JR-2023-LON-001397

In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

In the matter of an application for Judicial Review

The King on the application of
S
(ANONYMITY ORDER MADE)

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Rimington

UPON hearing Ms C Meredith of counsel, instructed by the Greater Manchester Immigration Aid Unit for the applicant and Mr J Anderson of counsel, instructed by GLD, for the respondent at a hearing on 5th March 2024 and

UPON the impugned Decision of 20th March 2023 having already been withdrawn, and the respondent having agreed to consider the decision on revocation within 56 days and having agreed to make a further decision in relation to the right to work within 28 days

IT IS ORDERED THAT:

(i) the application for judicial review is granted in accordance with the judgement attached and only to the extent that the respondent should lawfully and in accordance with DLP v10 (thus applying ECAT article 14(1)(a) and KTT) remake the decision on whether to grant the applicant discretionary leave as a VoT within 28 days.

(ii) The respondent to pay the applicant's reasonable costs to be assessed if not agreed.

(iii) The There be a detailed assessment of the Applicant's publicly funded costs in accordance with the Civil Legal Aid (Costs) Regulations 2013.

Signed: H Rimington

Upper Tribunal Judge Rimington

Dated: **1st May 2024**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 02/05/2024

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2023-LON-0001397

IN THE UPPER TRIBUNAL

(IMMIGRATION AND ASYLUM CHAMBER)

Field House,

Breams Buildings

London, EC4A 1WR

Before:

UPPER TRIBUNAL JUDGE RIMINGTON

- - - - - - - - - - - - - - - - - - - -

Between:

THE KING

on the application of

S

(Anonymity direction made)

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - - - - - - - - - - - - - - - - -

Ms C Meredith

(instructed by Greater Manchester Immigration Aid Unit), for the applicant

Mr J Anderson

(instructed by the Government Legal Department) for the respondent

Hearing date: 5th March 2024

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J U D G M E N T

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Order regarding anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the applicant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the applicant, likely to lead members of the public to identify the applicant. Failure to comply with this order could amount to a contempt of court.

Judge Rimington:

1. The applicant challenges the decision of the respondent dated 20th March 2023 (the Decision) refusing the applicant leave to remain as a victim of trafficking (VoT). The applicant asserts that the refusal to grant discretionary leave, the failure to determine his outstanding revocation application and his right to work was unlawful.

Background and immigration history

2. Believed to have been born in Nigeria on 12th December 1978, the applicant was brought to the UK at the age of 9 or 10 years by his mother and considered to have been trafficked to the UK for the purpose of domestic servitude and sexual exploitation. The applicant escaped but continued to experience the effects of the trauma.

3. In 2006 the applicant's then representatives submitted an application for Indefinite Leave to Remain but in 1996 (whilst under the age of 18) S was convicted of burglary (conditional discharge), convicted in 1997 of robbery and burglary (3 years and 9 months imprisonment) and in April 2009 conspiracy to supply heroin and possession of a Class C drug. For the last offence he was sentenced on 11th June 2009 to 6 years imprisonment. A deportation order was signed on 8 March 2012 and the automatic deportation provisions under S32(5) of the UK Borders Act 2007 were considered to apply. An attempt to remove the applicant was made but the Nigerian authorities declined to accept his nationality at that time. His appeal against deportation on human rights grounds was dismissed by the First-tier Tribunal (FtT) (notwithstanding his children and partner owing to limited contact) and the dismissal was upheld by the Upper Tribunal on 28th August 2012. He was, however, referred to the National Referral Mechanism (NRM) on 27th March 2015 as a potential VoT and further representations made. On 30th September 2015 the respondent made a negative reasonable grounds decision and refused the further submissions under paragraph 353 of the Immigration Rules.

4. On 29th November 2019 the applicant received a positive reasonable grounds decision following reconsideration and judicial review. On 26th June 2020 the applicant submitted detailed representations in support of a Conclusive Grounds Decision (CGD), and sought a grant of Discretionary Leave to Remain (DLR) relying on the then Discretionary Leave policy (DLP) of September 2018. A report from Dr Griffiths was provided who recommended trauma focussed psychological therapy. On 24th March 2022 in response to a pre-action protocol letter, the respondent requested the completion of a Personal Circumstances Questionnaire (PCQ) indicating a CCD would be made within 8 months of receipt of the PCQ. This was returned on 1st April 2022 with a further updated letter from the applicant's therapist.

5. On 28th November 2022 a positive CCD was made by the Competent Authority. At the time of the CCD no DL decision was made. On 12th December 2022 yet further representations were made by the applicant's representatives to the Competent Authority enclosing further updated evidence on the applicant's mental state. There was further exchange between the parties. On 5th January 2023 the Single Competent Authority (which replaced the various authorities in April 2019) asked for evidence confirming specific details and on 16th January 2023 the applicant's representatives sent yet further information vis a further report from the applicant's counsellor.

6. On 23rd February 2023 a further PCQ was issued as it was considered the previous form was out of date being nearly a year old. On 20th March 2023 the Decision under challenged was provided.

The Decision

7. Leave to remain as a VoT was refused under the post 30th January 2023 regime under the Immigration Rules Appendix Temporary Permission to Stay for Victims of Human Trafficking or Slavery (TPS). It was considered that the applicant had received treatment in the UK and could continue treatment in his home country. The Decision took into account the report of Dr Griffiths and the counsellor's letters but concluded the country information for Nigeria demonstrated that treatment for mental health conditions including PTSD was available in Nigeria. S was also refused DL by reference to part 9 of the Immigration rules. It was considered that his children could be adequately cared for by their mother and considering all the available evidence he was not eligible for a grant of TPS.

8. The Decision was maintained on 18th April 2023 on the basis that it was made in line with guidance.

Grounds for Judicial Review

9. Ground 1 submitted that the Discretionary Leave policy version 10 (DLP v10) applied, not the Temporary Permission to Stay for Victims of Human Trafficking and Modern Slavery (TPS) policy which applied post-30 January 2023. The Decision had unlawfully applied the TPS policy. The respondent had departed from her published policy. Further the Decision failed to apply DLP version 5 (DLP v5) and the law in accordance with DLP v5. There was a failure to grant leave from 28th November 2022. Leave should be backdated to 28th November 2022 with back payments of universal credit.

10. There was a blanket exclusion of deportation cases so as to defend the use of the TPS and to 'disapply' KTT which was unlawful. This would induce unlawful conduct by the caseworkers. The Secretary of State should not be in breach of Section 6 of the HRA 1998 and the unlawful policy was inconsistent with ECAT. When considering whether the policy induces unlawful conduct the Court must consider (i) what the policy objectively construed in its context requires of those who operate it (ii) what the law requires and (iii) whether the relationship between the former and the latter rendered the policy unlawful (R (A) v SSHD [2021] 1 WLR 3931 [41]). The result is that the caseworker was directed not to consider DL even where the applicant's stay is necessary owing to personal circumstances as here. Further the law required consistency with Article 4 of the ECHR. This unlawfully provided for confirmed VoTs to be denied supported and protection owed.

11. The applicant fell under the pre-30th January 2023 DL policy. The PCQ was a delaying tactic.

12. In the event grounds 2 (unlawful failure to apply anxious scrutiny of material considerations) and Ground 3 were no longer relied upon. I note that in the amended grounds the numbering jumped from ground 2 to ground 4 and from ground 4 to 6.

13. Ground 4 submitted that there was a failure to grant DLR from 28th November 2022 because of the positive obligation in Article 4 of the ECHR. This undermined his recovery, deprived the applicant of his entitlement to work and of benefit such as Universal Credit and keeping him in limbo in the hostile environment. There was a breach of the Article 4 protective obligation as his entitlement under ECAT remained unsecured. He continued to be entitled to support and assistance measures. Additionally, there was a breach of article 8 in the light of ground 1 and a breach of the applicant's private and family life. The applicant also experienced unjustified discrimination because of the reliance on the VTS policy and the NAB Act 2022 owing to the applicant's 'other status' from his criminal offending.

14. Ground 6 asserted a disproportionate and unreasonable delay in relation to the revocation decision, grant of leave and right to work.

15. The relief initially sought was

    a. A declaration that the Respondent unlawfully refused to grant the Applicant discretionary leave as a victim of trafficking
    b. An order that the Respondent withdraw the VTS decision forthwith;
    c. An order quashing the VTS decision;
    d. A declaration that v.10 of the DL policy is unlawful in the ways set out above.
    e. An order that the Respondent remake the decision on whether to grant the Applicant discretionary leave as a victim of trafficking within 28 days, and if granted, that leave be granted for 12 months and pending the final lawful determination of the Applicant's further submissions;
    f. An order that the Respondent determine the Applicant's application to revoke a deportation order and right to work, within 3 months;
    g. Any other remedy that the Court sees fit; and
    h. Costs.

16. On 21st December 2023 the Secretary of State indicated by way of an attempted consent order that he would withdraw and remake the Decision in relation to DL and reconsider the Applicant's application dated 27 March 2015 (and further submissions dated 23 April 2015

and 26 June 2020) for revocation of the deportation order made against him on 8 March 2012, within three months (absent special circumstances) from the date of receipt of the sealed order; and make a further decision in relation to the right to work within 28 days. The respondent also agreed to pay the applicant's costs from the date the claim was issued.

17. After the Secretary of State had submitted his detailed grounds of defence the applicant made a further application to amend his grounds of application following the promulgation of R (on the application of VLT (Vietnam)) v Secretary of State for the Home Department [2024] UKUT 67 (IAC) and R (XY) v Secretary of State [2024] EWHC 81 (Admin). That application to re-amend the grounds was refused owing to the very late application and that the revised nature of the application could have been foreseen. Nonetheless the day before the hearing the applicant provided GCID notes disclosed in the case of XY to which the respondent did not object but stated were irrelevant.

18. In her written reply dated 4th March 2024 to the respondent's detailed grounds of defence (DGD), Ms Meredith confirmed that only grounds 1 and 4 remained live.

The Legal framework

19. The Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) was signed by the UK in March 2007, ratified in December 2008 and came into force on 1 April 2009. ECAT has not been directly incorporated into domestic law. The UK's obligations to victims of trafficking under ECAT have been considered in a line of authorities including R (PK(Ghana)) v SSHD [2018] 1 WLR 3955, §60, MS Pakistan v SSHD [2020] 1 WLR 1373, R(KTT) v SSHD [2021] EWHC 2722 (Admin), and EOG [2022] EWCA Civ 307.

20. Article 14 of ECAT provides for a "renewable residence permit" to be provided to those conclusively identified as victims where "their stay is necessary owing to their personal situation" (14(1)(a)) or where their "stay is necessary for the purpose of cooperation…in investigation or criminal proceedings" (Article 14(1)(b)). This is "without prejudice to the right to seek and enjoy asylum" (Article 14(2)).

21. ECAT is not incorporated into legislation, but a breach of ECAT is justiciable insofar as the UK has sought to implement the provisions through policy. EOG endorsed the conclusions in KTT. In EOG the Court's conclusions at [73] –[74] were that the policies of the

Secretary of State (with reference to versions 3 and 4) intended to reflect the requirement in Article 14 (1)(a) of ECAT to consider whether a grant of discretionary leave is necessary owing to the individual's personal situation. Linden J in KTT found that version 2 of the Modern Slavery Leave (MSL) policy was inconsistent with Article 14 and that Versions 3 and 4 were misleading as to the effect of Article 14(1)(a). JP v SSHD [2019] EWHC 3346 held against a scheduling rule whereby decisions on DL were automatically deferred pending an asylum claim and PK (Ghana) v SSHD [2018] 1 WLR 3955 held that Article 14(1)(a) and what is 'necessary' must be seen through the prism of the objectives of the Convention. EOG held that the policy that victims of trafficking should be considered for DL pending a CCD decision was unlawful.

22. On 30th January 2023 the Nationality and Borders Act 2022 (NABA) entered into force (specifically sections 63 and 65). On same date the Secretary of State published his TPS guidance and on 16th March 2023 published the Discretionary Leave Policy Version 10 (DLP v10).

23. The relevant and material sections of The Nationality and Borders Act are as follows:

Sections 65:

"**Leave to remain for victims of slavery or human trafficking**

> (1) This section applies if a positive conclusive grounds decision is made in respect of a person—
>
> > (a) who is not a British citizen, and
> >
> > (b) who does not have leave to remain in the United Kingdom.
>
> (2) The Secretary of State must grant the person limited leave to remain in the United Kingdom if the Secretary of State considers it is necessary for the purpose of—
>
> > (a) assisting the person in their recovery from any physical or psychological harm arising from the relevant exploitation,
> >
> > (b) enabling the person to seek compensation in respect of the relevant exploitation, or
> >
> > (c) enabling the person to co-operate with a public authority in connection with an investigation or criminal proceedings in respect of the relevant exploitation.
>
> (3) Subsection (2) is subject to section 63(2).
>
> …
>
> (6) Subsection (7) applies if the Secretary of State is satisfied that—

(a) the person is a threat to public order, or

(b) the person has claimed to be a victim of slavery or human trafficking in bad faith.

(7) Where this subsection applies—

(a) the Secretary of State is not required to grant the person leave under subsection (2), and

(b) if such leave has already been granted to the person, it may be revoked.

(8) Leave granted to a person under subsection (2) may be revoked in such other circumstances as may be prescribed in immigration rules.

(9) Subsections (3) to (7) of section 63 apply for the purposes of this section as they apply for the purposes of that section."

Section 63:

"**Identified potential victims etc: disqualification from protection**

(1) A competent authority may determine that subsection (2) is to apply to a person in relation to whom a positive reasonable grounds decision has been made if the authority is satisfied that the person—

(a) is a threat to public order, or

(b) has claimed to be a victim of slavery or human trafficking in bad faith.

(2) Where this subsection applies to a person the following cease to apply—

(a) any prohibition on removing the person from, or requiring them to leave, the United Kingdom arising under section 61 or 62, and

(b) any requirement under section 65 to grant the person limited leave to remain in the United Kingdom.

(3) For the purposes of this section, the circumstances in which a person is a threat to public order include, in particular, where—

(a) the person has been convicted of a terrorist offence;

(b) the person has been convicted of any other offence listed in Schedule 4 to the Modern Slavery Act 2015 anywhere in the United Kingdom, or of a corresponding offence;

(c) the person is subject to a TPIM notice (within the meaning given by section 2 of the Terrorism Prevention and Investigation Measures Act 2011);

(d) there are reasonable grounds to suspect that the person is or has been involved in terrorism-related activity within the meaning given by section 4 of that Act (whether or not the terrorism-related activity is attributable to the person being, or having been, a victim of slavery or human trafficking);

(e) the person is subject to a temporary exclusion order imposed under section 2 of the Counter-Terrorism and Security Act 2015;

(f) the person is a foreign criminal within the meaning given by section 32(1) of the UK Borders Act 2007 (automatic deportation for foreign criminals);

(g) the Secretary of State has made an order in relation to the person under section 40(2) of the British Nationality Act 1981 (order depriving person of citizenship status where to do so is conducive to the public good);

(h) the Refugee Convention does not apply to the person by virtue of Article 1(F) of that Convention (serious criminals etc);

(i) the person otherwise poses a risk to the national security of the United Kingdom.'

24. The explanatory note on Section 63 NABA is as follows:

> 'Subsection 2 provides that the individual is no longer protected from removal from the UK by Section 60 and 61, and that where a positive conclusive grounds decision is made, there is no requirement to consider the individual for a grant of limited leave under Section 65. This is intended to enable the removal of those who pose a threat to the UK. This is in keeping with the UK's ECAT obligations.'

Submissions

25. At the hearing Ms Meredith disputed that the withdrawal of the Decision under challenge rendered the application academic. The three issues she submitted were still outstanding were whether the refusal was lawful, whether the DL policy was unlawful and whether there was a breach of convention rights. She continued to seek (i) a declaration that the respondent unlawfully refused to grant the

applicant discretionary leave as a VoT (ii) a declaration that DL v10 was unlawful in the ways set out and (iii) an order that there be a decision by the respondent to remake the decision on whether to grant the applicant discretionary leave within 28 days and if granted for 12 months and (iv) any other order the Court saw fit. This translated into still seeking relief (listed above) under (a) (d), (e) and (g); (f) had been conceded Ms Meredith confirmed there was no damages claim.

26. Ms Meredith submitted there was an unexplained deferral of DL and now there was the judgment in XY which should be considered. She submitted there had been a long lasting effect on the applicant and the best interests of his children should be considered. The applicant should still benefit from KTT. There were various letters from the solicitors challenging delay notwithstanding they provided further evidence and medical evidence. The applicant became eligible for consideration under DLP v5 from the solicitor's letter of 12th December 2022 (which provided a further bundle of evidence totalling 147 pages). Here the solicitors made representations in support of DL following the making of the positive CCD. Further information was again provided on 13th December 2022.

27. Ms Meredith accepted that Mr Justice Linden was not considering DLP v5 but policies versions 2, 3 and 4. DLP v5 was clear that the policy was to make decisions on DL in accordance with ECAT Article 14(1)a. Failure to do so was a public law error. The applicant should be given leave in accordance with KTT. The applicant made further submissions and at least fell within the transitional provisions of DLP v10. But for the exclusion the applicant was entitled to KTT leave. VLT had found the deportation carve out unlawful. The TPS policy evinced a shift in policy but not DLP v10. The applicant should be considered under DLP v5. Under that policy it was clear that the respondent intended to make decision on DL in accordance with Article 14(1)(a) of ECAT. Where a policy intended to give leave in accordance with ECAT and failed to do so it is a public law error. The underlying disclosure pointed to the DLP v10 as 'filling the gap' but nonetheless the applicant fell within the transitional provisions of DLP v10. The TPS Policy showed a shift in policy but there was no similar intent in DLP v10. It could be seen from the hitherto undisclosed material that a secret policy was being followed to put cases affected by KTT on hold. Ms Meredith emphasised that KTT herself was subject to a deportation order. Deportation cases evidently fell within the scope of Article 14(1)(a) of ECAT.

28. Like KTT the respondent should be ordered to grant DL within 28 days as in VLT and I was obliged to follow VLT owing to judicial comity and because it was likely to be reported as there was no

indication to date it was being appealed. Effectively a 'carve out' for foreign criminals had no basis in ECAT. There was no challenge to the transitional provisions in DLP v10. This was important as there were hundreds of other cases to which this would be applied. Ms Meredith also submitted that in the period of the claim at the point of the CGD until DPLv10 there was a secret unpublished policy instructing caseworkers to put DL decisions post KTT on hold. That included deportation cases. Deportation cases were included in the ambit of KTT. I was referred to various pages of the correspondence from XY furnished to the Upper Tribunal the day before the hearing.

29. The transitional cases benefited from KTT and thus the applicant should succeed. The applicant should be successful in the same way that the applicant in VLT was and the respondent should be ordered to grant DL within 28 days in accordance with KTT there had been a persistent refusal to consider DL.

30. Finally the refusal and unlawful deferral was a breach of convention rights under Article 4 and Article 8. The Decision was not in accordance with the law and I should consider best interests of the children.

31. Mr Anderson submitted that the respondent was still considering an appeal to the Court of Appeal on VLT.

32. Mr Anderson submitted that the Decision under challenge was being withdrawn not on the basis that it was not compliant with ECAT but because it had unlawfully applied Part 9 of the Immigration Rules which covered General Grounds for Refusal. The delay identified in the challenge was that of the delay in failure to revoke the deportation order and not focussed on the delay in relation to making a decision on whether to grant DL as a VoT and further the challenge was made in relation to failing to apply DLP v10 properly and not in large part focussed on v5. The challenge was not defended on the basis of a delay claim but a challenge to the Decision which was accepted would be withdrawn. It was logical to consider revocation first because if it were revoked then all of the argument on the current policies in place and their lawfulness would be academic. The applicant was simply inviting the Tribunal to make an order that when the Secretary of State redetermined the matter she should make a direction in accordance with KTT. The Upper Tribunal should merely state that any further decision should be said to be made lawfully and it was unnecessary for the court to make an order in any other terms.

33. The claim was primarily academic and the impugned Decision no longer before the Tribunal. There was a discretion not to consider a

claim when the Decision had been withdrawn and would be remade. There is a discretion to consider claims which are academic but that should be exercised sparingly. This was a closed cohort of those whose CCD decision predated January 2023 and the decision in VLT addressed the same point.

34. In relation to the human rights ground advanced no relief was pleaded and it was difficult to see that they added anything to the ECAT ground and were parasitic. The policy was to fulfil ECAT.

35. Mr Anderson went through the trafficking cases noting that JP was a challenge to the scheduling rule whereby there was a blanket deferral of decisions on ECAT until asylum claims were decided without consideration of the personal circumstances. That was not the case here and it was not authority for the position that the decision on DL needed to be made at the same time as a CCD decision.

36. KTT concerned the Secretary of State postponing decisions on trafficking leave because the possibility of leave to a VoT, who could not be removed owing to an asylum claim, was not recognised in accordance with ECAT. The argument related to the justiciability of the claim, the intentions of the policy and its content. The question that had to be asked was whether the stay was necessary owing to personal circumstances. There was no point taken here in relation to asylum or Article 3.

37. This was not an XY case. In that case there was a CGD on 21st July 2021 and by July 2022 there was a challenge to the delay on making a trafficking leave decision following KTT on the basis of an unpublished policy. There was a hold on refusal decisions because KTT was subject to an application for permission to appeal and a hold was in place until the effect of KTT was decided. Negative decisions were not communicated. If the Secretary of State was faced with a challenge on delay, he would issue DL. In that case the court held that the defendant had applied an unlawful unpublished policy. KTT, however, was not authority for any proposition that applicants were entitled to a decision on DL on KTT grounds at the date of the CGD or on the basis of a particular policy. In fact the decision was authority for the contrary proposition and I was referred to [91]of XY. The applicant experienced a breach of Article 8 because of the delay in making the positive decision. Mr Justice Lane (as he then was) specifically rejected the submission that there is an entitlement to a grant of DL running from the date of the CGD. In this case the CGD was made on 28th November 2022 and further representations were made culminating in the submission of a further PCQ. The refusal

was then made on 20th March 2023. There was no unreasonable delay. In XY the CGD was taken long before the final decision.

38. There was no basis for considering that DLP v5 was the policy in play in March 2023. The proper approach is that decisions are taken on the basis of the policy in place at the date of the decision, Odelola v Secretary of State [2009] UKHL 25. None of the line of trafficking cases support the approach of looking at an older policy and VLT considered the decision on the basis of the 2023 policies.

39. The key question was in relation to the 2023 policies (TPS 30th January 2023 and DLP v10 16th March 2023) and the intention to fulfil article 14(1)(a) of ECAT. The premise of KTT was based on whether the policy intended to put in place article 14(1)(a). It was important to take the policies chronologically.

40. TPS v1 clearly expressed a shift in intention particularly in relation to criminals. There was a public statement of the Secretary of State's policy which has changed the landscape overall. As a headline point the Secretary of State was no longer seeking to fulfil article 14(1) (a). This set the background for the DLP v10 policy.

41. DLP v10 makes specific reference to the TPS and refers to 'potential entitlement'. DLP v10 sets a distinction in the policies in force previously and now, and summarised the authorities in KTT and EOG. Specifically DPL v10 states at page 11 when DL should not be considered. On the face of this policy there is an injunction not to consider DL in deport cases and this was emphasised by a whole section on deportation.

42. The policies should be considered together and the TPS is clear that it does not intend to fulfil ECAT article 14(1)(a). DLP v10 was not as a whole intended to fulfil ECAT and this was a domestic decision. The previous policies were said to be consistent with ECAT but not DLP v10. DLP v10 does not intend that people subject to deportation should be considered for DL and the withdrawn Decision was not wrong for applying TPS. There was a clear policy intention change and thus the whole premise of KTT falls away.

43. VLT was wrong. Those subject to subject to deportation are to be considered under the TPS which came first and that clearly indicated a policy change. The judge separated the relevant policies and gave no heed to their chronological order. It would be artificial to read the DL policy as if intending to fulfil article 14(1)(a) only in relation to a narrow cohort when referring to a previous policy.

44. In relation to the ECHR claim there was no authority to suggest that article 4 confers entitlement of any KTT type leave. ECAT was an unincorporated international treaty and had no application. None of

the authorities pleaded give any basis for that proposition. Secretary of State v Minh [2016] EWCA Civ 565 makes the point that ECAT cannot be read into article 4. The conventions were distinct with different intentions. It would be a considerable leap to conclude anything different.

45. The Secretary of State was not obliged to make a human rights decision in all requests and this fell within the considerations of the deportation revocation. Further no relief was pleaded. In so far as article 8 was engaged, there was no removal decision. Unless the appellant could establish a positive obligation that he be permitted to stay in the UK any complaint on trafficking took him nowhere. The applicant could not merge article 14 of ECAT and article 8 of the ECHR to create an unqualified right when subject to a deportation order because there was a strong interest in deportation as per Hesham Ali v SSHD [2016] UKSC 60. Additionally there was no relief pleaded.

46. Article 14 related to unjustified difference in treatment between those with and without offending. There was no breach and again no relief sought.

47. Ms Meredith responded that the applicant had been consistently arguing that the refusal to grant in accordance with KTT was unlawful. The applicant should be ordered similar relief to that ordered in VLT. The respondent should backdate any leave given. The applicant was entitled to the benefit of the transitional provisions in DLP v10 and should not have to wait to have the revocation decided first. That said the policy applied should be the previous policy. The TPS policy does not read across to the DLP v10. If there were a read across it would render otiose the saving provisions and all cases would be considered as post 30th January 2023 cases. The carve out referred to in VLT was a carve out from a policy which intended to benefit KTT. There was unexplained delay in addressing this case and there was no defence to that.

48. In terms of human rights the applicant was mixing up duties and article 8 was engaged and in terms of relief the court could make the order it sought fit and as appropriate. This was a highly vulnerable adult and his children’s best interests should be considered. The authorities cited did not assist.

Conclusions

49. In relation to ground 1, as indicated in correspondence between the parties, the impugned Decision has been withdrawn and the decisions on trafficking leave and revocation will be reconsidered within a specified time period. The respondent should remake the decision on whether to grant the applicant discretionary leave as a VoT within 28 days. The revocation decision can be made at any point up to 56 days. (I note that the Secretary of State agreed on 2nd February 2024 to make a decision on the revocation within 2 months). I do not direct the extent of the leave which is a matter for the Secretary of State. The applicant has submitted extensive amounts of material and time should be afforded for proper consideration. Obviously if the Secretary of State wishes to conclude the revocation decision before the DL then that is open to him. Essentially the challenge to the Decision and its unlawfulness is now academic. Save for my observations below, as to which policy should apply and its interpretation, I find that there are no exceptional circumstances in which to assess this ground further.

50. The policy in place at the date the decision was made is the relevant policy and thus DLP v10 is the policy which should be applied not DLP v5. Odelola supports this proposition.

51. In the DLP v10 under the rubric 'Pre-30 January 2023 modern Slavery (including human trafficking) cases', there is the following statement

> 'Individuals who before 30 January 2023 had both a positive conclusive grounds decision and had made an asylum claim or further submissions, based in a material part on a claim to a well-founded fear of re-trafficking/real risk of serious harm due to re-trafficking, which had not been finally determined, were potentially entitled to DL had their applications for leave been determined under the Home Office policies prior to 30 January 2023.'

52. This is framed to catch outstanding claims and there is no suggestion that a previous policy should apply. Indeed the provisions in the DLP v10 applicable to the applicant were referred to by Ms Meredith as transitional provisions within the DLP v10 itself, thus implying that she accepted that this policy did indeed apply rather than any previous version.

53. Moreover, I am not persuaded that it was even possible to apply an earlier policy owing to the ongoing submissions made by the applicant's representatives by way of reports. There was no suggestion, despite the further documentation released in relation to 'secret policies' that the Decision had been 'put on hold'. The CGD was taken on 28th November 2022 but after that, and on 16th January 2023, further information was provided by the applicant's representatives by way of further evidence from a psychotherapist

(Rita Edah report dated 16th January 2023). Additionally on 23rd February 2023 a further PCQ was issued as it was considered the previous form was out of date being nearly a year old. There was no suggestion the further questionnaire which was said to update the applicant's circumstances (and answered by return) was not relevant and clearly further reports needed to be considered by the respondent. Shortly afterwards, on 20th March 2023 the Decision under challenge was provided. That does not indicate delay or delay owing to a secret policy.

54. As Mr Anderson pointed out, XY at [91] held as follows in relation to the article 8 claim

> '…Assuming a lawful decision-making process on the part of the defendant, it would clearly take time for the conclusive grounds decision to translate into the grant of discretionary leave to remain. Nor do I consider that the 29 November 2021 is the correct starting point. The communication on that date referred to a "provisional decision", which was said to be "subject to checks." The defendant was plainly entitled to carry out such checks. I find that the correct starting point is, accordingly, 8 December 2021. That was the date when the officials said that the checks would be completed. In the circumstances, there is no reason to assume that - absent the illegality identified in respect of the primary issue - those checks would have had an adverse consequence for the claimant.'

55. There is no indication at this point in any GCID note in relation to the applicant that consideration of his leave was delayed beyond the time when the official checks were completed which evidently included the receipt of an up to date PCQ.

56. Moreover, XY related to the delay in refusal decision making whilst the respondent attempted to challenge the decision in KTT, and, XY deprecated, the practice of instructing

> 'officials not to make decisions, or to make them and withhold them, it is no answer at all to expect the individuals concerned to suffer the trouble and expense of having to bring legal proceedings in order to discover why the decisions are not being made or communicated'.

57. The position on KTT was settled on 17th March 2022 well before the CGD in this case in November 2022. The judicial review in this case was to the Decision, which in the circumstances, was promptly made following the CGD and, now, has in fact been withdrawn. The 'secret policy' is not therefore relevant in this case. Lastly, as Mr Anderson pointed out, the focus on delay in the grounds, if any, was in relation to the revocation decision not in relation to the trafficking decision and that aspect of the challenge had fallen away. No specific relief was pleaded on that basis (see above).

58. Turning to the issue which Ms Meredith submitted was not academic was the interpretation of the policy to be applied.

59. What is clear from KTT is that if there is a clear policy intention, the Secretary of State is permitted to depart from an international policy. KTT said this at [79]

> 'Given that this is the approach, however, as Sir Stephen Silber recognised in **Galdikas**, it is in principle possible for a court to conclude that the policy in question provides that decisions will be taken in accordance with some aspects of an international treaty but not others. If, therefore, the policy document makes statements as to the approach which will be taken which are inconsistent with an international treaty, it is also open to a court to conclude that a deliberate decision has been taken to depart from the requirements of the treaty – on an objective construction of the document as a whole the approach is to be as stated rather than as per the treaty - and the claim is then likely to fail. I have taken this point into account in coming to my conclusions given, for example, the inconsistency of the scheduling rule with ECAT. But in my view the MSL Policy document, read in context, overwhelmingly demonstrates a commitment to take decisions as to discretionary leave in accordance with ECAT albeit, for reasons which I will explain, the requirements of Article 14 have not been fully appreciated.'

60. As stated at [78] in KTT

> 'What matters is the question whether the stated policy conveys to the reasonable reader that this is the approach which will be taken.'

61. There are clear statements in the DLP v10 that it should be read in conjunction with KTT, and KTT, as can be seen above, expressly held that if the policy document makes statements which are contrary to the all encompassing range of ECAT Article 14(1)a that is lawful. The previous policies which were considered under KTT evinced an intention to apply ECAT 14(1)a to all cases notwithstanding deportation. Mr Anderson advanced that in this instance the policy was not to apply ECAT Article 14(1)(a) to all, especially not to foreign criminals.

62. I accept that the TPS represents a clear shift in policy. DLP v10 and the TPS are set against the background of the NAB Act 2022 and both policies reference the NAB Act 2022, the exclusion provisions of which I have included above and into which the applicant would undoubtedly normally fall. The DLP v10 states that

> 'Discretionary Leave version 10 guidance MUST be read in conjunction with other key guidance 'products' in particular Temporary Permission to Stay considerations for Victims of Human Trafficking or Slavery.'

63. The DLP v10, however, identifies two categories of modern slavery cases (VoTs), those pre and post 30th January 2023, and that **post** January 2023, modern slavery cases_would be considered under the TPS and based on the criteria in section 65 of the NAB Act 2022.

64. There is, additionally, a clear statement in DLP v10 at page 6 that

‘Individuals with a positive conclusive grounds decision whose outstanding asylum claim or further submissions (which is based in a material part on a claim to a well-founded fear of re-trafficking/real risk of serious harm due to re-trafficking) has not been finally determined before 30 January 2023 should be considered for DL. DL will normally be granted in these circumstances on the grounds that their ‘stay in the UK is necessary’ to pursue their asylum claim or further submissions.’

65. I set out further extracts from the DLP v10 from pages 10-11 for clarity as follows.

‘Pre-30 January 2023 modern slavery (including human trafficking) cases

Individuals who before 30 January 2023, had both a positive conclusive grounds decision and had made an asylum claim or further submissions, based in a material part on a claim to a well-founded fear of re-trafficking / real risk of serious harm due to re-trafficking, which had not been finally determined, were potentially entitled to DL had their applications for leave been determined under the Home Office policies prior to 30 January 2023.

A claim for asylum is based on a ‘well-founded fear of persecution’ and a claim for humanitarian protection is based on a ‘real risk of serious harm’. Please refer to the Assessing credibility and refugee status or Humanitarian protection guidance for more information. The terms ‘risk’ and ‘fear’ are used interchangeably as shorthand for these tests, to cover both instances.

Individuals who meet the requirements above may be entitled to DL because the Home Office policies in force at the time implemented Article 14 (1)(a) of the Council of Europe Convention on Action against Trafficking in Human Beings 2005 (ECAT).

The Court of Appeal in the case of EOG & KTT v Secretary of State for the Home Department [2022] EWCA Civ 307 (17 March 2022), referred to as ‘KTT’, determined that the Home Office approach to applications for Modern Slavery Discretionary Leave was not in accordance with Article 14 (1)(a) of ECAT (which the policy was found to commit to implementing). Article 14 (1)(a) of ECAT leads states to consider whether the victim's “stay is necessary owing to their personal situation". The Court found that a confirmed victim of trafficking, who has an outstanding asylum claim which is trafficking-related, requires a consideration of leave to remain in the UK

because their ‘stay in the UK is necessary’, owing to their personal situation as a victim of trafficking, in order to pursue that asylum claim.

…

When to consider DL

Under this policy, those individuals who were eligible for consideration of leave to remain under the KTT judgement prior to 30 January 2023, **will not** have their applications for DL determined under Temporary Permission to Stay considerations for Victims of Human Trafficking or Slavery. Instead, where:

• a competent authority made a positive conclusive grounds decision prior to 30 January 2023; and

• the individual had prior to 30 January 2023 articulated an asylum claim or further submissions which were trafficking-related as set out above; and

• the individual’s asylum claim or further submissions have at the present date not yet been finally determined (this means that they are still awaiting a decision or still have in-country appeal rights to exercise) **you must consider granting DL**.

DL will normally be granted in these circumstances.

When to not consider DL

DL does not need to be considered on these grounds where the individual:

• already has leave to remain in the UK – this includes where the individual has been granted Modern Slavery Discretionary Leave
• has had their asylum claim declared inadmissible under the relevant Immigration Rules (as set out in the Inadmissibility guidance).
• has had their asylum claim or further submissions refused and their appeal rights are exhausted
• received a Modern Slavery Discretionary Leave refusal prior to the KTT judgement
• falls to be refused DL under Part 9 of the Immigration Rules (general grounds for refusal)
• is subject to deportation proceedings (see Deportation cases section)

66. The issue of article 14(1)(a) of ECAT has been considered in VLT which has now been reported. UTJ Frances made clear for those applicants who had a CGD and asylum claim (or further submissions) in place before 30th January 2023 (‘the cohort’), as this applicant, the DVLP v10 intent was to apply ECAT article 14(1)(a). That was an overarching finding.

67. At [44] VLT held

‘the DLP [v10] provides that DLMS cases should be decided in accordance with Article 14(1)(a) given the lack of an express intention to the contrary and the clear and explicit reference to and the clear and explicit reference to ECAT and KTT.’

68. Additionally, DLP v10 clearly states that those individuals who were eligible for consideration of leave to remain under the KTT judgement prior to 30 January 2023, **will not** have their applications for DL determined under Temporary Permission to Stay considerations for Victims of Human Trafficking or Slavery. It is the TPS policy which underlines that the policy shift is in line with the NAB Act 2002 and the exclusion of foreign criminals.

69. The DLP v10 states the caseworker in these circumstances must consider granting DL. There is no injunction at this point in the DLP v10 to exclude those subject to deportation including foreign criminals. The policy is silent.

70. The section entitled ‘when not to consider DL’ (and where specific grounds are set out) is separate and therefore is not applicable because the caseworker has already been instructed that he/she must consider DL. It is under the section of ‘when not to consider DL’ that the reference is made to the ‘Deportation cases section’ (and the exclusion therefore of foreign criminals).

71. The reference at page 14 of the DLP v10 under the heading ‘Deportation cases’ does not and cannot refer to the cohort because it specifically states that the TPS should apply which, as seen above, it does not to the cohort. It simply states

‘Where the individual is currently subject to deportation proceedings, with by way of extant deportation order or where a deportation decision has been made and deportation continues to be pursued, they must not be considered under the DL policy for modern slavery (including human trafficking) cases pre-30 January 2023. Instead they will be considered under Temporary Permission to Stay considerations for Victims of Human Trafficking or Slavery upon application.’

72. The later section of DLP v10 entitled ‘Exclusion and criminality’ concentrates on exclusion, cancellation and is silent on the cohort and it states

‘Where an individual does not fall within the restricted leave policy (for example where they are not excluded under Article 1F or the criminal sentence was less than 12 months imprisonment), you must consider the impact of any criminal history before granting DL, having regard as appropriate to Part 9 (General Grounds for Refusal) and, where an individual is not liable to deportation, paragraph 353B(i) of the Immigration Rules.

Criminal or extremists should not normally benefit from leave on a discretionary basis under this policy because it is a Home Office priority to remove them from the UK'.

73. Mr Anderson stated in his submissions that the Decision under challenge was withdrawn in part precisely because it did consider Part 9. As found in VLT for those applicants who had a CGD and asylum claim (or further submissions) in place before 30th January 2023 ('the cohort'), as this applicant, the DVLP v10 intent was to apply ECAT article 14(1)(a). Silence in relation to the cohort cannot exclude the application of ECAT article 14(1)(a) and ambiguity may point to compliance with ECAT rather than not (KTT [32]-[34].).

14. Indeed KTT was a foreign criminal herself having been sentenced to 2 years in prison and as VLT confirms at [15] 'Article 14(1)(a) contains no exception on grounds of public order equivalent to that set out in Art 13(3)'.

74. Thus the transitional provisions, (and it seems the respondent conceded they were transitional in VLT), specifically bypass the requirement to consider the TPS which unambiguously introduces the exclusion of foreign criminals and embodies the shift in policy.

75. There indeed has been a shift in policy owing to the NAB Act 2022 brought into force on 30th January 2023 for those who do not fall within the cohort. There is nothing unlawful in DLP v10 in terms of approach to the cohort or indeed to cases outside the cohort where the NAB Act 2022 does apply. Rather than a carve out there is a shift in policy for all those who do not fall within the cohort. Having made the findings in relation to the applicability of Article 14(1)(a) to the cohort, in which this applicant falls, the consideration further of incompatibility or otherwise with the NAB Act 2022 is otiose.

76. The respondent has agreed to reconsider the revocation of the deportation order and therefore the challenge on this is academic. I have set out the time within which the further decisions should be made.

77. In relation to ground 4 and Article 4, the ECtHR does not impose and has not been held to impose an obligation to grant leave to remain. Such a holding would go far beyond the body of Strasbourg jurisprudence. The general duties imposed by ECAT identified do not require the UK to implement the specific obligations agreed in ECAT, SSHD v Minh [2016] EWCA Civ 565. VLT also held as follows:

'Article 4 does not have the effect of incorporating Article 14(1)(a) ECAT adopted by KTT into domestic law via the HRA 1998.'

78. In relation the claim under article 8 there has to date been no human rights decision and this fell within the considerations of the deportation revocation. Further no relief was pleaded.

79. Article 14 related to unjustified difference in treatment and thus discrimination between those with and without offending. The applicant had no status for article 14 purposes because past offending did not fall into the bracket of 'other status' and further there was ample justification for treating criminals differently. There was no breach and no relief sought.

80. It would appear ground 6 was not longer pursued.

81. Bearing in mind the impugned Decision has already been withdrawn, and the respondent has already agreed to consider the decision on revocation within 56 days, the application for judicial review is granted only so far as follows:

    (i) The respondent should lawfully and in accordance with DLP v10 (thus applying ECAT article 14(1)(a) and KTT) remake the decision on whether to grant the applicant discretionary leave as a VoT within 28 days.