

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

Delivered:	31/5/2012
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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**  

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**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**  

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**IN THE MATTER OF AN APPLICATION BY W FOR JUDICIAL REVIEW**  
**W's Application [2012] NIQB 37**  

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**TREACY J**

**Introduction**

[1] This application was originally considered in my previous judgment [*In the Matter of an Application by W for Judicial Review (2011) NIQB 76*] which is currently under appeal. The application has been remitted back to this court to reconsider the challenge under Art 4 ECHR and give full reasons for the decision under that head.

[2] The factual matrix concerning the Applicant is fully laid out in my previous judgement at paras 4 -18.

**Issues**

[3] The issues in this case are firstly, whether the National Referral Mechanism policy ("NRM policy") breaches Art 4 ECHR and, secondly, whether the decision in the applicant's case breaches the State's obligations under that article.

**Background**

[4] The applicant alleges that the NRM policy breaches Art 4 obligations by failing to provide an effective means of identifying people who have been victims of trafficking. She further claims that the impugned decision breached the Art 4 procedural obligations by failing to provide an effective investigation. It is claimed that the investigation was ineffective inasmuch as there was bias, insufficient involvement of the applicant in the procedures to allow her to protect her legitimate interest and that the investigation was incapable of ascertaining those responsible.

**Decision**

[5] The NRM policy is a policy set up to determine:

**'If an individual is eligible for the provisions of the council of Europe Convention on Action against Trafficking in human beings'.**

[6] As indicated in my previous judgment, the provisions of that convention are not justiciable in a domestic court. Thus the issues before me concern only the extent to which, if any, the operation of the NRM policy and the impugned decision by the Competent Authority breaches Art 4 ECHR.

#### **Art 4 ECHR**

[7] Art 4 provides:

- (i) No one shall be held in slavery or servitude.**
- (ii) No one shall be required to perform forced or compulsory labour.**
- (iii) For the purpose of this article the term "forced or compulsory labour" shall not include:**
  - a. Any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;**
  - b. Any service of a military character or, in the case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;**
  - c. Any service exacted in case of an emergency or calamity threatening the life or well-being of the community;**
  - d. Any work or service which forms part of normal civic obligations.**

[8] Under Art 1 ECHR the State is required to secure the listed rights and freedoms within its jurisdiction. The rights and freedoms under Art 4 are absolute and no derogation from them is permissible. Thus as far as relevant in the instant case, one enjoys an absolute right not to be held in slavery or servitude or to be required to perform forced or compulsory labour.

[9] *Rantsev* [2010] ECHR 25965/04 (7 January 2010) confirmed that trafficking itself breaches Art 4 of the convention:

**“The court concludes that trafficking itself, within the meaning of ... Art 4 (a) of the Anti-Trafficking convention, falls within the scope of A4 of the convention.”**

Therefore all activity falling foul of Art 4(a) of the anti-trafficking convention falls within the scope of Art4 ECHR.

[10] Art 4 (a) of that convention reads:

**“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.”**

[11] The state has an obligation to secure freedom from the treatment outlined in Art 4(a) within its jurisdiction and a failure to comply with that obligation engages A4 ECHR.

[12] In *Rantsev* it was acknowledged that:

**“284. In assessing whether there has been a violation of Art 4, the relevant legal or regulatory framework in place must be taken into account ... The court considers that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking, accordingly, in addition to criminal law measures to punish traffickers, article 4 requires member states to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore a states immigration rules must address relevant concerns relating to**

**encouragement, facilitation or tolerance of trafficking.”**

Thus, from this paragraph it can be seen that the obligations under Art 4 are broad and must amount to “a spectrum of safeguards ... adequate to ensure ... practical and effective protections.” This is specifically to include criminal, regulatory and immigration efforts. The state will **not** be in breach if, via an appropriate spectrum of safeguards, victims’ rights are practically and effectively protected.

[13] In *Siliadin v France* [2005] 73316/01 (26 July 2005) it was confirmed that Art 4 ECHR confirms a **specific** obligation (ie above and beyond, or separate to the obligations above) to penalise and prosecute effectively any act aimed at maintaining a person in slavery by providing a legislative and administrative framework to prohibit and punish same.

[14] The court in *Rantsev* noted that the extent of positive obligations under Art 4 must be considered within the broader context of the fact that the states signed up to the Palermo Convention and the Anti-Trafficking convention have acknowledged that trafficking can only be effectively fought by a combination of measures addressing three key issues. These issues are:

- **Preventing** Trafficking;
- **Protecting** Victims of Trafficking;
- **Punishing** Traffickers.

[15] The relevant conventions therefore advocate a three-pronged approach to combating trafficking. Each ‘prong’ is separate but related to the overall goal. In *Rantsev* the procedural obligations are analysed separately under the following heads:

- ii) Positive obligation to take protective measures;
- iii) Procedural Obligation to investigate trafficking.

I shall follow suit and analyse the NRM policy in the same manner.

### **Procedural Obligation to investigate Trafficking**

[16] Para 288 of *Rantsev* states:

**“Like Articles 2 and 3, Article 4 also entails a procedural obligation to investigate situations of potential trafficking. The requirement to investigate does not depend on a complaint from the victim or next-of kin: once the matter has come to the attention of the authorities they must act of their own motion... For an investigation to be effective, it must be independent from those**

**implicated in the events. It must also be capable of leading to the identification and punishment of individuals responsible, an obligation not of result but of means. A requirement of promptness and reasonable expedition is implicit in all cases 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 or the next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests."**

[17] Clearly then, there is a procedural obligation to *investigate* situations of potential trafficking. However this obligation is separate from the *protective* obligation. **The requirement to investigate does not depend on a complaint from the victim or next of kin.** The court then notes the essential features of any such investigation which include: independence; capacity to identify and punish (means not result); promptness; involvement of victim / Next of kin to the extent necessary to safeguard legitimate interests.

[18] It is noted at this point that the 'obligation to investigate situations of potential trafficking' is a standalone obligation that does not require a complaint from a victim or next of kin. Therefore victim status has no direct causative link to the obligation to investigate. The objective of the obligation is to identify and punish traffickers and it is thus a separate though related to the obligation to protect victims. Thus the minimum standard of investigation promulgated in *Rantsev* is not relevant or applicable to the Competent Authorities (CA) investigation of victim status. These investigations have separate purposes and there appears to be no basis for imputing the standards required by one to the other.

[19] Notably in the present case the police had decided that they had no plans to further investigate W's trafficking claims **before** the decision of the CA was notified to them and so it is quite clear that the CA's denial of victim status played no part in the discharge of that investigative obligation. I would further observe that the purpose of the CA is **not** to investigate the identity of traffickers and punish same, but to investigate victim status in order to protect that victim's rights. The CA therefore is not responsible for and has no jurisdiction to discharge the procedural obligation under Art 4 to investigate allegations of trafficking. Indeed in *Rantsev* there had been **no determination** that Ms Rantsev was **in fact** a victim, however the investigative obligation under Art 4 was activated regardless.

[20] Further it may be noted that within the policy itself it is clear that the First Responder, believing there to be indicators to suggest that the person is a potential victim of Trafficking (PVoT) the matter is passed to UKHTC to be referred to the police and simultaneously passed onto the CA. Therefore, both the obligations, one to protect victims (via CA) and to punish traffickers (via police) are instigated. As

the Art 4 procedural standard is not applicable to the decisions of the CA there can have been no breach of that standard. In this light, it is unnecessary to address the protective obligation however I propose to do so for the purposes of completeness and clarity.

### **The Positive Obligation to Protect**

[21] At para 286 of *Rantsev* the court noted that in certain circumstances:

**“Art4 may... require a state to take operational measures to protect victims or potential victims of trafficking.”**

This obligation will arise if the state was aware or ought to have been aware of circumstances giving rise to a credible suspicion that an identified individual had been, or was at a real and immediate risk of being, trafficked. The court continued:

**“In the case of an answer in the affirmative (ie that a credible suspicion arose) there will be a violation of Art4 of the convention where the authorities fail to take appropriate measures within the scope of their powers to remove an individual from that situation or risk”.**

[22] Two issues arise here. The first is that an obligation will arise if the authorities are aware or ought to have been aware of circumstances giving rise to a credible suspicion of trafficking. The second is that a violation **will only occur** if the authorities fail to take appropriate measures to remove the individual from that situation or risk. This necessarily implies that the state is only under any meaningful obligation if a situation or risk still pertains. As it is common case that W was not ‘presently in jeopardy’ there could be no obligation on the state to protect her.

[23] The purpose of the CAs role is in the protective function. If an individual is designated as a victim they will be entitled to a range of protections. If they are not designated as a victim (‘presently in jeopardy’) they will not be entitled to those protections. However, their status as a victim in the broader sense remains unaffected and they remain entitled to the other protections available in law (including effective criminal investigation and civil remedies for breach of their Art 4 rights).

[24] At para 287 in *Rantsev* that court stated:

**“Bearing in mind the difficulties involved in policing modern societies and the operational**

**choices which must be made in terms of priorities and resources, the obligation to take operational measures must, however, be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities”**

Given the complexity of trafficking in Human Beings and the very real and serious risks that victims ‘in present jeopardy’ face to their personal, psychological and economic well-being, and considering the other common law protections available to historic victims, it seems a thoroughly reasonable policy choice to differentiate between the needs of the two classes of victims. To cast the net any wider could jeopardise the CAs capacity to respond quickly and with appropriate resources to those who need it most.

[25] The granting or withholding of victim status under the NRM policy is the means by which the state can identify victims in need of protection whom they can usefully protect. As noted the obligation to protect arises only when the authorities are aware or ought to have been aware of circumstances giving rise to a credible suspicion that an individual had been, or is at real and immediate risk of being, trafficked. The CA must apply the ‘Reasonable Grounds’ test to ascertain if a credible suspicion can be said to exist.

[26] The CAs guidelines in the Section ‘Reasonable Grounds to Believe’ specify indicators to be taken into account in making this decision. They state that the indicators are to be taken as a flexible instrument, to be used in highlighting a potential situation to allow the officer to dig further. It further states:

**“Reasonable Suspicion can never be supported on the basis of personal factors alone ... without reliable supporting intelligence or information or some specific behaviour by the person concerned. It should normally be connected to precise and up to date intelligence.”**

In the decision in the instant case the authorities have not acted outside this discretion in applying the policy.

[27] The State, in the adoption and administration of the NRM policy, has not breached Art 4. They have successfully achieved all procedural requirements thereunder. The procedural requirements under Art 4 are not co-extensive with the protections in the Anti-Trafficking convention. The NRM policy represents a comprehensive means to protect the rights of victims. Protection must necessarily be available to those who actively need it. It would not be an appropriate use of funds and resources to provide unnecessary protections to those who are no longer in

danger. The applicant is not deprived of a **general** victim status, but only the particular type of victim status required to obtain access to special rights.

## **Conclusion**

[28] In summary, the following general points may clarify the current content of the states obligations under A4 ECHR.

### **1. The Nature and Extent of the Positive Obligations Under A4 ECHR**

The states positive obligations under A4 ECHR must be considered within the broader context of the three-pronged approach outlined in the Palermo Convention and Anti-Trafficking Convention. The three heads of positive obligation are:

- To Prevent Trafficking;
- To Protect Victims of Trafficking;
- To Punish Traffickers

Each of these obligations is separate but related to the main goal. In the instant case only the first two obligations were considered.

### **2. The Obligation to Investigate**

The obligation to investigate must be fulfilled by an investigation that meets the minimum standard outlined in Rantsev, i.e. it must meet the following minimum criteria:

- It must be independent.
- It must have the capacity to identify and punish those responsible – an obligation of means not results
- It must be prompt
- It must allow for the involvement on the victim / their Next of Kin to the extent necessary to safeguard their legitimate interests.

### **3. The Positive Obligation to Protect Victims**

A breach of the obligation to protect victims of trafficking will arise if:

- a) The State was aware or ought to have been aware of circumstances giving rise to a credible suspicion of that an individual had been, or was at a real and immediate risk of being, trafficked; **and**
- b) The authorities fail to take appropriate measures within the scope of their powers to remove an individual from that situation or risk.



#### **4. Circumstances when the State will not be in Breach of its A4 obligations**

The State will not be in breach of its A4 obligations if there is a 'spectrum of safeguards' in place which are 'adequate to ensure ... practical and effective protections' of victims' rights. This spectrum should specifically include criminal, regulatory and immigration efforts.

#### **5. Limitations on the Extent of the obligations under A4**

In all events the positive obligation on the state must not impose an impossible or disproportionate burden on the authorities.

[29] For the reasons outlined above it appears that the State has not breached its A4 ECHR obligations to the Applicant and therefore the Applicants claim in this regard must fail.