

# Judicial Communications Office

14 March 2024

## COURT DIRECTS PPS TO RETAKE PROSECUTION DECISION

### Summary of Judgment

The Divisional Court today directed the Public Prosecution Service to retake a decision in respect of alleged offences involving the owners of a fishing boat based in Kilkeel.

#### Background

The applicants are three fishermen from Ghana who were recruited through a Ghana-based recruitment agency called Sea Crew Ltd (“Sea Crew”) to work on the “Kestrel” fishing boat. The Kestrel is owned and managed by John and Mark Anderson and based in Kilkeel. The recruitment of the men was arranged by Acquis Business Systems Ltd (“Acquis”) a Northern Ireland company of which John Anderson is a director.

The men required 'Letters of Invitation' and “OK to Board” letters from their prospective employer to enable them to obtain visas to join a ship in the UK. These documents were signed by John Anderson and stamped with the Acquis business stamp and stated that they were to join a boat “operating in international waters”. The visas permitted them to enter the UK and travel within the UK for the purpose of joining a ship that would work in international waters. They did *not* provide a right to remain in the UK, to work generally in the UK, or to work on a fishing boat that operated in UK territorial waters. Before leaving Ghana, the applicants received a Seaman's Contract of Employment with Acquis, whereby they agreed to work on the boat for 12 months at a salary of £400 per month. They were also required to sign a letter to the effect that, if they left their jobs before the end of the 12-month contract term, they, and a guarantor, would have to pay \$2000 to Sea Crew.

The applicants arrived in Kilkeel on 6 May 2011 having travelled with an employee of Sea Crew. Upon their arrival, two of the three applicants had their passports confiscated by the employee. On 18 and 20 May 2011, the applicants’ visas expired but no steps were taken by the Andersons or by Acquis to regularise their immigration status. On 9 June 2011 the applicants were removed from the boat by the PSNI amid concerns about human trafficking and forced labour. On 10 June 2011, a National Referral Mechanism form for each applicant was sent to the Home Office. The Home Office made a “reasonable grounds decision” that the applicants were victims of human trafficking for the purposes of the Council of Europe Convention on Action Against Trafficking in Human Beings.

#### The applicants’ case

The applicants submit that because the boat did not fish in international waters as indicated they were in contravention of their visa status and this put them at risk of deportation for breach of immigration laws. They were also at risk of failing to complete their contracts which put them and their guarantors at risk of enforcement of the debt bond. They sought to have Acquis Business Systems Limited and/or John and Mark Anderson, prosecuted for a range of alleged criminal offences against them, namely, facilitating a breach of immigration law; employing an individual knowing he is disqualified from employment by reason of his immigration status; fraud; human

# Judicial Communications Office

trafficking and slavery; slavery, servitude and forced or compulsory labour; and failure to pay the minimum wage. The applicants also claimed they endured exploitative working conditions in that wages were withheld, they worked excessive hours and lived in substandard conditions with poor hygiene facilities and poor-quality food.

On 30 May 2019, the Public Prosecution Service (“the respondent”) issued a decision letter refusing to prosecute Acquis Business Systems, John Anderson, Mark Anderson or any other person for any criminal offence. The court noted that on 25 September 2019, Newry Magistrates’ Court issued an order for forfeiture of withheld wages in respect of six persons who had worked on the Andersons’ boat, including two of the applicants in this case. In March 2020 the applicants requested a review of the respondent’s non-prosecution decision. On 6 October 2020 the respondent issued a review decision letter (‘the October decision letter’), which upheld the original decision not to prosecute as the evidential test had not been met.

On 15 December 2020 the applicants issued a pre-action protocol letter challenging the October decision letter and leave to bring a judicial review was granted. On 3 February 2023 the respondent issued a new decision letter (‘the February decision letter’) which reviewed the non-prosecution decisions. In respect of fraud by false representation the decision maker noted that John Anderson had accepted in interview that he issued the OK to Board letter and that the letter said the men were “joining a vessel that was to fish in international waters.” The decision maker was satisfied that Anderson made a false statement with the intention to make a gain. The second offence was a breach of section 21 of the Immigration Asylum and Nationality Act 2006. This provides that a person commits an offence if he employs another (‘the employee’) knowing that the employee is disqualified from employment by reason of the employee’s immigration status. Although satisfied that the evidential limb of the test for prosecution was satisfied for both these offences, the February decision maker decided that the public interest limb of the prosecution test was not satisfied in either case. This was on the basis that “the offences were committed at time when there was widespread non-compliance with the regulations around immigration status of non-UK fishermen and that non-compliance was recognised and to some extent tolerated by the introduction of a concession by the UK Government to the UK fishing industry which between March 2010 and August 2012 and which enabled fishermen operating in the UK waters without the appropriate authority to regularise their position.”

After the February decision letter was issued further extensive correspondence was exchanged between the parties. The case was re-listed for hearing on 15 and 16 March 2023. On 13 March the respondent again issued a new decision (‘the March 2023 decision’). On this occasion prosecutions were directed for three offences, namely: facilitating a breach of the immigration law contrary to section 25 of the Immigration Act 1971; employing an individual knowing he is disqualified from employment by reason of his immigration status contrary to section 21 of the Immigration, Asylum and Nationality Act 2006; and fraud by false representation contrary to section 2 of the Fraud Act 2006. The decision maker had therefore reversed the decision of February 2023 that it was not in the public interest to prosecute the fraud offence and the section 21 offence. The remaining issues before the court are challenges to the no prosecution decisions in relation to the remaining offences: the human trafficking offence; the forced labour offence; and the minimum wage offence.

## **The general context**

The court said the approach taken by the respondent treats the factual background to the men's immigration status “as if it were a simple aspect of happenstance which befell them quite

# Judicial Communications Office

haphazardly. It fails to make any reference to the fact that the factual circumstances of the men's employment in the UK were purposefully engineered by John Anderson, as this prosecutor accepts elsewhere in his decision letter."

It said the evidence in relation to John Anderson's role in the 'OK to Board' letters, his procurement of the insufficient visas, and his intentions when taking these actions, are relevant to the question of his general intentions towards these men. There were obvious inferences that could be drawn from the facts the decision maker found about what John Anderson did and why, which are relevant in relation to the *mens rea* of the human trafficking offences, and there is no evidence that the decision maker gave any thought to what those inferences might be.

The court was also concerned about the decision maker's knowledge and understanding of the concession made by the Government to the UK fishing industry at the material time. It noted that when John Anderson hired the men in Ghana he had a choice of applying for "to join a ship" visas and falsely declare that the ship they would work on would operate in international waters (the illegal route) or to hire them using "to join a ship" visas but compliantly with the "concession" system operated at that time. To use this route Anderson would have to give undertakings that these fishermen would (a) be paid at least the minimum wage and (b) would be given appropriate onshore accommodation when their ship was in port. The court said the evidence suggested that John Anderson knowingly and deliberately chose the illegal route. It said the February decision maker did not identify or evaluate what inferences might be drawn from such illegal behaviour but proceeded on a fundamental misunderstanding because he understood or believed that the 'concession' that applied at the time "operated like an amnesty." The court said it could find no rational basis for such a conclusion about the concession which was "a limited mechanism to permit employers to operate *within* the rules; not a licence to turn a blind eye to those acting *outside* the rules." It concluded that the decision simply did not add up, proceeded on the basis of flawed logic and therefore cannot stand.

The court said there ought to have been anxious scrutiny of the totality of the arrangements and mechanisms in play, not least because of the context of alleged human trafficking. It said the decision maker's acceptance, without proper investigation and anxious scrutiny of the arrangements and mechanisms in play, poses clear danger:

"In the field of exploitative crime such as human trafficking, decision makers must be astute not to place undue weight on, for example, the formal legal separation between a principal and his agent as a basis for non-prosecution. Indeed, the "separate" legal entity may be the vehicle (or one of them) by which alleged exploitation is engineered. The danger is that by failing to probe or being complacent in the face of agency arrangements, prosecutors could unwittingly enable principals to be effectively insulated from full or any criminal responsibility for actions taken by their agents. This is extremely dangerous ground given that in human trafficking cases, foreign agents acting outside the reach of our criminal laws, could be (and no doubt are) regularly being recruited precisely to take the actions that would carry criminal responsibility if done directly by a UK principal."

The court noted that there was direct witness evidence of John Anderson's involvement in the drawing up of the contract and said that competent authorities need to be diligent in following the evidence necessary to show which party was in truth directing the alleged wrongs suffered by complainants in cases of suspected human trafficking:

# Judicial Communications Office

“Should traffickers gain the impression that enforcement agencies were disinclined to go behind basic agency arrangements to ascertain where criminal liability may really come to rest, this would come with very high and unacceptable costs. One of those costs is that migrant fishermen rendered vulnerable by engineered insufficient visa arrangements, could be subjected to forced labour, made to work excessive hours for no or insufficient pay and forced to live in quite unsuitable conditions without any or effective access to any redress. Another cost is that lower skilled jobs which are intended by Government policy to be made available to less skilled workers within the domestic economy will never become available to those workers simply because it is immeasurably cheaper to hire illegal migrant workers to perform that work. From a public policy perspective this is a lose-lose situation for every party involved except the employer who illegally maximises his profits at the expense of every other stakeholder and potential stakeholder involved.”

In light of all of the above the court concluded that the respondent’s conclusion that there is insufficient evidence to prove the intent required for the human trafficking offences cannot stand.

In considering the challenge to the living conditions, the court stated that accommodation requirements for seamen are regulated by secondary legislation. It said there was no evidence that the prosecutor consulted the legislation but instead reached the conclusion that there was insufficient evidence of exploitation on the basis of views expressed by another worker living on the boat. The applicants had made quite specific complaints about features of their working condition which they claimed were exploitative including wages being withheld, hours being excessively long and living conditions being inadequate. The October decision maker found no evidence that wages had been withheld but was then supplied with the order from Newry Magistrates’ Court. The February decision did not refer to that evidence and it appears to have been left out of account when assessing the exploitation issue.

## **Conclusion**

The court said the decision maker had proceeded on a fundamental misunderstanding or misinterpretation of material facts by considering that the Government “concession” arrangement “operated like an amnesty”. It also said the decision-maker did not have regard to his own findings of fact in respect of the offences for which it is accepted the evidential test was satisfied. These findings were relevant when considering the issue of intent to exploit for the purposes of the human trafficking offences. The court added that the evidence in relation to John Anderson’s role in the ‘OK to Board’ letters, his procurement of the insufficient visas, and his intentions when taking these actions, is relevant to the question of his general intentions towards the men. It said there was no evidence that the prosecutor forensically evaluated why John Anderson chose to make the men illegal and to place them in legal and other jeopardy:

“He *chose* the illegal route thereby avoiding the requirements to pay the minimum wage, provide suitable onshore accommodation and deliberately exposing them to the aforesaid menaces. There is no evidence that the decision maker identified, evaluated or gave consideration to these plainly relevant matters and the potential inferences that might in consequence ensue.”

# Judicial Communications Office

The court commented that given its conclusions on the human trafficking offences and the acknowledgment by the decision maker that they applied the same principles and the same reasons to the forced labour offence, it considered that the application of the flawed analysis to the forced labour offence requires the prosecutor to consider this offence afresh. If upon reconsideration it is concluded that the evidential test for prosecution is met in respect of the human trafficking offences and specifically a reasonable prospect of proving the requisite intent, this is likely to be a material consideration in respect of the forced labour offence. It considered that an “engineered precarious immigration status in combination with the other resulting menaces of arrest, deportation, criminal charges and risk of enforcement of the debt bond against the applicant or their guarantors” are plainly relevant considerations: “It will be a matter to investigate whether these fears and risks were engineered, nurtured and reinforced by the factual situation they were placed in by the choices the Andersons made and sustained by their failure to regularise the men’s immigration status after the initial visa expired.”

The court said that the decision maker will want to consider the decision of the ECtHR in *Chowdury & Ors v Greece* (Application no. 21884/15) which considers the issue of “forced labour” at paragraph 90 *et seq* and, in particular, the following:

“95. The Court also observes that the applicants did not have a residence permit or work permit. The applicants were aware that their irregular situation put them at risk of being arrested and detained with a view to their removal from Greece. An attempt to leave their work would no doubt have made this more likely and would have meant the loss of any hope of receiving the wages due to them, even in part. Furthermore, the applicants. Could neither live elsewhere in Greece nor leave the country.

96. The Court further considers that where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves voluntarily. The prior consent of the victim is not sufficient to exclude the characterisation of the work as forced labour. The question whether an individual offers himself for work voluntarily is a factual question which must be examined in the light of all the relevant circumstances of the case.

97. In the present case the Court notes that the applicants began working at a time when they were in a situation of vulnerability as irregular immigrants without resources and at risk of being arrested, detained and deported. The applicants probably realised that if they stopped working they would never receive their overdue wages .... Even assuming that, at the time of their recruitment, the applicants had offered themselves for work voluntarily and believed in good faith that they would receive their wages, the situation changed as a result of their employers’ conduct.”

The court directed that a fresh decision be taken in respect of the forced labour offence. The court also set aside the prosecutor’s decision in relation to the minimum wage offence and asked that this decision be reconsidered by a fresh prosecutor.

## Conclusion

# Judicial Communications Office

The court quashed the decisions not to prosecute for (i) Human trafficking contrary to section 4 of the Asylum and Immigration (Treatment of Claimants) Act 2004; (ii) Forced or compulsory labour, contrary to section 71 of the Coroners and Justice Act 2009 and (iii) Failure to pay the minimum wage contrary to section 31 of the National Minimum Wage Act 1998. The court further directed that the decision whether to prosecute or not in respect of those three offences be taken by a fresh prosecutor.

## NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://www.judiciaryni.uk/>).

**ENDS**

If you have any further enquiries about this or other court related matters please contact:

Alison Houston  
Lady Chief Justice's Office  
Royal Courts of Justice  
Chichester Street  
BELFAST  
BT1 3JF

Telephone: 028 9072 5921  
E-mail: [LCJOffice@judiciaryni.uk](mailto:LCJOffice@judiciaryni.uk)