trafficking situation. Some members of his or her family may have come to join him or her and they may have made a new life for themselves.

Consider

- **Has the person been free from traffickers for a significant period of time at the point of referral?**
- **Has the person established a safe family life since escaping his/her exploitation?**
- **Had the person managed to support himself/herself during that period independent of the trafficker(s)?**

- **Has the person brought himself/herself to the authorities' attention for reasons unconnected to the alleged trafficking conduct – for instance when s/he was no longer self-sufficient?"**

[50] Paragraph 18 of the guidance provides:

"It is entirely possible to accept that someone has been a victim of the crime of human trafficking but at the time their case is considered decide that their specific circumstances do not engage the Convention obligations. A negative decision in such cases would not be denying that someone was or had been a victim of crime simply that at the time if assessment they did not meet the Convention criteria or need the protection that it can afford".

Affidavit of Pamela Moore of the United Kingdom Border Agency dated 19 May 2010 in response to W's grounding affidavit

[51] Pamela Moore of the United Kingdom Border Agency avers the guidance document was produced to aid competent authorities in the consideration of cases *"where it appears that the exploitation element of the alleged trafficking is remote in time or place from the present"*. She deposes that the guidance emphasises the present tense question of whether the potential victim of trafficking is subject to trafficking rather than an historical inquiry as to possible past events. In essence, at paragraph 7 of her affidavit, Ms Moore avers W did not make any allegation of trafficking until interview with Constable Simpson of the PSNI on 18 May 2009. Paragraph 10 of the affidavit sets out matters that were apparent from W's immigration history:

- "(i) She had been encountered on arrival at Gatwick Airport on 2nd August 2003**
- (ii) On her account she had travelled into the United Kingdom on her own.**
- (iii) On her account she was released by the alleged traffickers in December 2005 having entered into a voluntary working relationship with them.**
- (iv) The Applicant lived independently of the alleged traffickers thereafter and had no contact with them.**
- (v) The Applicant had made an independent life for herself in the United Kingdom and had supported herself financially since absconding from immigration control in 2003.**

(vi) The Applicant only came to the attention of the UKBA when she was arrested by the PSNI on serious drugs charges and a referral was made to UKBA.

(vii) There was no evidence that the Applicant was receiving any ongoing treatment for trauma caused by the alleged trafficking at the time of her arrest by the PSNI in June 2008”.

[52] Ms Moore deposed that in light of W’s immigration history, in accordance with the guidance and in giving due weight to all the available evidence, the competent authority determined there are no reasonable grounds to believe she is a victim of trafficking.

Affidavit of John Corcoran of the United Kingdom Border Agency dated 26 May 2010 in response to X’s grounding affidavit

[53] Mr Corcoran deposes at paragraph 3 that X is not considered to be a victim of trafficking but that her grounding affidavit describes an historical instance of trafficking. Paragraph 7 of the affidavit sets out matters that were apparent from her immigration history:

“(i) On her account she had travelled into the United Kingdom on her own.

(ii) The Applicant lived independently of the alleged traffickers thereafter and had no contact with them.

(iii) The Applicant had made an independent life for herself in the United Kingdom and had supported herself financially since absconding from immigration control in 2003.

(iv) The Applicant only came to the attention of UKBA when she was arrested by PSNI on serious drug charges and a referral was made to UKBA.

(v) There was no evidence that the Applicant was receiving any ongoing treatment for trauma caused by the alleged trafficking at the time of her arrest by PSNI in 2009”.

[54] Mr Corcoran deposed that in light of X’s immigration history, in accordance with the guidance and the available evidence, he as the competent authority determined there were not reasonable grounds to believe she is a victim of trafficking.

Preliminary issue

[55] A number of the grounds of challenge require the Court to consider whether or not the NRM policy and the impugned decisions are in accordance with the proper meaning of specific provisions of the Trafficking Convention. Therefore, a preliminary issue which must be addressed is whether the High Court in Belfast has any jurisdiction to construe or apply the provisions of the Trafficking Convention, an unincorporated international instrument.

The applicants' submissions on the preliminary issue

[56] The applicants make two primary submissions in respect of the preliminary issue which are referred to below as "the misdirection argument" and "the legitimate expectation argument".

The misdirection argument

[57] Counsel for W submits that, despite the general principle set out in *J H Rayner (Mincing Lane) Limited v Department of Trade and Industry* [1990] 2 AC 418 ("International Tin Council"), there are some circumstances in which a domestic court will consider and rule on the meaning of an unincorporated international instrument. Paragraph 54 of her skeleton argument sets out a summary of the relevant factors which it is asserted should be considered in assessing whether or not it would be appropriate for a court to review the NRM policy against the pleaded grounds:

- "(i) What is the subject matter of the provision at issue? Does it concern fundamental human rights issues or issues of similar gravity?**
- (ii) Is there a "live dispute" before the domestic court as to the meaning of a particular unincorporated provision? Is the disputed term ambiguous?**
- (iii) Is there any judicial authority on the meaning of that provision to assist the domestic court?**
- (iv) To what degree has the provision been implemented in the domestic setting?**
- (v) Would an adverse ruling operate to deter decision-makers "on the ground" from giving effect to international obligations?**
- (vi) Have the contracting parties embraced an alternative means of resolving differences in respect of a disputed provision?**
- (vii) Did the decision maker or policy maker clearly intend to act consistently with the UK's international obligations?"**

[58] It is argued that although the above factors should be weighted differently none possess a veto power so as to prohibit review, especially when other factors suggest review would be appropriate. It is submitted that a balanced and contextual approach is required. A number of more detailed submissions in respect of the above identified factors were made. These are summarised below.

[59] In reliance on *R v Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839, it is submitted that the strict principle in *International Tin Council* was qualified. It is argued that, despite the ruling of the House of Lords in *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756 and *Re McCallion's Application* [2009] NICA 55, the decision in *Launder* remained intact. It seems, therefore, that the primary submission being made is that the apparent intention of the decision-maker (or policy maker) will be relevant to the question of whether or not it is appropriate for a domestic court to interpret an international law obligation. It is contended that, in the present application, the competent authority and the Secretary of State misdirected themselves in law by making a decision/operating a policy which is not in accordance with specific provisions of the Trafficking Convention in circumstances where they clearly intended to operate a policy in accordance with those very provisions. Therefore, counsel for W asserts that this Court can properly and lawfully review the NRM policy which purports to implement significant provisions of the Trafficking Convention and determine whether that policy is compatible with the terms of the Trafficking Convention in light of the pleaded grounds.

[60] It is submitted there has been further action (legal, political and administrative) taken to implement the practical substance of the Trafficking Convention in the domestic context. This further action has been described fully in the skeleton argument but, broadly, it includes amendments to primary and secondary legislation and the introduction of detailed policy documents and procedures. In such circumstances, even if there is a dispute as to the meaning of certain provisions and where there is an absence of judicial authority on their meaning, it is contended that it is appropriate for a domestic court to consider and interpret the specific provisions of an international instrument.

[61] It is argued that, although the Trafficking Convention has a monitoring mechanism, the existence of such alternative means of resolving differences in respect of a disputed provision does not bar a domestic court from examining the terms of an international treaty where appropriate.

The legitimate expectation argument

[62] Despite acknowledging it is a disputed area of law whether ratification of an unincorporated convention without more may give rise to a legitimate

expectation, reliance is placed on the earlier Court of Appeal decision in *McCallion* ([2005] NICA 21(2)) in which Coghlin J accepted that ratification of an unincorporated convention along with some further Executive action *may* be capable of giving rise to a legitimate expectation (see paragraph 15). Counsel for W contends it is necessary to ask questions very similar to those in paragraph [57] above in order to establish whether or not the alleged additional action is sufficient to create the substantive legitimate expectation claimed.

[63] It is asserted, in the present application, that the further legal, political and administrative actions taken by the Executive (as fully referred to in paragraph 45 *et seq* of W's skeleton argument) so as to implement the terms of the Trafficking Convention are sufficient to give rise to the claimed legitimate expectation that the NRM policy would be compatible with the specific terms and requirements of the Trafficking Convention (having particular regard to Articles 4, 10 and 15). It is asserted those expectations have been breached as the NRM policy does not adequately reflect the terms of the Trafficking Convention. Therefore, Counsel for W contends it is quite proper for this Court to examine and interpret the relevant provisions of the Trafficking Convention when assessing the substantive grounds of this challenge.

The respondent's submissions on the preliminary issue

[64] Primarily, in reliance on *McCallion* [2009] NICA 55 (specifically paragraph [29]) and *Corner House Research* (specifically paragraph 44 of Lord Bingham's speech), the respondent submits that questions of the interpretation of an unincorporated international treaty are not justiciable by way of judicial review.

[65] The respondent argues that the present application involves an analysis of a provision of the Trafficking Convention which is an unincorporated international treaty and that the contested issue arises in an area where there is no developed jurisprudence at an international level. Specific reliance is placed on paragraph 65 of Lord Brown's speech in *Corner House Research* in which he considered that for a domestic court to embark on an exercise of interpreting an international treaty in such a context it would be a "*remarkable thing, not to be countenanced save for compelling reasons*". The respondent submits that there are no such compelling reasons in the present case.

Relevant case law in respect of the preliminary issue

[66] The House of Lords in *International Tin Council* affirmed the well established principle that international treaties which have not been incorporated into domestic law do not form part of the law of the United Kingdom and that the courts do not generally have a jurisdiction to interpret

or apply them. This approach was reasserted by the House in *R v Lyons* [2002] 4 All ER 1028.

[67] However, in *Lauder*, the House of Lords was prepared to construe the ECHR at a time when it had not been incorporated into domestic law. Lord Hope of Craighead stated:

“...If the applicant is to have an effective remedy against a decision which is flawed because the decision-maker has misdirected himself on the Convention which he himself says he took into account, it must surely be right to examine the substance of the argument. The ordinary principles of judicial review permit this approach because it was to the rationality and legality of the decisions, and not to some independent remedy... [p867]”.

[68] The leading cases in respect of the preliminary issue are *Corner House Research* and *Re McCallion's Application* [2009] NICA 55. In *Corner House Research*, Lord Bingham considered *R v Secretary of State for the Home Department, ex parte Lauder* and stated:

“44. In support of step (1) in this argument reliance was placed in particular on R v Secretary of State for the Home Department, Ex p Lauder [1997] 1 WLR 839, 866-867 and R v Director of Public Prosecutions, Ex p Kebilene [2000] 1 AC 326, 341-342, 367, 375-376. Both cases concerned decision-makers claiming to act consistently with the European Convention at a time when it had not been given effect in domestic law. The courts accepted the propriety of reviewing the compatibility with the Convention of the decisions in question. But there was in the first case no issue between the parties about the interpretation of the relevant articles of the Convention, and in the second there was a body of Convention jurisprudence on which the courts could draw in seeking to resolve the issue before it. Whether, in the event that there had been a live dispute on the meaning of an unincorporated provision on which there was no judicial authority, the courts would or should have undertaken the task of interpretation from scratch must be at least questionable. It would moreover be unfortunate if decision-makers were to be deterred from seeking to give effect to what they understand to be the international obligations

of the United Kingdom by fear that their decisions might be held to be vitiated by an incorrect understanding”.

[69] Lord Justice Girvan considered *Corner House Research* in paragraphs [27] - [29] of *Re McCallion's Application* [2009] NICA 55 and stated it confirmed the principles which Lord Oliver stated in *International Tin Council*. Lord Justice Girvan indicated this emerged most clearly in Lord Brown's speech at paragraphs 65 and 67 as set out in paragraph [27] of *McCallion*:

“[27]...Lord Brown at paragraph 65 said:

“Although, as I have acknowledged, there are occasions when the court will decide questions as to the state's obligations under unincorporated international law, this, for obvious reasons, is generally undesirable. Particularly it is so where as here the contracting parties to the Convention have chosen not to provide for the resolution of disputed questions of construction by an international court but rather (Article 12) to create a working group through whose continuing processes it is hoped a consensus view will emerge. ... For a national court itself to assume the role of determining such a question (with whatever damaging consequences that may have for the state in its own attempts to influence the emerging consensus) would be a remarkable thing, not to be countenanced save for compelling reasons.”

He went on to state in paragraph 67:

“The critical question is not as the respondent's arguments suggest whether the Director's successor would make the same decision again once the courts have publicly stated that this would involve a breach of the Convention; rather it is whether the court should feel itself impelled to decide the true construction of Article 5 in the first place. It simply cannot be the law that, provided only a public officer asserts that his decision accords with the state's international obligations, the courts will entertain a challenge to the decision based upon his misunderstanding of that obligation and then itself decide the point of international law at issue. For

the reasons I have sought to give it would certainly not be appropriate to do so in the present case.”

[70] In paragraph [29] of *McCallion*, in light of the speeches of their Lordships in *Corner House Research*, Lord Justice Girvan said “*there can be no doubt the House sought to qualify and restrict the ambit of the decision in Launder and to reassert the approach stated in Lord Oliver’s speech in Rayner and by Lord Bingham in R v Lyons*”. He continued:

“[29]...The statements of principle in Corner House, even if they may be strictly obiter, are of the highest authority and are in any event in line with the earlier House of Lords case law. Thus this court should follow and apply the approach the House has stated. In the light of Corner House it is clear that the court will require a very compelling reason to become involved in seeking to interpret a treaty provision unincorporated into domestic law. There may be situations in which the courts are driven to interpret an unincorporated treaty provision. This can arise if the parties contractually incorporate such a provision into a binding agreement which falls to be construed. It may happen if the Minister makes it abundantly clear that he is seeking to make his decision strictly in accordance with the correct legal interpretation of a treaty provision. In that event if he misconstrues the treaty provision then he has misdirected himself by the standard which he has set himself. However in considering whether he has misconstrued a treaty or Convention provision the court in reviewing the Minister’s decision ought to recognise that the Minister must be afforded a wide margin of appreciation. The negotiation of a treaty or the development of a practice which comes to contribute to the development of a ruling of customary international law takes place without the detailed domestic internal political debate and compromise appropriate to determining detailed domestic rules of law. Treaty and Convention provisions are often deliberately ambiguous or flexible and aimed at encouraging incremental developments in particular fields of international interest. That sets the context of international treaty provisions in which a Minister’s interpretative function is to be carried out. Furthermore, a Minister in construing a treaty provision is doing so in the context of deciding

whether a resultant decision will or will not breach the international law obligations of the state. Since the unincorporated treaty does not confer rights on the individual citizens the Minister is not construing a provision giving rights but is seeking to construe a provision breach of which has international political implications”.

Conclusion

[71] Lord Bingham in *Corner House Research* recognised that in *Lauder* and *Kebiline* the Courts had accepted the propriety of reviewing the compatibility with the then unincorporated ECHR of the decisions in question. But the characteristics of the two cases to which he drew attention were that in *Lauder* there was *no issue* between the parties about the interpretation of the relevant articles of the Convention and that in *Kebiline* there was a body of Convention jurisprudence upon which the Court could draw in seeking to resolve the issue before it. He however questioned whether, in the event of a live dispute about the meaning of an unincorporated provision on which there was no judicial authority the Courts would or should undertake such a task “from scratch”.

[72] Lord Brown in the same case, whilst acknowledging that there are occasions on which the Courts will decide questions as to the States obligations under unincorporated international law stated that this is “for obvious reasons ... generally undesirable ... [and was] not to be countenanced save for compelling reasons”[para 65].

[73] The Trafficking Convention has its own architecture for investigating and reporting on contracting States’ compliance described at para 34 above. The Convention does not provide for the resolution of disputed questions of construction by an international Court but envisages that these matters will be grappled with via the specific monitoring mechanisms set up under the Trafficking Convention. Lord Brown, having observed that it was for obvious reasons generally undesirable for the Court to decide questions as to the State’s obligations under unincorporated international law emphasised that this was particularly so where, as here, the contracting parties to the Convention had chosen not to provide for resolution of disputed questions by an international Court but had created alternative mechanisms. This observation is obviously pertinent to the present case.

[74] The present application involves a dispute as to the meaning and scope of a treaty provision unincorporated into domestic law. The contested issue arises in an area where there is no developed jurisprudence at an international level. As we have seen Lord Brown in *Corner House Research* considered that for a domestic court to embark upon such an exercise would be a “remarkable thing, not to be countenanced save for compelling reasons”.

In my view no compelling reason has been advanced which would justify or require the court to depart from the approach in *Corner House Research* and followed by the Court of Appeal in *McCallion*.

[75] Had the Court considered it appropriate to engage in an interpretative exercise the Respondent submitted that the applicants' cases were in any event fundamentally misconceived since the Trafficking Convention was concerned with the protection of persons who are *present* victims of trafficking. They emphasised the use of the present tense "is" in Article 4(e) and 13 of the Convention [set out at para 31 and 33 above]. In support of their argument the Convention was preoccupied with protecting those whose status *at present* is that of a trafficked person. They also relied on paragraphs 99-100 of the explanatory report [set out at para 41 above]. They also submitted that the explanatory report is an important aid to the construction of the Convention and drew a crucial distinction between the smuggling of migrants with their consent and the exploitative and coercive transportation of individuals [see para 7 and 77 of the explanatory report set out at para 36 and 41 above]. The respondent submitted that the evidential history presented in each of the applicants' cases was one which involved the smuggling of migrants with their consent rather than the exploitative and coercive transportation of individuals and accordingly invited the Court to find that these cases fell outwith the terms of the Trafficking Convention. They contended that the Trafficking Convention is explicitly concerned with affording protection to persons who are presently victims of human trafficking and not with affording further rights of appeal to smuggled migrants with no lawful basis for entry. The court was reminded that both applicants had evaded lawful immigration control to the UK, have no lawful authority to be in this jurisdiction and made no effort to regularise their immigration status until apprehended by police in the course of major criminal investigations. Faced with applicants who (according to the Respondent) ought to be characterised as economic migrants covertly smuggled into this jurisdiction many years ago the Respondent submits they cannot conceivably be considered victims of the grave crime of human trafficking.

[76] Persuasive though these arguments are I consider it unnecessary to address them in light of my acceptance of the respondent's primary submission on the preliminary issue.

[77] The impugned decisions were also challenged on various grounds including misapplication of the test, alleged irrationality, and procedural unfairness. I do not accept the applicants' contention that the test of "reasonable grounds to believe" has been misapplied. I am satisfied that the test was correctly identified and correctly applied. In light of the information available to the competent authority a contention that its decisions were irrational is not sustainable. I also reject the claim of procedural unfairness.

The obligations under the Trafficking Convention involve the implementation of national referral mechanisms to ensure that potential victims of trafficking are identified and that unmeritorious claims are promptly screened out. I accept the respondent's argument that the imposition of the 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.

[78] Accordingly none of the applicants grounds of challenge are made out and both applications must therefore be dismissed.