

THE HIGH COURT

Between:

THE INTERNATIONAL TRANSPORT WORKERS' FEDERATION

Plaintiff

-and-

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

Defendants

-and-

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae



OUTLINE LEGAL SUBMISSIONS OF THE *AMICUS CURIAE*

Introduction

1. By order of Mr Justice Barniville dated 15 October 2018, the Irish Human Rights and Equality Commission (“the Commission”) was given liberty to intervene as *amicus curiae* in these proceedings.
2. On the basis of the affidavit evidence before the Court, there is a range of factual matters in dispute between the plaintiff and defendants. It is not the role of the Commission as *amicus curiae* to express views on matters of factual dispute and the Commission does not propose to do so.

Test for interlocutory injunction

3. The test for granting an interlocutory injunction set out by the Supreme Court in *Okunade v. Minister for Justice* [2012] IESC 49, [2012] 3 I.R. 152, is the test to be applied in judicial review proceedings. The traditional test from *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88 remains applicable to the grant of an interlocutory injunction in plenary proceedings. These proceedings are not judicial review proceedings. However, they are in substance public law proceedings that - with regard to the reliefs sought and leaving aside the significant factual contest between the plaintiff and the defendants - have much in common with judicial review proceedings. They are closer in substance to judicial review proceedings than “*proceedings involving commercial questions, property issues, employment law disputes or the like*” to which the *Campus Oil* test is suited: per Clarke J. in *Okunade* at para. 81, p. 185. It is submitted that it would be appropriate for this Court to apply the *Okunade* test in adjudicating on this interlocutory application.
4. The test for granting an interlocutory injunction is a common law test that must be interpreted and applied in a manner consistent with the Constitution, and in particular, any constitutional rights that are affected by its application in this case. Further, given that “rule of law” is defined in section 1(1) of the European Convention on Human Rights Act 2003 as including *common law*, the test is a rule of law for the purpose of the 2003 Act. Accordingly, by virtue of section 2 of that Act, it must be both interpreted and applied in a manner compatible with the State’s obligations under any relevant European Convention on Human Rights (“ECHR”) provisions.

Relevant Irish statutory law and practice

5. The Oireachtas has enacted the Criminal Law (Human Trafficking) Act 2008 (as amended), which is concerned with criminal offences relating to human trafficking rather than conferring rights on its victims. Hogan J. in *Lin v. Governor of Cloverhill Prison* [2014] IEHC 214, [2014] 1 I.R. 134, noted at para. 21, p. 140:

The main effect of the Act of 2008 is to create specific criminal offences

penalising persons who engage in the trafficking of adults and children. It does not, as such, confer any rights or entitlements on any trafficked person.

6. Similarly, the Criminal Law (Human Trafficking) (Amendment) Act 2013 is concerned with the criminalisation of trafficking.
7. The State has made *Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking (as amended)*, which deal with the immigration status that can be provided to people who may be victims of human trafficking. This administrative policy is not directly relevant to the matters at issue in these proceedings.
8. The plaintiff takes issue with certain conditions attached to the *Atypical working scheme: Non-EEA crew in Fishing Fleet* (“the scheme”). The scheme is part of the State’s general administrative framework and is connected to immigration policy. Its conditions must be in compliance with the Constitution and section 3(1) of the European Convention on Human Rights Act 2003 as well as any applicable EU law.

Relevant constitutional rights

9. The test for whether to grant an interlocutory injunction must be interpreted and applied in a manner compatible with the Constitution. The Constitution has a greater reach than the European Convention on Human Rights Act 2003 and more powerful remedies. For that reason, when considering a potential breach of the European Convention on Human Rights Act 2003, it is always advisable, and indeed necessary, first to address the question as to whether the right in question is protected under the Constitution: see, for example, the comments of O’Donnell J. in *Y.Y. v. Minister for Justice* [2017] IESC 61 at para. 31. There is, to date, no express consideration of the scope of protection against trafficking given by the Constitution or the nature of any relevant positive obligations that may flow from it. The Commission submits that it is instructive, in considering the scope of the applicable constitutional rights, to take into account the relevant Strasbourg jurisprudence, referred to below. The Commission respectfully submits that the Constitution provides protection against trafficking that is at least co-extensive with that arising under Article 4 ECHR. Further, it is submitted that the relevant positive

obligations that have been held to arise under Article 4 arise similarly under the relevant provisions of the Constitution.

10. At para. 2, p. 2, of *P. (otherwise P.) v. Chief Superintendent of the Garda National Immigration Bureau* [2015] IEHC 222, O'Malley J. noted that it was common case between the parties “*that the trafficking of a human person involves a breach of that person’s rights under the Constitution*”.
11. Even if the right to freedom from trafficking were not recognised as protected under Article 40.3.1° or 2°, trafficking of a human being would amount to a violation of a wide range of other express and implied constitutional rights. It is submitted that human trafficking represents a grave infringement of the personal rights of the victim of trafficking under Article 40 of the Constitution, including the right to liberty protected under Article 40.4.1° and the right to freedom from inhuman and degrading treatment under Article 40.3.1° (see *State (C) v. Frawley* [1976] I.R. 365; *O v. Minister for Justice* [2004] 4 I.R. 426, Gilligan J. (at p. 432)). These are fundamental rights that apply to all persons, whether Irish or foreign citizens.
12. The constitutional right to bodily integrity and the right to privacy would also be violated by trafficking of a human being, as would (in certain circumstances, which do not arise here) the right to travel within and outside the State. Also relevant here is the constitutional right of migrant fishermen to work or earn a livelihood guaranteed under Article 40.3.1° of the Constitution. The Supreme Court has recently confirmed that foreign citizens may invoke this constitutional right: *N.H.V. v. Minister for Justice* [2017] IESC 35, [2018] 1 I.R. 246. This fundamental right is one which inheres in each person by virtue of his or her human personality and dignity.
13. While the Irish courts have not yet had to specifically address the issue, it is submitted that the right to freedom from human trafficking, either independently or as an element of a broader right to freedom from slavery and forced labour, constitutes one of the implied personal rights protected under Article 40.3.1° of the Constitution, or in the alternative, encompassed within the right to the protection of the person under Article 40.3.2°. The ECHR does not refer directly to trafficking; however, the interpretation of rights protected under the Convention has led the European Court of Human Rights to

the inevitable conclusion that human trafficking is prohibited under Article 4 ECHR. It is submitted that a similar approach should be taken by this Court to the interpretation of fundamental rights under the Constitution.

14. In considering the scope of constitutional human rights protection, it is relevant to take into account the constitutional aim of assuring the essential dignity and freedom of the individual, as set out in the Preamble to the Constitution. Hogan J. in his dissenting Court of Appeal judgment in *N.H.V. v. Minister for Justice* [2016] IECA 86, [2018] 1 I.R. 246, stated at para. 154, p. 301:

The object [of the Constitution's fundamental rights guarantees] . . . was to ensure that, subject to the ultimate decision of the people via the referendum process, the substance and core of certain fundamental rights of the individual should be placed beyond the reach of majority vote in the Oireachtas. This objective, was, after all, as the Preamble to the Constitution declares, to secure the dignity and freedom of the individual as befits a democratic society governed by the rule of law. These are objectives which soar above the exigencies of public administration, the fine calculations of the legislative and the executive branches or the vagaries of public opinion.

15. In his judgment for the Supreme Court in that case, [2017] IESC 35, [2018] 1 I.R. 246, O'Donnell J. too relied on the Constitution's aim of promoting the dignity and freedom of the individual, apparent from its Preamble. O'Donnell J. stated at para. 16, p. 315:

*. . . it must be recognised that work is connected to the dignity and freedom of the individual which the Preamble tells us the Constitution seeks to promote. It can be said of the Constitution, if anything more aptly than of the European Convention on Human Rights, that in its fundamental rights provisions, it is intended to permit, and perhaps encourage, without outside interference, the development of the human personality in his or her relations with other persons: *Botta v. Italy* (App. No. 21439/93) (1998) 26 E.H.R.R. 241 at p. 256. Set on a foundation of the essential equality of the human person, the Constitution guarantees first life and then personal liberty, and freedoms radiating outwards from these: freedom of thought and conscience, freedom of expression, freedom*

to associate with others, family rights and the right to acquire, hold and transfer property, among others.

16. It is submitted that the key constitutional objective of preserving the essential dignity of the individual, as set out in the Preamble to the Constitution, mandates the recognition of a constitutional right to freedom from human trafficking.

The European Convention on Human Rights and human trafficking

17. Under section 3 of the European Convention on Human Rights Act 2003, subject to any statutory provision or rule of law, every organ of the State, which includes the first defendant, *“shall perform its functions in a manner compatible with the State's obligations under the Convention provisions”*. It follows that the first defendant must perform his functions – including deciding whether to maintain the scheme with its current conditions – in a manner consistent with the State’s obligations under Article 4 ECHR, as interpreted in *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010.
18. *Rantsev* is the leading judgment of the European Court of Human Rights dealing with human trafficking. The case highlighted the serious problems in Cyprus since the 1970s involving young women, frequently from the countries of the former Soviet Union, being forced to work in the sex industry. The applicant’s daughter, a Russian national, had died a few days after arriving in Cyprus on an artiste visa and having been granted a permit to work until 8 June 2001 as an artiste in a cabaret.
19. At para. 282 of its judgment, the Strasbourg Court stated:

In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.

20. The Court held at para. 284 that “*a State’s immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking*”. States are required to put in place a legislative and administrative framework to prohibit and punish trafficking (para. 285).
21. At paras. 291 to 293, the Court examined the general legal and administrative framework in Cyprus and the adequacy of Cypriot immigration policy. In identifying a number of weaknesses in that general framework and policy, the Court, at para. 291, relied on information contained in reports of the Council of Europe Commissioner for Human Rights, the U.S. State Department, and the Cypriot Ombudsman.
22. A serious issue arises in these proceedings as to the compatibility of the scheme - as part of the general Irish legal and administrative framework and related to immigration policy - with the Article 4 positive obligations identified at paras. 284 and 285 of *Rantsev*.

Relevant EU law provisions

23. Both Ireland and the European Union are parties to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children to the United Nations Convention against Transnational Organized Crime (“the Palermo Protocol”). Ireland signed the Palermo Protocol on 13 December 2000, ratifying it on 17 June 2010. The European Union signed it on 12 December 2000 and approved it on 6 September 2006. Article 216(2) TFEU provides:

Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

24. Since Case 181/73 *Haegeman* [1974] ECR 449, the Court of Justice has confirmed that international agreements binding on the EU form an integral part of EU law.
25. Recital (1) in the preamble to Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (“the Directive”) recognises such

trafficking as a “*serious crime*” and “*a gross violation of fundamental rights*”. Article 2 of the Directive, in practical terms, defines “trafficking”. Article 2(1) states that the following intentional acts must be punishable:

The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those 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.

26. Article 2(3) states:

Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

27. Article 18(1) of the Directive requires Member States to “*take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation related to trafficking in human beings.*” A serious issue arises as to whether the scheme - put in place as a response to known concerns about human trafficking in the fishing fleet - constitutes a measure within the scope of Article 18(1).

Relevant international law

28. The right not to be subjected to forced or compulsory labour or trafficking in human beings is amongst the most fundamental of all human rights. It gives rise to a number of obligations on the State under international law. These international law obligations can form a helpful reference point for the identification of “*prevailing ideas and concepts*” in the light of which this Court can interpret the Constitution, to assess the scope of constitutional protection against human trafficking: see *M.X. v. Health Service Executive* [2012] IEHC 491, [2012] 3 I.R. 254, at para. 60, p. 282.

29. Article 4 of the Universal Declaration of Human Rights recognises the following universal right:

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

30. The concept of human dignity underlies the Universal Declaration of Human Rights: see the judgment of the Supreme Court of New Zealand in *New Health NZ v. South Taranaki DC* [2018] NZSC 59, [2018] 4 LRC 592 at para. 231, p. 661.

31. Article 8(1) to (3)(a) of the International Covenant on Civil and Political Rights states:

1. *No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.*
2. *No one shall be held in servitude.*
3. (a) *No one shall be required to perform forced or compulsory labour; ...*

32. Ireland is party to a number of international agreements that expressly protect the rights of victims of human trafficking and affirm the entitlement of victims to full respect for their human rights.

33. Ireland is a party to the Council of Europe Convention on Action against Trafficking in Human Beings (“the Warsaw Convention”). The Warsaw Convention establishes a monitoring mechanism in the form of the Group of experts on action against trafficking in human beings, known as GRETA, which carries out an evaluation of parties’ implementation of the Convention.

34. It is respectfully submitted that Ireland’s relevant international law obligations can guide the Court in its interpretation of Article 40.3 of the Constitution as to the scope of protection given to the right to freedom from human trafficking, as referred to above.

Conclusion

35. In light of its non-partisan role as *amicus curiae*, the Commission wishes to emphasise that it sees its role as being of assistance to the Court rather than as contending for a particular outcome on the particular facts of this case, and the Commission remains available to provide such further assistance as the Court may request.

David Leonard BL
Feichín McDonagh SC

19 November 2018

On behalf of the Irish Human Rights and Equality Commission,
acting as *Amicus Curiae*

(Word count: 2,931)