OUTER HOUSE, COURT OF SESSION

[2014] CSOH 126

P1206/12

OPINION OF LORD ARMSTRONG

In the petition

JB (AP)

Petitioner;

for

Judicial Review of a decision of the Secretary of State made on 18 November 2010 and intimated on 1 November 2012, and of a further decision dated 19 October 2012

Respondent:

Petitioner: Carmichael, QC, Bryce; Drummond Miller LLP

Respondent: McIlvride; Office of the Advocate General

14 August 2014

Introduction

[1] The petitioner is a Nigerian national, born on 23 February 1991, who, when interviewed by the Immigration Advisory Service on 25 October 2010, claimed to be a victim of trafficking and forced prostitution, having been taken firstly from Nigeria to Italy and thereafter from Nigeria to the UK. Her case turns on its own very particular facts.

[2] On 13 January 2011, the UK Border Agency concluded that there were reasonable grounds to believe that she had been trafficked. On 29 May 2012, the UKBA confirmed, following further investigations, that she had in fact been trafficked. On 18 November 2010, by a decision not intimated to the petitioner until 1 November 2012, the UKBA certified the petitioner's claim for asylum (in terms of Council Regulation (EC) No. 343/2003 ("Dublin II")) as one appropriately requiring removal to Italy. In implement of that, removal directions dated 19 October 2012 were issued. The respondent seeks reduction of these two decisions. Although reduction was initially sought of a further decision, dated 30 October 2012, that decision was subsequently withdrawn and accordingly reduction of it is no longer

an issue before the court. In these circumstances it was conceded by the respondent that the legitimacy of the removal directions was entirely dependent upon the validity of the decision dated 18 November 2010. It was accepted that if there was to be a reduction of the decision dated 18 November 2010, then the decision to remove the petitioner dated 19 October 2012 would also fall. Against that background, the respondent no longer insisted on his second and third pleas-in-law.

[3] In broad summary, the issues arising are (1) whether in the circumstances of the petitioner's claim, the return provisions of Dublin II were appropriately engaged, and (2) in the context of the exercise of discretion conferred by article 3(2) of Dublin II, whether due regard was given to the rights and obligations arising from the petitioner's status as a victim of trafficking.

[4] The respondent is the Advocate General for Scotland representing the Secretary of State for the Home Department. The AIRE (Advice on Individual Rights in Europe) Centre are interveners in the proceedings and lodged written submissions in support of the petitioner's claim. I have had full regard to these submissions and to the comprehensive notes of arguments lodged by the other two parties. The arguments set out in these documents are summarised in what follows.

The effective date of the decision of 18 November 2010

[5] It was agreed that the decision dated 18 November 2010 was not intimated to the petitioner until 1 November 2012. It was also agreed that because of that, as a matter of law, the decision's effective date was 1 November 2012, (*R (Anufrijeva)* v *Secretary of State for the Home Department* (2004) 1 AC 604). On that basis, it was also not in dispute that, for the purposes of an assessment of the validity of the decision, the referable date to which regard should be had in determining the extent of the information available to the decision-maker, was 1 November 2012.

The evidence available at 1 November 2012, as to the petitioner's status

[6] For the petitioner, it was submitted that by that date, the Secretary of State had four principal sources of information which should have been taken into account. First: a letter sent to the UKBA from the TARA (Trafficking Awareness Raising Alliance) Project, a department of Glasgow Community and Safety Services,

dated 27 October 2010, had confirmed that, when 14-15 years of age, the petitioner had been taken from Nigeria to Genoa and forced into prostitution, had escaped to Milan where she sought asylum, unsuccessfully, and had then arranged her own return to Nigeria. The letter explained her reluctance to reveal these facts at her earlier screening interview because of a ritual oath she had been required to make and her fear of dire consequences in the event of breaching it.

[7] Secondly: under a covering letter sent to the UKBA and dated 6 December 2010, the terms of a very full interview of the petitioner, held by the Immigration Advisory Service, on 25 October 2010, which confirmed (i) the oath administered by a juju priest, to which she was subject, evidence of which was apparent from the bodily markings remaining from its administration, (ii) the details of her journey to Italy, (iii) the details of her forced prostitution while there, (iv) her return to Nigeria, (v) further abuse suffered by her there, (vi) the details of her being taken to the UK, (vii) the details of her forced prostitution in the UK, and (viii) her ultimate escape from the man who had been detaining her. The IAS also provided to the UKBA, under cover of the same letter, a document entitled "Trafficking in Women from Nigeria to Europe". That document confirmed the prevalence of the trafficking of women from Nigeria and in particular from the State of Edo from where the petitioner came. It confirmed that the principal destination in Europe of trafficked Nigerian women was Italy where it was estimated there may be 10,000 Nigerian prostitutes. It also confirmed the "magic–religious" or "voodoo" element of ritual ceremony which appeared to create fear in the women in the event of breach of an indigenous religious pact or "ohen" between the women and their traffickers.

[8] Thirdly: under cover of a letter dated 23 October 2012, in which the UKBA was requested to exercise discretion under article 3(2) of Dublin II to substantially consider the petitioner's claim for protection on the basis that it had been recognised by the UK authorities, by then, that she was a victim of trafficking, a statement by the petitioner which gave further details of her experiences in forced prostitution in Genoa and included her expressed concerns that on return to Italy she would be at risk from her traffickers and would face prostitution again, and that if returned to Nigeria she would face persecution there too.

[9] Fourthly: the UKBA Nigeria Operational Guidance Note, dated 4 October 2012, confirmed that "Often victims of trafficking have sworn blood oath to a "juju shrine" and to the juju priest of the local community.", and that "… Nigerian women and girls, primarily from Benin City in Edo State, are subjected to forced prostitution in Italy…" .

[10] For the respondent, it was submitted that the relevant matters which were known to the Secretary of State by 1 November 2012 comprised four components. First: the terms of the petitioner's screening interview held on 22 October 2010 indicated that she had travelled to the UK by plane and had travelled through two other countries in doing so, that she had not previously applied for a visa or been fingerprinted in any other country, and had not claimed asylum in any other country before. The content of the screening interview was also to the effect that she had known the man who had brought her to the UK for about one week before the departure from Nigeria and that she had stayed for a day in the countries she had travelled through *en route*, but that she did not know which countries they were.

[11] Secondly: her travel history interview, held on 22 October 2010, which disclosed that she had been fingerprinted in Milan and had not returned to Nigeria since then. It was submitted that the information given was inconsistent with other details given by the petitioner, such as, thirdly, in the letter sent to UKBA by the TARA Project, Glasgow Community and Safety Services, dated 27 October 2010 and relied upon in this regard by the petitioner. Accordingly it was not clear that she had in fact travelled to the UK directly from Nigeria. While there was evidence from the petitioner herself as to her movements there was nothing available in support of the account on which she relied.

[12] Fourthly: reliance was placed on confirmation from the Italian authorities, dated 18 November 2010, that, in terms of Dublin II, Italy accepted the intended transfer of the petitioner. It was submitted that if the Italian authorities had considered that Dublin II did not apply to the petitioner they would have declined to accept her transfer. The fact that they did not decline was something on which the Secretary of State was entitled to rely.

[13] I conclude that there was sufficient information available to the UKBA to alert a decision-maker to the likelihood that the petitioner had been trafficked to Italy and thereafter from Nigeria to the UK. While it is true that all the sources of evidence were not entirely consistent, in the context of an explained reticence to provide comprehensive detail, it was incumbent on the UKBA to have regard to its own operational guidance which confirmed the practice of requiring victims such as the petitioner to swear a blood oath, in effect to protect the traffickers concerned. In any event, by 29 May 2012, the UKBA had expressly confirmed the conclusion that the petitioner had been trafficked.

Rights and obligations arising as a result of the petitioner's status as a victim of trafficking

1. The international instruments

[14] The Council of Europe Convention on Action against Human Trafficking ("the Anti-Trafficking Convention"), ratified by the UK, is an international measure the purpose of which is *inter alia* to protect victims of trafficking and safeguard their rights. Its provisions require that due account is taken of a victim's safety and protection needs, that a renewable residence permit is to be issued to a victim if the competent authority considers that to stay is necessary owing to the victim's personal situation, and that return of a victim to another state should be with due regard to the rights, safety and dignity of the victim (articles 10(1) and (2), 12(1) and (2), 14(1) and (5), and 16(2)). One basis on which a renewable residence permit should be issued is that it would be unreasonable to compel the victim to leave the national territory (see the Explanatory Report on the Anti-Trafficking Convention, at paragraphs 164, 180, 184 and 202).

[15] In the context of the implementation of Dublin II, the provisions of the Charter of Fundamental Rights of the European Union are also relevant. In particular, in terms of article 1, human dignity must be respected and protected (see also articles 3-5).

[16] Article 4(2) of the European Convention on Human Rights and Fundamental Freedoms ("ECHR") provides that no one shall be required to perform forced or compulsory labour.

2. The case law

[17] Human trafficking threatens human dignity and falls within the scope of article 4 ECHR. A state's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking. Where state authorities are aware or ought to be aware of circumstances giving rise to a credible suspicion that an identified individual has been trafficked, there arises a positive obligation to take relevant operational measures (*Rantsev* v *Cyprus and Russia* (2010) 51 EHRR 1, at paragraphs 272-3, 277-9, 281-2, 284 and 286).

[18] A failure to comply with arrangements necessary to provide the protection which article 4 ECHR guarantees, together with a failure to have regard to the obligations put in place by articles 12, 14 and 16 of the Anti-Trafficking Convention in the context of a factual background indicating a need for humanitarian protection to a victim of trafficking will render a relative decision unlawful *(EK (Tanzania)* (2013) UKUT 00313 (IAC), at paragraphs 29-30, 42-44, 60-66).

[19] The obligations which arise in relation to a victim of trafficking continue after the cessation of the trafficking. To conclude that there is no longer a need for protection and assistance because the relevant trafficking has become historic is inconsistent with the nature of the obligations imposed (*Atamewan* (2013) EWHC 2727 (Admin.), at paragraphs 69-80, 73, 78-79; now reported at 2014 1 WLR 1959).

The petitioner's challenges to the decision dated 18 November 2010

1. The application of Dublin II

[20] The petitioner challenged the decision on two principal grounds. Firstly, it was submitted that the transfer provisions of Dublin II did not apply since the petitioner's claim was based on having been trafficked from Nigeria to the UK. That was not a claim which had ever been made previously in Italy. In those

circumstances, article 13 was engaged, rendering the UK the member state responsible for determining the claim. This was the primary submission of the AIRE Centre and was adopted on behalf of the petitioner. Further, the terms of Immigration Rule 345(2) meant, in the circumstances of this case, where the petitioner had in effect entered the UK directly from Nigeria, that the Secretary of State should not have issued the relevant certificate.

[21] Secondly, on the basis that the transfer provisions of Dublin II were engaged, notwithstanding a request having been made that she should do so, the Secretary of State had failed to exercise the residual discretion available under article 3(2) of Dublin II by taking into account that the claim was one of having been trafficked to the UK. In that regard, the letter dated 29 May 2012 which confirmed the competent authority's conclusion that the petitioner had been trafficked, but stated that "those circumstances no longer exist", appeared to ignore the legal position as stated in *Atamewan*, that once it had been determined that the petitioner was a victim of trafficking it was necessary to continue to treat her accordingly, regardless of any change of her circumstances. That included having due regard to the rights and obligations which arose as a result of her status.

[22] Although I have come to the view that there is force in the first ground of challenge, I have reached my judgement in this case on the basis that, even if I am wrong in that, on the basis that the transfer provisions were engaged, the second ground of challenge is also well founded.

[23] In that regard, it is correct that the decision dated 18 November 2010 makes no reference to the petitioner's status as a victim of trafficking nor to any consideration of how the relevant obligations imposed by the Anti-Trafficking Convention were to be implemented in her case. Neither is it apparent from the decision that any regard was had to the petitioner's article 4 ECHR rights in the context of her acknowledged status.

[24] While it is true that in the particular circumstances of this case, the letter dated 29 May 2012, confirming the petitioner's status, post-dated the decision under challenge, nevertheless, in circumstances where that decision, dated 18 November 2010, was not intimated until 1 November 2012 which, it was agreed, was the

decision's effective date, it is from that date – 1 November 2012 - that the validity of the decision must be judged.

[25] At that date, it was known to the UKBA that the petitioner was a victim of trafficking and had expressed fears of persecution in Nigeria, all as recognised in the decision dated 18 November 2010, but also that she had expressed fears of further forced prostitution if returned to Italy. That being so, in the context of the decision dated 18 November 2010, I consider that not to address these matters in considering whether to exercise the residual discretion conferred by article 3(2) of Dublin II, was to leave a material consideration out of account.

2. Whether it is open to the petitioner to challenge the decision?

[26] For the respondent it was submitted that, as a general rule, Dublin II does not confer freestanding rights on individuals. Rather its purpose is to regulate relations between member states (*R(G)* v *Secretary of State for the Home Department* (2005) EWCA Civ 546, at paragraphs 1-3, 12, 18, 21, 24-27, 29; *R(J)* v *Secretary of State for the Home Department* (2009) EWHC 1182 (Admin), at paragraphs 1, 15, 18-21; *RF* (2013) CSOH 89, at paragraphs 9, 11-13, 24; *AR (Iran)* v *Secretary of State for the Home Department* (2012) EWHC 1207 (Admin), at paragraphs 1-4, 5, 13-15, 17, 18-20, subsequently affirmed at (2013) EWCA Civ 778).

[27] For the petitioner it was submitted that the underlying principle of the Anti-Trafficking Convention was the need to recognise and protect human rights and the dignity of the human being. Article 12 (provision of assistance to victims, taking due account of their protection needs) and article 14 (consideration of a victim's personal circumstances, in the context of whether a renewable residence permit should be issued), required to be interpreted in that light. Further, article 4 EHCR was informed by these positive obligations imposed on contracting states. In particular, any decision to return the petitioner to Italy ought to have been made with due regard to her dignity in that context.

[28] I accept the analysis put forward on behalf of the petitioner. I find that, on the evidence available, the proposed return to Italy, determined by the decision dated 18 November 2010, raised a real possibility of a breach of the petitioner's

article 4 ECHR rights in the form of further forced prostitution. On that basis, the case falls within the exception stated in *Yong Quin Chen* v *Secretary of State for the Home Department* (2008) EWHC 437 (Admin), at paragraph 35, and *R(AA Afghanistan)* v *Secretary of State for the Home Department* (2006) EWCA Civ 1550, at paragraphs 12 and 13. See *RF* (2013) CSOH 89, at paragraphs (12) and (13), to which I was referred in the course of the argument). This is not a situation where, in the context of Dublin II, the petitioner is insisting that one member state rather than another should determine her claim. I recognise that were that the case, by adopting such a position, she would in effect be seeking to challenge in a UK court the decision of the Italian authorities to accept their obligation under Dublin II. That is not the situation here. Rather, the petitioner's challenge is akin to the circumstances which comprise the second qualification set out in *AR (Iran),* at paragraph 18, that is that her personal circumstances are such that it was required of the Secretary of State to exercise her discretion under article 3(2) by taking into account the possibility that return to Italy involved a real possibility of breach of the petitioner's article 4 ECHR rights. That being so, I find that it is open to the petitioner to challenge the decision dated 18 November 2010.

Return to Italy as a safe third country

[29] It was argued for the respondent that, in the context of the consensus and objects of the EU common asylum system, it is possible to assume that all participating states will observe fundamental rights including those of the ECHR, although, as a presumption, that is capable of rebuttal where for example there is a systemic failure in asylum procedure and in reception conditions for asylum seekers. Where a member state cannot be unaware of such circumstances, it may not transfer an asylum seeker *(R (NS (Afghanistan))* v *Secretary of State for the Home Department* (2013) WB 102, pages 149-165, at paragraphs 11, 14-15, 75-78, 88-91, 94, 109, 112-115).

[30] In *Hussein* v *Netherlands and Italy* (2013) 57 EHRR SE 1, the European Court of Human Rights found that there was no basis on which it could be assumed that Italy would not deal appropriately with those seeking asylum there. The test, however, is

not whether there is a systemic failure in asylum procedure and reception conditions, but rather whether, in that regard, there is a real possibility that return would result in violation of ECHR rights (*EM (Eritrea*) (2014) 2 WLR 409, at paragraphs 40, 46, 47, 51, 58, 63-64).

[31] It was not suggested that, in the generality, the test was satisfied in the case of Italy. That being so, it was submitted that it could not reasonably be asserted that to return the petitioner there would result in an infringement of her ECHR rights.

[32] I accept that analysis as being correct at the level of an assessment of asylum procedure and reception conditions provided for asylum seekers in Italy, in the context of agreement between two member states that return there is appropriate.

[33] In this case, however, the principal issue is a different one. It is whether, at the effective date of the decision under challenge, having regard to the information then available and the recognised status of the petitioner, there was a failure to exercise discretion under article 3(2) of Dublin II by considering the risk that the petitioner's article 4 ECHR rights would be breached on return to Italy by exposure once again to forced prostitution. It is not obvious that an assessment of the available standard of asylum procedures and reception conditions would necessarily address that consideration.

Conclusion

[34] In the very particular circumstances of this case, I consider that there was such a failure so to exercise discretion under article 3(2) of Dublin II and that it is open to the petitioner to challenge the resulting decision.

[35] The facts and circumstances which lead me to that decision are particular to this case. Whatever the explanation for the delay between the express date of the decision of 18 November 2010 and its ultimate intimation to the petitioner on 1 November 2012, that being, as a matter of agreement between the parties, the effective date at which its legitimacy should be assessed, it is that delay which has allowed the arguments for the petitioner to be advanced. Despite the valiant efforts of counsel for the respondent, I consider the submissions made on her behalf to be

well founded and conclude that she is entitled to the remedy she seeks. In this unusual situation, how matters should properly proceed in relation to the existing agreement under Dublin II, between the UK and Italy, is not an issue in relation to which this court can directly intervene, but is one which I have no doubt, in the light of my decision, the Secretary of State will now consider.

[36] In the result, I sustain the petitioner's first plea-in-law, repel the respondent's pleas-in-law and pronounce decree of reduction of the decision of the Secretary of State dated 18 November 2010. Given the concession that the removal direction decision, dated 19 October 2012, depended for its legitimacy on the decision dated 18 November 2010, for the avoidance of doubt I will also pronounce decree of reduction of that decision dated 19 October 2012. I reserve the question of expenses.