

THE HIGH COURT

2008 971 JR

BETWEEN

L. O.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice Hedigan, delivered on the 23rd day of October, 2008.

1. The applicant is seeking leave to apply for judicial review of the decision of the Minister for Justice, Equality and Law Reform ("the Minister") to make a deportation order in respect of her. She is also seeking injunctive relief.

Background

2. The applicant is a national of Nigeria and a Christian. Before coming to Ireland in 2007, she lived in a village in Delta State. She claims that members of a named religious sect selected her to perform certain rituals. She says that she refused to perform such rituals because of her religion, and members of the sect then threatened to kill her and use her blood to appease the gods. She left her village for Lagos, where she stayed for a fortnight. While in Lagos, she went to the police. She says they refused to help her and advised her to perform the rituals. She states that she travelled by plane from Lagos with a trafficker, who told her that upon arrival at his chosen destination, she would have to work as a prostitute. She says she escaped from her trafficker at Heuston Station and is not aware of his current location.

3. The applicant applied for asylum in the State on 17th April, 2007. She was unsuccessful before the Office of the Refugee Applications Commissioner (ORAC) and her appeal was rejected by the Refugee Appeals Tribunal (RAT). She did not seek to challenge those decisions by way of judicial review. On 18th February, 2008, representations were made on her behalf seeking leave to remain in the State and also seeking subsidiary protection. In those representations, the sole reference to trafficking is as follows, under the title "Background":-

"A trafficker aided our client journey to Ireland and told her she would be forced to work in prostitution once she arrived at his chosen destination. When our client arrived in Ireland she managed to escape and applied for asylum."

4. No further reference was made to trafficking in those submissions, or in any of the eight letters of recommendation forwarded in support of the applications, or indeed in the applicant's personal statement, which was forwarded with the letters.

The Decision to Make a Deportation Order

5. The applicant was refused subsidiary protection and her file came to be analysed under section 3 of the Immigration Act 1999. In the section 3 analysis, dated 13th June, 2008, an officer of the Minister's Department expressly addresses each of the humanitarian considerations outlined in section 3(6) of the Act of 1999. He then outlines the applicant's claims in respect of the religious sect, and notes as follows:-

"The applicant claimed that, as she left the police station [in Lagos] crying, a man came to her and offered to help her. The applicant claimed that this man introduced her to his friend who turned out to be a trafficker. The applicant claimed that this man arranged her transport to Ireland and she agreed to work as a prostitute for him. The applicant claimed that she left Nigeria on 15/04/2007 and that she managed to escape from the trafficker when in Ireland [...]."

6. The officer then cites a passage from a UK Home Office *Country of Origin Information Report: Nigeria*, dated November, 2007, including a lengthy section dedicated to "Trafficking in Women". He concludes that the repatriation of the applicant would not breach section 5 of the Refugee Act 1996 and would not give rise to any issues under section 4 of the Criminal Justice (UN Convention Against Torture) Act 2000. He proceeds to give consideration to the applicant's rights under Article 8 of the European Convention on Human Rights, and finally recommends that the Minister make a deportation order. That recommendation was affirmed by a more senior officer of the Minister's Department on 17th June, 2008, and the Minister signed a deportation order in respect of the applicant on 9th July, 2008.

Extension of Time

7. The decision to make a deportation order was notified to the applicant by letter dated 31st July, 2008. Section 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000 allows an applicant a period of 14 days, commencing on the date of notification of the decision, within which to commence judicial review proceedings. The within proceedings were commenced outside of that time by a matter of days. Nevertheless, this does not appear to have raised the concern of the Minister and I am satisfied that there is good and sufficient reason for extending time.

The Submissions

8. The primary grounds on which the applicant's claim was advanced at the oral hearing may be summarised as follows:-

a. Failure to take action on the issue of trafficking; and

b. Failure to take account of a material change in the applicant's circumstances since the ORAC and RAT decisions were made.

9. The applicant made additional complaints, albeit subsidiary, in the written submissions but did not seek to rely on those additional complaints at the oral hearing.

(a) Failure to Take Action on the Trafficking Issue

10. On her behalf, it has been pointed out that throughout the asylum process, the applicant consistently claimed to have been trafficked. In her ORAC questionnaire, she indicated that she was accompanied on her journey to Ireland by a named individual. As to what she fears might happen if she was returned to Nigeria, she stated: "The [...] people will kill me and the person that bring me here will kill for me to run away and make him spend money for my travelling [sic]." As to her travel arrangements, she said "I have to pay 20 thousand dollars to him that bring me here after working prostitute for him [sic]." In her ORAC interview, the applicant stated that that she travelled to Ireland with "A man. I don't know but he helped me to come here". She reiterated that "He told me he would take me if I do prostitution he would take me [sic]." She further said that she managed to escape when they arrived at the train station because "I knew I couldn't do prostitution". Later, when asked who she feared might kill her if she was returned, she stated

"The juju people and if that man finds me who I ran away from."

11. The applicant points out that trafficking is now criminalised under the Criminal Law (Human Trafficking) Act 2008. It is submitted that in the light of the coming into force of that Act, the Minister erred by failing to bring the applicant's claim in respect of trafficking to the attention of An Garda Síochána, and by failing to investigate the matter further. The applicant points out that when introducing to the Dáil the Bill that was to become the Act of 2008, the Minister stated that "[i]t is necessary to adopt a holistic approach to the issue and deal with human trafficking comprehensively." It is contended that there has been a breakdown in the holistic approach heralded by the Minister.

12. The respondent submits that although the applicant claims to have been trafficked, she has adduced no evidence to substantiate that claim even though the burden of proof lies on her. The respondent also points out that the applicant escaped from her trafficker before she was forced into prostitution and, more significantly, that she made no reference to the issue of trafficking in the personal statement that was submitted in support of her application for leave to remain in the State. It is contended, therefore, that the issue of trafficking was not before the Minister.

(b) Material Change of Circumstances

13. The applicant contends that the Minister failed to take account of a material change of circumstances since the ORAC and RAT decisions were made, namely the coming into force of the Criminal Law (Human Trafficking) Act 2008. The Bill that was to become the Act of 2008 was first introduced to the Dáil on 25th October, 2007. It received a swift passage through the two Houses and was signed into law on 7th May, 2008, coming into effect one month later. As seen above, the Minister was deliberating at that time as to whether or not to deport the applicant.

14. In this regard the applicant relies on the decision in *Kouaype v The Minister for Justice, Equality and Law Reform* [2005] IEHC 380, where Clarke J. held that if an applicant can show - at the deportation order stage - that there has been a significant change in his or her material circumstances since ORAC and the RAT made their decisions, and that the relevant change has been sufficiently significant as to arguably lead to a different conclusion, it may be incumbent on the Minister to engage in a significant reconsideration of the relevant aspect of the applicant's claim.

15. The respondent submits that the appropriate course of action, in circumstances where it is contended that there has been a material change of circumstances since the ORAC and RAT decisions were made, is for an application to be made for revocation of the deportation order under section 3(11) of the Immigration Act 1999.

The Court's Assessment

16. This being a leave application, the applicant is required to establish substantial grounds for the contention that the Minister's decision is invalid or ought to be quashed. As is now well established, this means that grounds must be shown that are reasonable, weighty and arguable, as opposed to trivial or tenuous.

(a) Failure to investigate the issue of Trafficking

17. While I have the greatest of sympathy for the applicant and indeed for all persons who may have been victim to the vile practice of human trafficking, this Court has no role in directing the investigation of alleged criminal offences or the prosecution of individuals. The fact that the Minister did not refer the matter of trafficking to the Gardai does not impact upon the validity of the decision to deport the applicant.

18. Likewise, I cannot accept that it was incumbent on the Minister to carry out any investigation into the circumstances of the alleged trafficking. The Supreme Court has held that there is no obligation on the Minister to enter into correspondence with an applicant or to inquire outside the documents furnished by and on behalf of the applicant. Rather, the Minister's sole obligation is to consider the representations made, and to notify the applicant of his decision (see *Baby O v The Minister for Justice Equality and Law Reform* [2002] 2 IR 169; *Oguekwe v The Minister for Justice, Equality and Law Reform* [2008] IESC 25).

19. In addition, it must be noted that no submissions were made on the issue of trafficking in the representations made on behalf of the applicant seeking leave to remain or in the applicant's personal statement, and no mention whatever was made of the Criminal Law (Human Trafficking) Act 2008. In the circumstances, there was no obligation on the officer who carried out the section 3 analysis to address the issue or investigate any further than he did.

(b) Material Change of Circumstances

20. Express references were made to the issue of trafficking by the ORAC officer in the section 13 report and by the Tribunal Member in her decision. Negative credibility findings were drawn in both decisions and it seems to me that little weight was given by the decision-makers to the issue of trafficking. As is now well established, it is for those decision-makers - and not for this Court - to determine the weight to be attached to various aspects of an applicant's claim (see, among others, *D.K. v The Refugee Appeals Tribunal & Anor* [2006] 3 IR 368).

21. I cannot accept that the coming into force of the Criminal Law (Human Trafficking) Act 2008 constitutes a material change in the applicant's circumstances, in the terms set out in *Kouaype* [2005] IEHC 380, since the ORAC and RAT decisions were made. The Act of 2008 criminalises the trafficking of persons for the purposes of their sexual or labour exploitation or the removal of their organs. In that regard, it is an important measure in the struggle to combat the practice of trafficking. It is not, however, the first statute to be enacted with respect to trafficking. Legislation in the area of human trafficking has been in place for some years in the form of the Illegal Immigrants (Trafficking) Act 2000. Section 2 of that Act provides as follows:-

"2 (1). A person who organises or knowingly facilitates the entry into the State of a person whom he or she knows or has reasonable cause to believe to be an illegal immigrant or a person who intends to seek asylum shall be guilty of an offence [...]."

22. In addition, the Child Trafficking and Pornography Act 1998 prohibits trafficking in children for the purpose of sexual exploitation. In April, 2007, the State signed the Council of Europe Convention on Action against Trafficking in Human Beings. Moreover, although the Act of 2008 received a relatively swift passage through the Houses of the Oireachtas, its provisions were extracted from the General Scheme of the Criminal Law (Trafficking in Persons and Sexual Offences) Bill 2006, which was published some 50 months before the Criminal Law (Human Trafficking) Bill 2007 was first introduced to the Dáil.

23. It seems clear to me that the *Kouaype* test has not been fulfilled: there has been no significant change in the material circumstances of the applicant since the ORAC and RAT decisions were made. Even if one was to accept that such a change had occurred by virtue of the coming into force of the Act of 2008, it could not be said that the situation has changed to a sufficiently

significant extent as to arguably lead to a different conclusion. It was not, therefore, incumbent on the Minister to engage in any significant reconsideration of the applicant's claim in respect of trafficking. Indeed, it is my view that the consideration given to the issue of trafficking in the section 3 analysis went over and above what was required of the Minister, even taking into account country of origin information on the issue.

Conclusion

24. In the light of the foregoing, I am not satisfied that substantial grounds have been established for the contention that the Minister's decision ought to be quashed and, in the circumstances, I must refuse to grant leave. Accordingly, the question of whether or not interlocutory relief should be granted does not fall for consideration.