

WELCOME TO ONE PUMP COURT

TRAFFICKING / MODERN SLAVERY UPDATE

WILL BE STARTING SHORTLY

Wednesday 10 March 2020

Chair: Claire Physsas

**Speakers: Parosha Chandran, Harriet Short and
Rachel Francis**



THIS SEMINAR WILL PROVIDE AN OVERVIEW OF RECENT CASE LAW DEVELOPMENTS IN TRAFFICKING AND MODERN SLAVERY LAW. WE WILL FOCUS ON STRATEGIES FOR BRINGING CHALLENGES ON BEHALF OF TRAFFICKED CLIENTS, WITH A PARTICULAR FOCUS ON HOW THESE CASES INTERSECT WITH THE ISSUES EXPERIENCED BY TRAFFICKED WOMEN.

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TRAFFICKING / MODERN SLAVERY UPDATE

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*V.C.L. and A.N. v. the United
Kingdom* (App
nos. 77587/12 and 74603/12.)



EOG (Anonymity Order Made) v Secretary of State for the Home Department (Rev 1) [2020] EWHC 3310 (Admin) (03 December 2020)

- <https://www.bailii.org/ew/cases/EWHC/Admin/2020/3310.html>

THE DISPUTE

- §8 “*The obligation on the state to assist potential victims awaiting a conclusive grounds decision in their physical, psychological and social recovery is at the heart of the dispute in this case.*”
 - Specifically the obligations that arise under Art 12 of Council of Europe Convention on Action against Trafficking in Human Beings ("ECAT").
 - More specifically still, Articles 12.3 and 12.4 as they engage with Article 14: residence permits (§18).



EOG (cont.)

THE POLICY

- §20 - *The policy in this country is set out in the DL Guidance. The Article 14 residence permit will be a grant of discretionary leave. The standard grant is for 30 months. The decision whether to grant discretionary leave is made by the SCA. Consistently with the terms of Article 14, consideration of whether there should be a grant of discretionary leave will only arise once there has been a positive conclusive grounds decision.*
- §21 - *Page 6 of the DL Guidance states that a victim will not qualify for discretionary leave solely because the SCA has confirmed that he or she is a victim of modern slavery. It says: "there must be reasons based on their individual circumstances to justify a grant of discretionary leave".*
- *It states at page 7:*
 - *"Discretionary leave may be considered under this specific policy where the SCA has made a positive conclusive grounds decision that an individual is a victim of modern slavery and they satisfy one of the following criteria: • leave is necessary owing to personal circumstances • leave is necessary to pursue compensation • victims who are helping police with their enquiries."*

And at page 11:

- *"A positive conclusive grounds decision does not result in an automatic grant of immigration leave. However, unless the confirmed victim has an outstanding asylum claim at the time the positive conclusive grounds decision is made, automatic consideration should normally be given at the same time, or as soon as possible afterwards, to whether a grant of discretionary leave is appropriate under this policy." (Emphasis added)*

§22 Therefore, it can be seen that the policy which has been adopted, reflecting the tacit imperative of expedition inherent in ECAT, is that a conclusive grounds decision should be made "as soon as possible" after the 45-day recovery period has finished. And that a decision about discretionary leave, where that is relevant, should be made at the same time as the conclusive grounds decision or "as soon as possible" thereafter.



EOG (cont.)

THE CONTEXT: DELAY

- *R (O) v SSHD* [\[2019\] EWHC 148 \(Admin\)](#)
- §23: *"In R (O) v SSHD a wholesale attack was mounted against the NRM on the grounds that it was beset by systemic, chronic delay and as such its functioning was irrational in public law terms and therefore unlawful. Between [41] and [45] Garnham J analysed the statistics as they stood in the final quarter of 2018. The statistics revealed great delays. However, at [99] Garnham J held on the evidence before him:*
 - *"Furthermore, it appears from the evidence and the agreed statistics that the position is now improving. The problems appear to have been identified and resources are being devoted to improving the speed at which cases are determined."*



EOG (cont.)

THE REALITY: DELAY

- §§24-27 Evidence on delay:
 - §24 – Delay has gone from, “*bad to worse*”;
 - §26 – Data extracted into table format;
 - §27 – “*remorseless increase in cases referred to the NRM*”.
- §29 *These delays are mirrored by the personal experience of the claimant in this case. She was referred to the NRM on 11 September 2018. She did receive a reasonable grounds decision, albeit negative, within six days. The NRM agreed to reconsider that decision. It took, remarkably, until 11 June 2019 for the claimant to receive a positive reasonable grounds decision. That was 273 days after her initial referral to the NRM. By the time that she made her judicial review application on 11 December 2019, 456 days after her initial referral, she had not received a conclusive grounds decision. She did not receive a conclusive grounds decision until 28 April 2020, an astonishing 595 days after her initial referral to the NRM. That conclusive grounds decision should have led to an automatic consideration of discretionary leave yet at the date I write this judgment, 26 November 2020, she has not yet been granted or refused such leave. 211 days have elapsed since the conclusive grounds decision without a decision having been made about discretionary leave. An astonishing 806 days have elapsed between her initial referral to the NRM and today.*



EOG (cont.)

THE REALITY: FOR THE CLAIMANT

- §30 *The effect of these delays has been to hit the claimant very hard. She entered this country on 20 September 2017 having been granted a Tier 5 Youth Mobility Scheme Visa, which entitled her to work and which was valid until 20 September 2019. Unfortunately, in April 2018 she fell under the domination of a man who abused her sexually and forced her into prostitution. Eventually she managed to escape, and as stated above, on 11 September 2018 she was referred into the NRM. On 25 June 2019 the claimant started work with a trafficking support organisation. She was able to do so because her visa remained unexpired. She very much enjoyed this work and on any view her ability to do it was an important component in her psychological and social recovery with which the state was obligated to assist her under the terms of the Convention. However, as stated above, her visa was due to expire on 20 September 2019. Therefore, a few days before that, on 14 September 2019, she ceased work, and has not worked since. Since then she has been dependant on payments from the state.*
- §33 *So it can be seen as a result of the defendant's delay the claimant finds herself in a most unhappy situation where she, as an overstayer, is branded a criminal (although no one has seriously suggested she would actually be prosecuted), deprived of access to basic services, unemployed, dehumanised and penalised. She has filed some moving evidence describing her sense of*



EOG (cont.)

THE CONCLUSION

- §48 *My conclusion is as follows. I agree with Ms Weston QC that there is an unlawful lacuna in the existing policy inasmuch as it fails to implement the obligation in Article 10.2 formally to protect persons in receipt of a positive reasonable grounds decision from removal from this country's national territory pending the conclusion of the process. Suffering such persons to remain as overstayers, or as illegal immigrants, does not fulfil the obligation. The defendant must formulate a policy that grants such persons interim discretionary leave on such terms and conditions as are appropriate both to their existing leave positions and to the likely delay that they will face. It is not for me to prescribe what such terms and conditions should be. I agree with Mr Tam QC that constitutionally that is a matter reserved to the defendant. However, the terms and conditions must obviously be lawful and this would mean that someone in the position of the claimant, who has a time-limited right to work, should not have the arbitrary adverse consequence of a removal of that right meted out to her simply by virtue of the delays that she is likely to face.*

EOG (cont.)

FURTHER OBSERVATIONS

- §2 *Although ECAT has not been formally incorporated into our domestic law it has been held that a failure by the government to apply its principles will be justiciable (see, for example, R (PK (Ghana)) v Home Secretary [2018] 1 WLR 3955 and MS (Pakistan) v Secretary of State for the Home Department [2020] UKSC 9 at [20]). Further, the Modern Slavery Act 2015 states in its explanatory notes that the Act was passed against the backdrop of ECAT and other international instruments and that the guidance that the Secretary of State is obliged to issue under section 49 must take into account the international requirements set out in the Convention. The latest version of that guidance (version 1.02) was re-issued in August 2020 ("the Main Guidance").*
- §3 *Therefore, ECAT is as close to being incorporated in our domestic law, without actually being so, as it is possible to be.*



EOG (cont.)

NEW POLICY

- Judgment handed down 3.12.2020
- New policy issued on 8.12.20
 - [Discretionary leave considerations for victims of modern slavery](#) Version 4.0



EOG (cont.)



MN & IXU v The Secretary of State for the Home Department [2020] EWCA Civ 1746

- The case concerns:
- “...the correct approach to deciding whether someone is a victim of human trafficking for the purpose of the process established under the so-called National Referral Mechanism (“the NRM”).” [2]

Facts for MN

- MN is an Albanian national.
- She gave an account which contained numerous indicators that she was a victim of trafficking, including that she had been forced to work as a prostitute in Italy.
- She was referred to the NRM. The CA made a reasonable grounds decision in her favour on 21 March 2013. On 7 August 2017, four years later, the CA made a conclusive grounds decision that MN was not a victim of trafficking.
- [5]

Facts for IXU

- IXU is a Nigerian national.
- She came to this country on 18 July 2012 on a student visa, which gave her date of birth as 27 October 1988. She says that in fact she came not primarily as a student but because she was trafficked and that on her arrival she was expected to become a prostitute. After, on her account, escaping from her traffickers she agreed to marry an EU national, but the marriage was prevented by the immigration authorities; and on 9 April 2014 she was convicted of an offence of conspiracy in relation to the proposed marriage. [6]

Common grounds

- [11] The Appellants appealed on three common grounds:
- (1) that the standard of proof for ‘Conclusive Grounds’ decision was unlawfully set at the balance of probabilities in breach of Article 4 ECHR; and that was relevant to the continued receipt of support and protection
- (2) that the Home Office erred in its approach to considering medical and other expert evidence in support of the Appellants’ claims to be victims of trafficking;
- (3) that the Home Office took the wrong approach to assessing their credibility.

Grounds particular to MN and IXU

- (4) *Anxious scrutiny*. MN argues that in her case Farbey J wrongly held that no duty of anxious scrutiny arose.
- (5) "*Nexus*". While she was still a child IXU underwent female genital mutilation ("FGM"). She says that the FGM was performed for the purpose of an intended forced marriage to an older man. The Judge held that that was immaterial to the question whether she was a victim of trafficking because the connection between the FGM and any possible future exploitation was not sufficiently proximate. IXU contends that he was wrong to do so. This has been referred to before us as the "nexus" issue, and we will retain the shorthand for convenience, though we are not sure that it is entirely apt.

Standard of proof arguments

- **[86]**
- Mr Husain's essential submission on behalf of the Appellants can be summarised as follows:
- (1) The effect of article 4 of the ECHR is that once it is established that there are reasonable grounds to believe¹⁵ that a person is a victim of trafficking, the protection duty recognised in the case-law of the ECtHR (see para. 47 above) requires the state concerned to afford them support and assistance of the kind provided for by Chapter III of ECAT for as long as it is needed.

Standard of proof arguments

- (2) The duty to afford support and assistance continues so long as there remain reasonable grounds to believe that the person in question is a victim of trafficking.
- It will only be terminated by the results of further investigation or consideration if those results justify the conclusion that there are no longer such reasonable grounds. An adverse conclusion on the balance of probabilities is not enough.

Standard of proof arguments

- (3) The NRM thus fails to comply with the requirements of article 4, and any person who is a potential victim of trafficking (in the sense that there are reasonable grounds to believe that they are) is entitled to enforce those obligations as a breach of section 6 of the HRA.

Standard of proof judgment

- [95] We do not believe that the analogy with the test for establishing refugee status is a good one. As Sir James pointed out, that test is based on the particular language of the Refugee Convention and is directed to the question of the likelihood of a future event, namely persecution if the putative refugee is returned.

Standard of proof judgment

- [100] “... it follows that the adoption of the civil standard of proof is unobjectionable, indeed in practice inescapable...”

Expert evidence

- [106] *Mibanga* principles

Expert evidence: *Mibanga*

- [108] *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123, [2018] 4 WLR 78, where the Senior President of Tribunals, Sir Ernest Ryder, said, at para. 19 (a):
 - “It is an error of approach to come to a negative assessment of credibility and then ask whether that assessment is displaced by other material.”

Expert evidence: principles

- [121]
- (1) The decision whether the account given by an applicant is in the essential respects truthful has to be taken by the tribunal or CA caseworker (for short, the decision-maker) on the totality of the evidence, viewed holistically – *Mibanga*.

Expert evidence: principles

- [121]
- (2) Where a doctor's opinion, properly understood, goes no further than a finding of "mere consistency" with the applicant's account it is, necessarily, neutral on the question whether that account is truthful – see *HE (DRC)*, but the point is in truth obvious.

Expert evidence: principles

- [121] (4) Such an opinion may be based on physical findings (such as specially characteristic scarring). But it may also be based on an assessment of the applicant's reported symptoms, including symptoms of mental ill-health, and/or of their overall presentation and history. Such evidence is equally in principle admissible: there is no rule that doctors are disabled by their professional role from considering critically the truthfulness of what they are told – *Minani; HK; MO (Algeria); SS (Sri Lanka)*. We would add that in the context of a decision taken by the CA on a wholly paper basis, a doctor's assessment of the truthfulness of the applicant may (subject to point (5) below) be of particular value.
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Expert evidence: principles

- [121]
- (5) The weight to be given to any such expression of opinion will depend on the circumstances of the particular case. It can never be determinative, and the decision-maker will have to decide in each case to what extent its value has to be discounted for reasons of the kind given by Ouseley J at para. 18 of his judgment in *HE (DRC)*.

Expert evidence: principles

- [121] (6) One factor bearing on the weight to be given to an expression of opinion by a doctor that the applicant's reported symptoms support their case that they were persecuted or trafficked (as the case may be) is whether there are other possible causes of those symptoms. For the reasons explained by Ouseley J (*loc. cit.*), there may very well be obvious other potential causes in cases of this kind. If the expert has not considered that question that does not justify excluding it altogether: *SS (Sri Lanka)*. It may diminish the value that can be put on their opinion, but the extent to which that is so will depend on the likelihood of such other causes operating in the particular case and producing the symptoms in question.



Expert evidence: conclusion

- [123] The essential message of that possibly over-elaborate discussion is that decision-makers should in each case assess whether and to what extent any particular expert evidence relied on by an applicant supports their case as a matter of rational analysis. Observations in the case-law are useful in drawing attention to likely limitations on the value of particular kinds of evidence, but they should not be treated as laying down rigid rules. If there are qualifications to the value to be given to a particular piece of evidence, that is not a reason for excluding it altogether: if it has some weight it must go into the overall assessment.



Credibility

- [125]
- Note that guidance has now been updated – we cover this in tomorrow's seminar.

Credibility

- [126] In our view, although the particular points made in that passage are valid and important, their categorisation as "mitigating circumstances" is not apt, and indeed Mr Irwin, who argued this part of the case for the Secretary of State, accepted as much. It is not simply that that phraseology has an inappropriate echo of criminal proceedings.

Credibility

- [126] cont.
- More substantially, it implies an approach under which the decision-taker first identifies the defects in the account of a putative victim and then tries to decide whether they can be excused for reasons of the kind given. That risks being over-mechanistic and does not reflect the real nature of the exercise. As is made clear in *Mibanga*, what is required is a single process in which the decision-maker assesses the credibility of the core account given by the putative victim. In doing so it will be necessary to take into account features which potentially call their credibility into question, such as incoherence, inconsistency or delay, alongside factors which may explain those features

Credibility

- [125]
- ‘credibility’ and ‘plausibility’ are not terms of art.
 - “Perhaps both points are too obvious to need making; but if terms are used too regularly they sometimes get in the way of the process of common sense decision-making.”

MN: 'anxious scrutiny'

- [242] “it is clear that a high quality of reasoning is required in a conclusive grounds decision, which engages fully with the case advanced by the putative victim of trafficking.”
- [242] A conclusive grounds decision is very important for the putative victim: we have described above some of the rights to which an established victim of trafficking becomes entitled. Although the potential consequences of a wrong conclusive grounds decision are not generally comparable in terms of gravity to the risk to a victim of persecution if wrongly returned to their country of origin, these are nonetheless gateway decisions that relate to important rights.

MN: 'anxious scrutiny'

- [244] See Cranston J at paras. 56-58 of his judgment in *R (BG) v Secretary of State for the Home Department* [\[2016\] EWHC 786 \(Admin\)](#), in which he held that in cases involving rights under article 4 of the ECHR "the intensity of review is high".

MN: judgment

- The competent authority's reasoning on credibility and expert evidence was unsustainable and would be remitted for redetermination [249-254]

IXU

- [335] What [the CA] ought to have done, but did not, is to decide whether the FGM was indeed performed for the purpose of a forced marriage.

IXU

- This is what was labelled "the nexus issue", the essential question being what degree of nexus there should be between the action relied on by IXU and her intended forced marriage. It is not an issue which may arise very often in practice, since typically where a child (or indeed an adult woman) is subjected to FGM for the purpose of a forced marriage the marriage will happen, in which case that will involve trafficking in its own right.
- [343] decision of whether the act of taking IXU away to subject her to FGM had been for the purpose of subjecting her to a forced marriage required a proper assessment and would be remitted

IXU

- The competent authority had also erred regarding expert evidence [348].

THANK YOU FOR
ATTENDING!

