

**THE HIGH COURT
JUDICIAL REVIEW**

[2013 No. 557 JR]

BETWEEN

L.T.C. AND I-B.J.K. (AN INFANT SUING BY HER MOTHER AND NEXT FRIEND L.T.C.) (NO. 2)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 14th day of April 2015

Introduction:

1. This is an application to amend these proceedings by joining a new respondent (The Garda National Immigration Bureau) and adding new grounds. The court has already delivered an *ex tempore* judgment in the matter on 21st May, 2014. In order to understand the issues on this application to amend it is necessary to set out some of the factual and procedural history in this needlessly complicated matter. Inevitably there is a degree of duplication in the description, by reference to the court's *ex tempore* judgment.

2. The first and second named applicants are mother and daughter. I shall refer to the first named applicant as "Mother" or "Ms. L.T.C." and the second named applicant as "daughter/child" or "baby I-B.J.K".

3. The mother arrived in Ireland on 8th February, 2007 (with her son who is not a party to these proceedings) and sought asylum, subsidiary protection and leave to remain. These applications failed and on 9th March, 2010 a deportation order was made in respect of the mother and her son.

4. On the 2nd June, 2009 baby I-B.J.K. was born and an asylum application was made for her in February 2010. It was refused by ORAC on 31st March, 2010 and was appealed on 16th April, 2010.

5. An application for leave to seek judicial review of the decision of ORAC in respect of the second named applicant was refused by Cooke J on 31st July, 2010.

6. On 20th September, 2012, more than two years after the appeal was instituted, supplementary submissions relating to baby I-B.J.K's appeal were made which mentioned for the first time that her mother was said to have been the victim of human trafficking.

7. On 25th October, 2012 the Refugee Appeals Tribunal refused the second named applicant's appeal. Judicial review proceedings in respect of that decision issued and the decision of the RAT was quashed on consent on 30th April, 2014.

Baby I-B.J.K's own proceedings [2012/944/JR]:

8. These proceedings, which issued on 17th December, 2012 sought to quash the decision of the Refugee Appeals Tribunal on a number of grounds including an allegation that the Refugee Appeals Tribunal had expressly found that baby I-B.J.K's mother was a victim of human trafficking and that certain obligations on the part of the State (Minister for Justice and Equality) were triggered. Other grounds were advanced in the proceedings but the basis upon which the decision was quashed on consent is unknown to the court.

9. Prior to the determination of baby I-B.J.K's proceedings, Messrs. Burns Kelly Corrigan solicitors, wrote to the Removals Unit of the Irish Naturalisation and Immigration Service, by letter of 11th February, 2013 regarding an "Application for Revocation of Deportation Orders and for Administrative Immigration Arrangements for the Protection of Victims of Trafficking". The letter's premise is that a decision of the RAT in respect of baby I-B.J.K "clearly found that [the mother] was a victim of trafficking".

10. The letter then said:

"Accordingly, the Applicants are entitled to protection under the Council of Europe Convention on Action Against Trafficking in Human Beings done at Warsaw on the 16th May 2005 (the "Convention"), signed by the State in April 2007. The Applicants duly request that they be provided with the protective measures under the Convention, including the right to remain."

11. The letter mistakenly asserts that there is a deportation order in respect of baby I-B.J.K. The letter then elaborates on the complaint being addressed and notes that the decision of the RAT in respect of baby I-B.J.K expressly said:

"There is nothing on file which suggests that the Applicant or the Applicant's mother has been approached by the Applicant's mother's former trafficker in this State. Therefore it is highly unlikely, having regard to the size and population of South Africa, that this trafficker now would have the motivation to seek out the Applicant were she to relocate with her mother [within] South Africa."

12. Having asserted that this quoted text constitutes a finding that the RAT had stated that the mother was a victim of trafficking the letter asserts as follows:

"An Garda Síochána, the ORAC and the RAT all have failed in their obligations under the Convention to consider these uncontroverted facts in light of the definition of trafficking, as set forth below. Contrary to their obligations, none of

these State agencies have made any referral of the Applicant's case to the Anti-Human Trafficking Unit."

13. The letter then quotes the various obligations which are said to arise under the Council of Europe Convention Against Trafficking before stating:

"Accordingly, it is submitted that the Minister is obliged to revoke the outstanding Deportation Order in order for your office to complete the identification process for the Applicant, as well as to provide her with assistance under Article 12 and to issue her with a residence permit pursuant to Article 14."

14. At page 7 of the solicitors' letter, reference is made to "Administrative Arrangements" in the following terms:

"Paragraph 5 of the Administrative Arrangements states that, when an individual has been identified by a member of the Garda Síochána not below the rank of Superintendent in GNIB as a suspected victim of human trafficking, she "may be granted a permission to remain lawfully in the State for a period of sixty days (a 'recovery and reflection period')." The Administrative Arrangements states that the purpose of the recovery and reflection period is to allow the person -

(a) time to recover from the alleged trafficking, and

(b) to escape the influence of the alleged perpetrators of the alleged trafficking so that he or she can take an informed decision as to whether to assist Gardaí or other relevant authorities in relation to any investigation or prosecution arising in relation to the alleged trafficking.

This recovery period has not yet been initiated. Whereas it is fair to conclude that the Applicant has escaped from the influence of her trafficker, she has not yet been granted the opportunity to make an informed decision on co-operating with investigating authorities. During this recovery period, the outstanding deportation order may not be enforced. Kindly note that, despite the permissive language of the Administrative Arrangements, the grant of a period of recovery and reflection is mandatory pursuant to Article 13 of the Convention."

15. Though the solicitors made complaint about the failure of various agencies to refer matters to the Anti-Human Trafficking Unit, it is not apparent that the solicitors were interested in referring the matters to the same Unit.

16. On page 8 of the letter, further detailed reference is made to these "Administrative Arrangements" in respect of the issuance of temporary resident permits for persons who claim to be victims of trafficking and who are co-operating with an investigation. In this regard, reference is made to paragraph 16 of the "Administrative Arrangements" to the effect that a victim of trafficking who has been denied refugee status *"may seek to have the fact that they have been identified as a suspected victim of human trafficking taken into account in any consideration of whether a proposal to make a deportation order should now be made under section 3(3) of the Immigration Act 1999."*

17. It is clear from a thorough review of the letter of 11th February, 2013 that Messrs. Burns Kelly Corrigan are fully *au fait* with the terms of a European Convention against Trafficking and also with the State administrative scheme established to comply with its international obligations referred to as the 'Administrative Arrangements'. They draw particular attention to the provisions of the Administrative Arrangements which requires a person not below the rank of a Garda Superintendent in the GNIB to decide whether there are reasonable grounds for suspecting that a person is a victim of trafficking.

18. By letter of 13th June, 2013 Messrs. Burns Kelly Corrigan wrote again to the Removals Unit at the Irish Naturalisation and Immigration Service in a letter which was again headed "Application for Revocation of Deportation Orders and for Administrative Immigration Arrangements for the Protection of Victims of Trafficking".

19. This letter reminds the Removals Unit of its letter of 13th February, 2013 and also asks the addressee to "See also *Notice of Administrative Immigration Arrangements for Protection of Victims of Human Trafficking (as amended)* (the "Administrative Arrangements") of 7th June, 2008." At page 2 the letter says: *"Paragraph 5 of the administrative arrangements requires that the Applicants must be identified by a member of the Garda Síochána not below the rank of Superintendent in GNIB as suspected victims of human trafficking, following which they "may be granted a permission to remain lawfully within the State for a period of 60 days (a "recovery and reflection period")."* The letter submitted certain medical reports on this occasion and the solicitors enclosed a copy of Council Directive 2011/36/EU of 5th April, 2011 (the Anti Human Trafficking Directive). The final paragraph of the letter is in the following terms:

"We have written to your offices on 11th February 2013, and we have furnished you with a finding by the Refugee Appeals Tribunal...that [the mother] was a victim of trafficking. We have requested protection on behalf of the Applicants under the Council of Europe Convention on Action Against Trafficking in Human Beings of 16th May, 2005... including of the revocation of their deportation order [sic] and a consideration of the right to remain. We have also referred you to your obligations under the Notice of Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking... We advise we are instructed to file an application for a Writ of Mandamus if our client's application for relief is not addressed adequately by 26th June, 2013."

20. The letters of 11th February, 2013 and 13th June, 2013 are based on an assertion that the Refugee Appeals Tribunal has declared the first named applicant to be a victim of human trafficking. Both letters assert that this having been established, certain obligations arising from the Council of Europe Convention and from the document referred to as the Administrative Arrangements follow. The State's obligations are said to have been triggered by 31st October, 2012, the date of the decision of the RAT. For reasons which have never been explained, the applicant's solicitors waited four months between 31st October, 2012 and 11th February, 2013 before calling upon the repatriation unit of the Immigration and Naturalisation Service to ensure that Ireland's obligations in respect of trafficking were carried out. The applicant's solicitors then waited until June 13th 2013 before repeating the request.

The Original Proceedings:

21. As originally framed, the proceedings sought an order of Mandamus directing the Minister for Justice & Equality to process an application for protection, relief and ancillary benefits as a victim of trafficking pursuant to Council Directive 2011/36/EU as well as pursuant to the Council of Europe Convention referred to earlier on. The pleadings made numerous allegations against the State for its failure to implement various international legal obligations and in respect of the failure of the respondents to deal with the request for administrative immigration arrangements for the protection of victims of trafficking.

22. These proceedings were commenced by *ex parte* application on 22nd July, 2013. The court directed that the application be made

on notice to the respondents and this was returnable for 14th October, 2013. The applicant's submissions in respect of the application for leave to seek judicial review stated that:

"The within application arises from a finding in a decision of the Refugee Appeals Tribunal ("RAT") in relation to the minor Second Named Applicant, dated 31st October, 2012 (the "Decision") that the First Named Applicant had escaped from her trafficker in Ireland. See exhibit BB1 to the Affidavit of Brian Burns. The Applicants submit that this amounts to a determination by the RAT that the First Named Applicant is a victim of trafficking to the State, and triggers the State's duties under both European and international legislation to provide protection and relief to the Applicants.

23. This submission goes on to state:

The first named applicant requested that the First Named Respondent process her application for her right to remain in the State as a victim of trafficking and for the minor Applicant to remain as her dependant, pursuant to the EU Anti-Trafficking Directive and / or the Convention...The Respondents have failed to make any determination or provide any relief in this regard, and the Applicants seek orders of mandamus to compel the Respondents to process their applications for revocation of their deportation orders and for protection and relief under the legislation."

24. Later in the same submissions the applicants say that:

"56...the Applicants' entitlement to assistance and support arises once GNIB have a reasonable-grounds indication for believing that the Applicants might have been subjected to any of the offences referred to in Articles 2 and 3.

57. The role of GNIB as the competent authority is reiterated in the Statement of Roles and Responsibilities at paragraph 2(b): "A suspected victim of human trafficking means a person who has been assessed by An Garda Síochána and for whom a member of An Garda Síochána not below the rank of Superintendent in GNIB has reasonable grounds to believe that he/she is a victim of trafficking in human beings."

58. Whereas the GNIB has demonstrably failed to carry out any such assessment or determination in the case at bar, the other agencies within the Department of Justice are not absolved from their responsibilities to the Applicants."

25. The application for leave on notice came on for hearing on 21st day of May, 2014. In an affidavit filed in support of the application to amend these proceedings it now emerges that the applicant, at some point unspecified by her solicitors, informed her solicitors that the GNIB paid her a visit. In addition, it also emerged in a later filed affidavit of Brian Burns that the GNIB furnished the applicants' legal representatives with a report of its investigation into certain matters on about the 20th May, 2014 – the eve of the hearing of the main proceedings. The report dated May 14th 2014 and given to the applicant's legal representatives on 20th May, 2014 is pertinent as follows:

"On 11th November 2013 [the first named applicant] was met by Detective Garda Des Lam and Garda Joanna McCormack, GNIB, at her accommodation...[She] outlined to Gardaí how an aunt of hers arranged for her to come to Ireland to seek employment. She was to stay with a named Irish Man in Co. Galway and it seems that the Irish man funded her flights and provided her with accommodation. [She] states that before she travelled to Ireland she was of the mind that a relationship might develop with this man.

She travelled to Ireland with her son... in February 2007 and stayed with the Irish man in his home in Co. Galway until June 2007. It seems that this man may have become abusive towards her and she fled his home in June 2007. She never made any report to Gardaí regarding alleged physical abuse she was subjected to.

In the interview [she] made it clear that she was not subjected to exploitation as defined in the human trafficking legislation. She was not under any form of duress or coercion when she travelled to Ireland.

Taking all of the above into account it is not intended to take any further action in this case unless [she] divulges further relevant information to the Gardaí. [She] has the contact details of the Gardaí dealing with this case.

The Gardaí have details of this Irish man. He has not been interviewed. Details of her aunt were not given to Gardaí during the course of the interview."

26. This report was in the possession of the applicant's legal representatives on 21st May, 2014 when these proceedings came on for hearing. The contents thereof were not divulged to the court and no complaint was made in respect of any matter contained therein.

27. The court took the view that it might be of assistance in shortening matters if it determined an issue which appeared to the court to be of central importance to the applicant's case. In the letters before action, the pleadings, the affidavit of Mr. Burns supporting the proceedings and the written submissions, significant emphasis was placed on the alleged finding of the Refugee Appeals Tribunal that the first named applicant was the victim of human trafficking. In my *ex tempore* judgment I concluded that the Refugee Appeals Tribunal had made no such finding. I also decided that no breach of the Directive could be established in so far as it only required Ireland to transpose its rules and create criminal offences relative to trafficking on or after April 2013. The alleged failure of Ireland to criminalise trafficking in the manner required by the Directive could only arise in a manner which might ground relief in respect of events happening or complaints arising after April 2013. The alleged trafficking in this case had happened many years earlier at a time when such activity was not a criminal offence. Even if the RAT had found that the mother was a victim of trafficking, no obligations connected to the Directive existed on the date of the decision of the RAT.

28. The court invited the applicants to consider their remaining grounds in light of the *ex tempore* ruling. The court granted the applicant leave to move an amendment to the grounds by motion returnable on 22nd July, 2014 and it is that application which is the subject of this judgment.

A New Pleading:

29. The applicants now seek an order of *certiorari*, for the first time, to quash the decision of the GNIB of 14th May, 2014 finding that the first named applicant was not a victim of trafficking. The applicants also seek orders of Mandamus demanding a member of the GNIB not below the rank of Superintendent to take action to determine if there are reasonable grounds for believing that the applicants might have been subject to any of the offences referred to in Articles 2 and 3 of Directive 2011/36/EU as well as under the Council of Europe Convention. Further, the applicants seek leave to add the Human Trafficking Investigation and Co-ordination Unit of the GNIB as a respondent party. This amendment seeks to change the case from one where it is alleged that the RAT has made a

finding that the mother is a trafficking victim to one which alleges that the GNIB have found that she is not such a victim but that the decision should have been taken by a person of a particular rank. This is not an amendment but the raising of a new complaint which is in complete contradiction of the case as originally pleaded. It is a new case, unrelated to the original proceedings.

30. Various grounds are advanced in favour of the new reliefs now sought. Firstly it is stated that *"the proposed respondent, an agency of the First Named Respondent, has failed, pursuant to Article 11(2) and (4) of the EU Directive, to make any lawful determination of a reasonable-grounds indication for believing that the Applicants might have been subjected to any of the offences referred to Articles 2 and 3 of the EU Directive...The proposed respondent has failed to take any action to inform the Minister of Justice and Law Reform whether or not there are reasonable grounds for believing that the Applicants are victims of [trafficking]."* It is stated that those respondents were on notice of the reasonable grounds for so believing and that Burns Kelly Corrigan wrote to the removals unit of the Naturalisation and Immigration Service on 11th February, 2013 and 12th June 2013 without response.

31. The applicants allege that the proposed new respondent is a 'competent authority' for the purposes of the Anti-Human Trafficking Directive. No indication has been offered as to why the respondent was not sought to be added when these proceedings were first instituted. It is not stated that the applicant's lawyers failed to comprehend the alleged role of the intended respondent. It is sought to be suggested, in the statement of grounds, that one of the reasons why the intended respondent might be added is that it was on notice of the reasonable grounds indication for the belief that the applicants were victims of trafficking. Apart from referring to letters written by Burns Kelly Corrigan to the repatriation unit of the Department of Justice, no basis is given for the assertion that the intended respondent was on notice of the alleged reasonable grounds belief that the applicants were victims of trafficking.

32. There has been significant delay pursuing these reliefs by the applicants. The applicant appears to have first raised the spectre of being a victim of trafficking in a submission in support of an appeal for the second named applicant dated September 2012. The contents of this appeal were known to her solicitors yet no attempt was made to communicate the contents of such allegations to any appropriate authority by the applicant's advisors until February 2013. The obligations of the GNIB to conduct certain investigations were the subject of detailed written submissions in support of the original application for judicial review but nonetheless, the intended respondent was not then a named party. Having regard to the fact that the applicants' lawyers seemed fully conversant with the alleged responsibilities of the intended respondent prior to the institution of these proceedings (or at all events prior to the hearing of the application for leave to seek judicial review) and in the absence of any explanation as to why the intended respondent was not a named party originally, it would be inappropriate to extend the time to add them as a party at this stage. Therefore I refuse this aspect of the application for amendment.

33. In respect of the requested order of *certiorari* of the alleged decision of the 14th May, 2014 it would appear that the ground advanced in support of this relief is that the alleged decision as to whether there are reasonable grounds to indicate that the applicants might be victims of trafficking could only be taken by a member of An Garda Síochána not below the rank of Superintendent in the office of the GNIB. The grounds advanced in favour of the order of *certiorari* appears to be as follows:

"On the day of the hearing on 21st May, 2014, the respondents furnished a report from GNIB of its investigation into the applicants trafficking in which a Detective Inspector determined that they were not victims of trafficking, and declined to refer the matter to a Garda Superintendent.

34. I have carefully examined the report of 14th May, 2014 and find that part of it declines to refer the matter to a Garda Superintendent.

35. A reference is made in the grounds to a rule which would require the report compiled on 14th May, 2014 to be compiled by a person of a different rank.

36. In opposing the application for an amendment of the pleadings Detective Garda Desmond Lamb of the Garda National Immigration Bureau has sworn an affidavit. He exhibits an important letter in this matter.

37. Following the judgment of the court on 21st May, 2014 the first named applicant swore a further affidavit where she gave more information about the nature of her alleged mistreatment which is thought to be identified as a form of trafficking. The affidavit exhibits correspondence from Detective Inspector Paul Molloy to Burns Kelly Corrigan dated 30th September, 2014. In relevant part the letter says as follows:

"Dear Mr. Burns

The Human Trafficking Investigation and Co-Ordination Unit (HTICU) are currently carrying out an investigation into allegations made by your client [first named applicant] that she is a victim of human trafficking.

As you are aware I am a Detective Inspector attached to HTICU. This matter was referred to the HTICU by the Irish Naturalisation and Immigration Service (INIS) in August 2013. The HTICU immediately began an investigation into this matter.

[The first named applicant] was interviewed by two members of the HTICU...on 11th November, 2013. She gave the Gardaí a brief outline of how she came to Ireland in 2007 and what she had been doing since then.

I reviewed the notes of the interview and I could find no evidence or information that would constitute human trafficking.

Both Detective Garda Lambe and Garda McCormack had given their contact details to [the first named applicant] and asked her to contact them if she wanted to talk to them again.

In July 2014 I became aware of the contents of an affidavit sworn by [the first named applicant] on 17th July, 2014 in Judicial Review proceedings. There are accounts in this affidavit of serious incidents that, I believe, may be relevant to the investigation the HTICU is currently carrying out.

As a result of this I asked Detective Garda Lambe and Garda McCormack to visit [the first named applicant] again. On 22nd August, 2014 the two named Gardaí interviewed [the first named applicant]. In general she had little more to tell the Gardaí than she had told them in the interview on 11th November, 2013. She told the Gardaí she had been suffering from depression when they spoke to her in November 2013.

[The first named applicant] declined to make a complaint or statement to the Gardaí.

The Gardaí again left their contact details with [the first named applicant] and advised her to talk to her solicitor about this matter.

Following on from that and noting that [the first named applicant] has not yet made any complaint or statement to the Gardaí, I am asking you if your client wishes to make a statement about this matter. I am anxious to progress this investigation...Paul Molloy, Detective Inspector."

38. In his affidavit of the 3rd of November, 2014 Detective Garda Lambe refers to the various difficulties there have been in interviewing the first named applicant. The deponent says that at the conclusion of the second interview with the first named applicant in August 2014 she was asked whether she was prepared to make a statement but she indicated that she was not and she was adamant that she did not want any Garda involvement. He concludes by saying "Whilst the investigation is ongoing it is very difficult to progress matters..."

39. It is clear to me from the content of the letter addressed to Burns Kelly Corrigan solicitors in September/October 2014 and the content of the affidavit of Detective Garda Des Lambe, that any application to amend the proceedings to quash an alleged decision of Detective Inspector Paul Molloy of 14th May, 2014 is entirely misplaced. It is perfectly clear that the investigation as to whether there are reasonable grounds indicating that the first named applicant is a victim of trafficking is an ongoing matter. The investigation is that which the solicitors for the applicants sought and they have been aware for some considerable time that the GNIB have been in touch with the mother in respect of these matters. It is also clear from the averments of Detective Garda Lambe that it is unlikely that progress will be made in the investigation unless and until meaningful co-operation is received from the first named applicant but she has indicated that she does not wish for there to be any further Garda involvement.

40. In view of the fact that the investigation into the applicant's claims is an ongoing matter, it is inappropriate to grant leave to amend the proceedings to seek an order of *certiorari* of a decision which does not purport to be a decision on whether or not the applicant has been the victim of trafficking. That investigation is ongoing but dependant upon co-operation from the first named applicant.

41. The third relief sought by way of amendment to the proceedings is an order of Mandamus commanding a member of An Garda Síochána not below the rank of Superintendent in the offices of GNIB to take action to determine if there is a reasonable grounds indication for believing that the applicants might be victims of trafficking. In view of the comments I have just made about the ongoing nature of this investigation it is premature and inappropriate to add such a claim to the case at this stage.

42. The only matter which could not have been pleaded prior to the institution of these pleadings and which is now sought to be added is the claim in respect of the alleged decision of 14th May, 2014. That report is not a final decision on whether the applicant is a victim of trafficking. Rather, it is a step in a stalled investigation of that question.

43. It is important to recall how these proceedings commenced. Letters were written to the repatriation unit of INIS seeking revocation of deportation orders and relief's said to be available to persons who are victims of trafficking. The letters were said to turn on a finding by the RAT that the first named applicant was a victim of trafficking. The correspondence was not pursued with any urgency. Proceedings issued which apparently complain that there had been a finding that the first named applicant was a victim of trafficking and that certain obligations flow from that. I dismissed that aspect of the case. It seems that the applicant also seeks to argue that officials of the State are required by EU law, Council of Europe law and domestic administrative arrangements, to carry out certain investigations. It emerges in the course of the application to amend the proceedings that such applications are ongoing but that they are stalled by the failure of the first named applicant to co-operate. I refuse the application to amend the proceedings.