Neutral Citation Number: [2021] EWHC 2722 (Admin)

Case No: CO/3510/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2021

Before:

THE HONOURABLE MR JUSTICE LINDEN

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Between:

THE QUEEN (On the application of KTT)	**Claimant**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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Mr Chris Buttler QC and Ms Zoe McCallum (instructed by **Duncan Lewis**) for the **Claimant**
Mr Robin Tam QC and Mr William Irwin and Ms Emily Wilsdon (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: 20, 21 July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII, if appropriate, and/or publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10.30am on Tuesday 12 October 2021

MR JUSTICE LINDEN:

Introduction

1. The Claimant is a Vietnamese national aged 33. She has a complex immigration history, a brief chronology of which is set out in Annex A to this judgment. But the essential points for present purposes are as follows.

2. For a period of approximately six months in 2016, the Claimant was forced to work as a prostitute in Vinh City before being brought to this country by people traffickers in November 2016. Her journey took her through various countries where she was also forced to work as a prostitute and, for a period of approximately 21 months after her arrival here, she was subjected to further forced labour including as a prostitute and on cannabis farms. On 17 April 2018 a positive reasonable grounds decision was made in her case and, on 31 October 2019, the Defendant accepted that she was *"a victim of modern slavery in Vietnam, Russia, Ukraine, unconfirmed countries, France and the UK during 2015-2018 for the specific purposes of sexual exploitation, forced labour forced criminality"* ("the conclusive grounds decision").

3. Meanwhile, on 22 January 2019, the Claimant made claims for asylum and human rights protection in this country. Those claims were based on a fear of being trafficked again if she was returned to Vietnam. They had yet to be determined at the time of the conclusive grounds decision. In accordance with her then policy (the so-called "scheduling rule") which was set out in Version 2 of *"Discretionary Leave for Victims of Modern Slavery"* ("the MSL Policy"), dated 10 September 2018, on 31 October 2019 the Defendant also decided that any decision as to the grant of discretionary leave – which is referred to in the authorities as ECAT leave but which I will call modern slavery leave, or "MSL" - would be postponed until after the determination of her claim for asylum/protection. In the light of the judgment of Murray J in **R (JP and BS) v Secretary of State for the Home Department** [2020] 1 WLR 918, however, the decision on MSL was brought forward and, on 21 July 2020, the Claimant's application was refused. The Defendant then reviewed her decision in response to arguments set out in the Claimant's pre-action protocol letter dated 22 July 2020 but, on 17 August 2020, the refusal was maintained. The Defendant's decision of 17 August 2020 ("the Decision") is the subject of this Claim.

4. On 23 April 2021, the Claimant's asylum and human rights claims were refused. That decision is the subject of an appeal to the First Tier Tribunal ("the FTT") which was lodged on 17 May 2021. It is estimated by the Claimant's solicitor that it will take until October 2022 for the appeal to be decided by the FTT.

Outline of the issues

5. There are now four pleaded grounds of challenge:

   i) The way in which Ground 1 is put has undergone some refinement, partly in the light of the Defendant's arguments. But, as expressed in the Claimant's skeleton argument dated 6 July 2021, at least, Ground 1 alleges that the MSL Policy is contrary to Article 14 of the Council of Europe Convention on Action Against Trafficking in Human Beings 2005 ("ECAT") *"because it fails to permit the grant of [MSL] to a victim on the ground that she has to remain in the UK to*

advance an asylum/protection claim" based on the fear of being re-trafficked if she is returned to her country of origin. On this basis, the refusal of leave in the Claimant's case is said to have been inconsistent with Article 14(1)(a) ECAT and therefore unlawful. Permission was granted in respect of this Ground by Mostyn J on the papers on 23 November 2020. He also adjourned the application for permission in respect of Grounds 2 and 3 to the substantive hearing of Ground 1.

ii) Ground 2 alleges that the MSL Policy is contrary to Article 4, European Convention on Human Rights ("ECHR"). The Claimant's skeleton argument indicated that this Ground is not pursued.

iii) Mr Buttler QC confirmed that Ground 3 is advanced in the alternative to Ground 1. As refined in Mr Buttler's oral submissions, Ground 3 alleges that the Decision was unlawful because the decision-maker failed to take account of, or to address, an argument that the Claimant's mental health would be ameliorated by the grant of MSL and would help her to engage with the therapy which is available here. Mr Buttler confirmed in the course of his submissions that it was also contended that the decision was irrational because one of the premises for the Decision was that the medical assistance needed by the Claimant was available to her in Vietnam, whereas her intention was to remain in this country pending the outcome of her asylum/human rights claims.

iv) Ground 4 alleges, in effect, that the effect of Article 10.2 ECAT was that the Claimant was entitled to MSL from the date of the reasonable grounds decision i.e. 17 April 2018. Permission to add this Ground was granted by Mostyn J on 10 May 2021. It is based on his decision in **R (EOG) v Secretary of State for the Home Department** [2020] EWHC 3310 (Admin) which is currently before the Court of Appeal. Mostyn J therefore stayed Ground 4 pending the determination of that appeal.

6. The key provision of ECAT for present purposes is Article 14. This states:

"***Article 14 – Residence permit***

1. Each party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:

(a) the competent authority considers that their stay is necessary owing to their personal situation;

(b) the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings." (emphasis added)

2 The residence permit for child victims, when legally necessary, shall be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions.

3 The non-renewal or withdrawal of a residence permit is subject to the conditions provided for by the internal law of the Party.

4 If a victim submits an application for another kind of residence permit, the Party concerned shall take into account that he or she holds, or has held, a residence permit in conformity with paragraph 1.

5 Having regard to the obligations of Parties to which Article 40 of this Convention refers, each Party shall ensure that granting of a permit according to this provision shall be without prejudice to the right to seek and enjoy asylum."

7. As Murray J said in **R (JP and BS)** (supra):

"18. ECAT leave is a temporary form of leave that enables a victim of trafficking to receive support (through access to the labour market, education and mainstream benefits) to facilitate recovery from trafficking and/or to facilitate co-operation with a criminal investigation into trafficking. It is generally granted for a period of 30 months, although it can be granted for a longer or shorter period in individual cases. It is not a route to settlement in the UK."

8. Under Ground 1, the Claimant's broad case is that she should have been granted MSL in accordance with Article 14(1)(a) ECAT on the basis that it is necessary for her to remain in this country owing to her personal situation i.e. in order to pursue her asylum and human rights claims based on her fear of being re-trafficked if she is returned to Vietnam. This, she argues, is the effect of Article 14.1(a) ECAT as a matter of construction. As, she says, the Defendant's stated policy is to comply with Article 14, the refusal of leave in her case was unlawful.

9. The evidence is that the Claimant has significant mental health issues as a result of her experiences of being trafficked, including Post Traumatic Stress Disorder and Anxiety and Depressive disorder, for which she takes anti-psychotic and anti-depressant medication. MSL would mean that she was eligible for Universal Credit which, she calculates, is worth more than six times the payments she currently receives. She would also have access to the labour market and to education and training, all of which, she says, would assist to recover from her experiences of trafficking. There is also evidence that her insecure immigration status is contributing to the issues with her mental health.

10. As matters stand, although sections 77 and 78 Nationality, Asylum and Immigration Act 2002 prevent the Defendant from removing the Claimant until the final determination of her asylum and human rights claims, and although victims of trafficking are exempted from the NHS charging regime (see Regulation 17(1) National Health Service (Charges to Overseas Visitors) Regulations 2015), the effect of the refusal to grant the Claimant MSL is that she is subject to the so-called hostile immigration environment underpinned by the Immigration Act 2014. As Underhill LJ noted in **R (Balajigari) v Secretary of State for the Home Department** [2019] 1 WLR 4647 at [81]:

"It is.... a criminal offence to be in the UK without leave to remain: see section 24 of the Immigration Act 1971. As regards practical consequences, a person without leave faces severe restrictions on their right to work (see section 24B of the 1971 Act), to rent accommodation (section 22 of the 2014 Act), to have a bank account (section 40 of the 2014 Act) and to hold a driving licence (sections 97, 97A and 99 of the Road Traffic Act 1988).....".

11. Mr Buttler also advanced an un-pleaded secondary argument under Ground 1 that Version 2 of the MSL Policy, although not the subsequent versions, was internally inconsistent in that the scheduling rule prohibited a decision on whether to grant leave pursuant to Article 14 ECAT until an asylum decision had been taken, whereas the Defendant's stated policy was to implement her obligations under ECAT.

12. Mr Tam QC's case in relation to Ground 1 was essentially four-fold:

    i) He argued that on the basis of the decision of the Supreme Court in **R (SC) v Secretary of State for Work and Pensions** [2021] UKSC 26, [2021] 3 WLR 428 which was handed down on 9 July 2021, Ground 1 is misconceived and/or not justiciable because it is essentially a complaint that the United Kingdom has failed to comply with obligations under an international treaty, ECAT, which has not been incorporated into our law. Various decisions of the Administrative Court and the Court of Appeal, starting with **R (Atamewan) v Secretary of State for the Home Department** [2014] 1 WLR 1959, which have considered and adjudicated the question whether the stated policy of the Defendant was consistent with ECAT were per incuriam and wrongly decided. This point was taken for the first time in the Defendant's skeleton argument dated 13 July 2021 but, rightly in my view, Mr Buttler did not object to it being considered given the timing of the **SC** decision and given that the issues now raised in relation to **SC** are issues of law.

    ii) Mr Tam's argument in relation to **SC** was developed further in oral submissions, in particular in that he submitted, as part of his argument that the Claimant was relying directly on ECAT, that the MSL Policy does not contain a commitment to make decisions as to MSL in accordance with Article 14 ECAT. As will be seen, this argument was also contrary to concessions which had been made by the Defendant in earlier cases.

    iii) In the alternative, Mr Tam submitted that Ground 1 is based on a misinterpretation of Article 14(1)(a) ECAT. His main argument under this head was that, reading Article 14(1)(a) in accordance with Vienna Convention principles, the question is whether the residence permit is required in order to facilitate a stay which is necessary for the stated purposes but would not otherwise be possible. Such a permit is not required by Article 14(1)(a) in a case where a victim of people trafficking is claiming asylum/protection in this country, because they are protected from removal by sections 77 and 78 Nationality, Asylum and Immigration Act 2002 in any event. Moreover, the Claimant's reading would put victims of people trafficking in a better position than other asylum seekers without there being any principled reason to do so.

    iv) The Claimant's secondary argument that the MSL Policy was internally inconsistent and irrational was not pleaded and was in any event denied.

13. Mr Tam's case in relation to Ground 3 was that permission should be refused, or alternatively this Ground should be dismissed, on the basis that there are no grounds for complaint about the Decision.

The Hearing

14. The following points should be noted about the Hearing.

i) First, I was told that the hearing of the appeal in the **EOG** case was originally scheduled for 14 or 15 July 2021. However, the Defendant had taken the **SC** point in that case, as a result of which the time estimate for the appeal had been increased to 3 days and the hearing had been postponed to a date which had not yet been fixed at the time of the hearing before me. In the light of this information I sought confirmation from the parties that neither was inviting me to stay these proceedings until the decision of the Court of Appeal, and both confirmed that this was their position. I understand that the hearing of the appeal in **EOG** has now been fixed for a 3-day hearing by the Court of Appeal, starting on 8 February 2022.

ii) Second, given that Mr Tam was asking me to depart from previous decisions of the Administrative Court and the Court of Appeal on the basis that they were per incuriam and wrong, and given that the justiciability of the question whether the Defendant's policies in relation to ECAT were consistent with ECAT itself had been conceded in some of the authorities which I will consider below, I asked for further assistance in writing on the questions of the scope of the doctrine of per incuriam and when a point of law which was conceded will or will not be binding. In response to this request I received helpful Notes from both sides dated 21 July 2021, for which I am grateful.

iii) Third, on 30 July 2021, and therefore after the Hearing, the Supreme Court handed down its decisions in **R (A) v Secretary of State for the Home Department** [2021] UKSC 37 and **R ((BF) Eritrea v Secretary of State for the Home Department** [2021] UKSC 38. These addressed the scope for intervention by the Court where it is alleged that a policy issued by a public body is likely to lead to unlawful decisions (what might be called **Gillick** challenges). On 13 September 2021, and from an abundance of caution given that no point of the nature at issue in **A** and **BF (Eritrea)** had been taken by Mr Tam, I invited the parties to make any observations or submissions which they wished to make in the light of these decisions. In response, I received helpful written submissions from both sides dated 17 September 2021:

a) Mr Buttler's position was that the Claimant does not contend that the MSL Policy was vitiated by a **Gillick** error. He usefully summarised the issues, in the light of the arguments at the Hearing at least, as follows:

> *"The Claimant's primary submission at the hearing was that (a) the Policy committed the Defendant to complying with Art 14 ECAT, and (b) the Defendant breached the Policy in the Claimant's case (and does so generally) because she has misconstrued the meaning of Art 14 ECAT …The Defendant contended that she had not breached her Policy because (a) the Court was precluded from construing the meaning of Art 14 ECAT, (b) the Policy did not commit the Defendant to complying with Art 14 ECAT and/or (c) Art 14 ECAT should not be construed in the way contended for by the Claimant. The issue between the parties was not about the lawfulness of the Policy. The issue was the alleged failure to comply with the Policy.* ***A*** *and* ***BF Eritrea*** *have nothing to say about this."*

b) Mr Buttler also said that his secondary internal inconsistency point was a complaint that the MSL Policy was irrational.

c) Mr Tam's position was that the decisions in **A** and **BF (Eritrea)** *"(in the strict sense) do not appear to affect the outcome of the present case"* although they did underline the distinction between policy and law, and this distinction reinforced the Defendant's *"primary argument"* on Ground 1 based on **SC**.

The justiciability issue

Relevant case law before the decision of the Supreme Court in **SC**.

JH Rayner (Mincing Lane) Limited v Department for Trade and Industry [1990] AC 2 AC 418

15. The key authority on the legal status of international treaties in domestic courts for present purposes is **JH Rayner (Mincing Lane) Limited v Department for Trade and Industry** [1990] AC 2 AC 418 in which Lord Oliver stated two related principles on which Mr Tam relied. I will call these "the **Rayner** principles":

i) First: *"It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law…. On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law."* (499E-H)

ii) Second: *"..as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations…."* (500B-D)

16. Lord Oliver went on to point out that this did not mean that the courts will never be entitled to construe an international treaty. At 500D-H he gave examples of where this will be permissible, namely:

i) Where the treaty is directly incorporated into English law by an act of Parliament;

ii) Where a statute is enacted to give effect to the United Kingdom's obligations under a treaty, in which case interpretation of the treaty may be necessary to resolve any ambiguity or obscurity as to the meaning or scope of the statute;

iii) Where parties have entered into a contract which incorporates the terms of the treaty;

iv) Where legislation expressly or impliedly requires recourse to a treaty in order to construe its terms;

v) In very rare cases in which the exercise of the Royal Prerogative directly effects an extension or contraction of the jurisdiction without the constitutional need for internal legislation.

17. As is well known, ECAT is an unincorporated international treaty. A number of authorities have therefore addressed the question of the effect of the **Rayner** principles in the context of challenges to the Defendant's policies on people trafficking where the challenge alleges failure to comply with ECAT. These authorities include the following.

R (Atamewan) v Secretary of State for the Home Department [2014] 1 WLR 1959

18. In **Atamewan**, one of the issues was whether the Defendant's *"Guidance for Competent Authorities"* on the subject of people trafficking correctly interpreted ECAT in stating the test for a *"victim of trafficking"*. Applying this Guidance, the decision-maker had decided that although the claimant had been trafficked into the United Kingdom there were no reasonable grounds to believe that she *remained* a victim of trafficking. This approach was said by the claimant to be contrary to Articles 4, 10.2 and 13 ECAT. In relation to this issue the Divisional Court (Aikens LJ and Silber J) noted at [55] that Mr Eadie QC (as he then was) submitted that:

> *"...the key question was whether the policy set out in the guidance (particularly in relation to "historic" trafficking cases) was sufficient to comply with the UK's international obligations under CAT. He accepted, at least in this court, that although CAT had not been transposed into domestic law by legislation and so did not have "direct effect", in so far as the guidance purported to give effect to the terms of the CAT and failed to do so, that would be a justiciable error of law. He also accepted that to the extent that the NRM decision was itself based on the terms of the guidance, if they were, in turn, based on an erroneous interpretation of the CAT, then the NRM decision could be challenged by judicial review because that decision would then have been based on a misdirection as to the legal basis for the relevant wording of the guidance."* (emphasis added)

19. Aikens LJ went on to note, at [68], that in the light of the arguments of the parties the issues which required to be decided included whether the United Kingdom's policy as described in the Guidance was unlawful because it misinterpreted the relevant articles of ECAT. At [69] he found that:

> *"The guidance sets out UK government policy in certain respects on the issue of trafficking in human beings and, in particular, in relation to those who are victims of trafficking. The guidance purports to set out this policy in a manner consistent with the provisions of the CAT."* (emphasis added)

20. He noted Mr Eadie's concession and he went on to hold that the Guidance had, indeed, misinterpreted ECAT and was therefore unlawful. It is clear from the passages cited above that the Divisional Court proceeded on the basis that where a public body states, in effect, that its policy is to reach decisions on a given issue in accordance with its obligations under an international treaty, the source of any public law obligation to do so is the policy statement rather than the treaty itself. In my view the Court positively

considered and accepted this point. This view is reinforced by a passage at [89] where, addressing an argument that the Defendant had also failed to comply with the duty under Article 27(1) ECAT to take steps to initiate effective investigations Aikens LJ said:

> *"89 Two obligations on the UK authorities are involved. First, there is the obligation of the UK in article 27(1) of the CAT. As already noted (see note 6), in his written submissions Mr Eadie took the points that, first, an unincorporated international treaty cannot be relied on in domestic courts to fill an alleged lacuna in government policy and, secondly, that the guidance does not purport to transpose any possible positive duty under article 27(1) of the CAT to provide for the referral of a victim of trafficking's case to the police in circumstances where the police have not already been alerted.*
>
> *90 I accept those propositions…."* (emphasis added)

21. Note 6 recorded that:

> *"6. In his written submissions, Mr Eadie argued that an unincorporated international treaty could not be relied upon in domestic courts to fill a lacuna in government policy and he referred to **J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry** [1990] 2 AC 418 and **R (Campaign for Nuclear Disarmament) v Prime Minister** [2002] EWHC 2777 (Admin); The Times, 27 December 2002. This point was not developed orally."*

22. It is therefore clear that both Mr Eadie and the Divisional Court had the **Rayner** principles in mind. They recognised that there is a distinction between a case where the stated policy of a public body purports to give effect to a given provision in an international treaty by indicating that decisions will be taken in accordance with that provision, on the one hand, and a case where the policy does not do so and the complaint of failure to comply with the provision therefore relies directly on the international treaty itself to fill the lacuna, on the other. In the former case, the policy is the source of the relevant obligation and the court is entitled to interpret the treaty in question to decide whether the impugned parts of the policy correctly state the position under the treaty and/or whether a given decision is in accordance with the commitment to comply with the treaty. In the latter case, the treaty is, in effect, the source of the obligation and court's interpretation of the treaty is therefore irrelevant.

R (Galdikas) v Secretary of State for the Home Department [2016] 1 WLR 4031

23. In **Galdikas**, the claimants' challenge included an argument that the Defendant's support regime failed to comply with Article 12 ECAT. On behalf of the Defendant it was submitted, amongst other things, that the **Rayner** principles meant that the claimants could not rely on any provision of ECAT because it had not been incorporated into English law: see [46] and [58]-[59]. Sir Stephen Silber held, at [48]-[52], that he was not bound by the concession made by Mr Eadie QC in **Atamewan** given that it was made *"at least in this court"* and given, he held, that it was merely assumed to be correct. In this connection, I note that **R (Khadim) v Brent London Borough Council Housing Benefit Review Board** [2001] QB 955, discussed below, does not appear to have been cited to him.

24. Sir Stephen therefore determined the issue himself.

i) At [59(B)] he held that whilst ECAT imposes no duties on the executive and confers no rights on individuals it *"can be given effect through SSHD's policies rather than as a source of freestanding rights and duties"*.

ii) At [60] he noted the argument on behalf of the claimants, relying on **Mandalia v Secretary of State for the Home Department** [2015] 1 WLR 4546 [29] and **R (WL (Congo)) v Secretary of State for the Home Department** [2012] 1 AC 245 [26] that they were entitled to rely on the principle that a public body is obliged to abide by its published policy unless there is good reason to depart from it. Per Lord Dyson JSC, this was *"a basic public law right"* and, the claimants argued, *"expressed in this way, this claim does not offend the principles set out in* ***Rayner's case*** *because the claimants are not seeking to enforce ECAT, but instead are requiring the SSHD to abide by her current policy unless there are good reasons to depart from it."* .

iii) At [61] Sir Stephen accepted this argument, adding that: *"Assuming for a moment that the Government adopts a policy based wholly or partially on an unimplemented treaty, I do not see any good reason why this approach cannot apply just because the policy replicates what appears in the unimplemented treaty. In other words, Lord Dyson JSCs principle could apply to a policy which is identical to that in an unimplemented treaty, which has a different source from the unimplemented treaty, namely the practice which the executive has propounded in, for example, formal guidance."* .

iv) He went on to say that: *"That raises the next question, which is whether the policy of the SSHD has been to incorporate or to adopt as her policy the entire ECAT or article 12 of it and, if so, for what purposes."* [61].

v) At [65] Sir Stephen held that it was the policy of the Defendant to apply Article 12 ECAT when considering applications for discretionary leave to remain from those who are accepted to be victims of trafficking.

vi) He went on, at [66] to reiterate that:

> *"The statements in* ***Rayner's case*** *[1990] 2 AC 418 do not... preclude the claimants from relying on the guidance which specifically adopts ECAT or parts of it where it has been accepted as the policy of the SSHD in the guidance."*

25. It will be noted that Sir Stephen's decision in **Galdikas** was entirely consistent with the approach in **Atamewan**. He recognised a distinction between direct reliance on the provisions of an international treaty as the source of the relevant obligations and reliance on a stated policy that decisions will be taken in accordance with the relevant articles of an international treaty. His approach also involved the application of well-established public law principles as to the effect of published policies. I have very little doubt that Mr Eadie had precisely the same reasoning in mind when he made his concession of law in **Atamewan** and so did the Divisional Court when it accepted that concession and agreed with his submission that international treaties could not be relied on directly to fill lacunae in stated policies. And Sir Stephen recognised that, subject to

any concession, it would be a matter for the court to determine, as a matter of construction, whether the policy document did indeed adopt the relevant treaty article and/or commit to making the relevant decisions in accordance with the terms of that article.

R (PK (Ghana)) v Secretary of State for the Home Department [2018] 1 WLR 3955

26. In **PK (Ghana)** it was argued by the claimant that the Defendant's then guidance as to when competent authorities should grant discretionary leave to victims of trafficking – set out in *"Victims of human trafficking – competent authority guidance"* Version 1 - was consistent with Article 14(1)(a) ECAT. The guidance said that this might be appropriate *"if their circumstances are compelling"* and the need to finish a course of medical treatment was given as an example of where this might be the case. A link to the then discretionary leave policy, which also applied a compelling personal circumstances approach was embedded. At first instance (before Picken J [2016] 4 WLR 25) it was common ground that the Guidance:

> *"was intended to, and purported to, give effect to [ECAT]; and that, if it failed to give effect to [ECAT], then that would be a justiciable error of law."*

27. Before the Court of Appeal, at [34], Hickinbottom LJ (with whom Singh and Patten LJJ agreed) recorded that:

> *"Before us, after some consideration and after taking instructions, Miss Bretherton, who also appeared for the Secretary of State below, confirmed that concession.".*

28. **Atamewan** was cited in argument and the concession in **PK (Ghana)** was consistent with the concession in that case. I also note that two things were conceded by the Defendant in **PK (Ghana)**:

    i) first, that as a matter of fact the policy of the government was to make decisions as to discretionary leave in accordance with Article 14 ECAT, and that this was reflected in the documents under consideration including the discretionary leave policy; and

    ii) second, that as a matter of law failure to give effect to Article 14 would therefore be a justiciable error of law.

29. Given these concessions, Hickinbotton LJ went on to note, at [39], that the narrow issue before the Court of Appeal was therefore whether *"in adopting the compelling circumstances criterion, the Secretary of State's guidance fails properly to reflect Article 14(1)(a) of [ECAT]"*. He then considered the correct interpretation of Article 14(1)(a) and concluded that the Defendant's guidance was not consistent with it. I will return to this aspect of the decision in **PK (Ghana)** below.

R (JP and BS) v Secretary of State for the Home Department [2020] 1 WLR 918

30. In the **JP** case, the issue specifically related to the compatibility of the terms of the MSL Policy (i.e. Version 2 of the policy which is in issue in the present case), and in

particular the scheduling rule, with Articles 12 and 14 ECAT. At [12] Murray J referred to paragraph [34] of **PK (Ghana)** and noted that:

> *"In her detailed grounds of defence for each claim in this case, the Secretary of State stated that "the published policies came into being to give effect to [articles 10, 12 and 14] of ECAT", which the claimants say is consistent with the Secretary of State's concession on justiciability of ECAT in **PK (Ghana)**. The Secretary of State's position in this case is that she is constrained to follow this concession, but she reserves her position for the future. In any event, she maintains that her published policies are consistent with the United Kingdom's obligations under ECAT and that they give proper effect to those obligations."* (emphasis added)

31. Again, I note that the concession in **JP** was two-fold. First, it was positively pleaded that as a matter of fact the MSL Policy gave effect to Article 14 ECAT, amongst others. Second, the legal proposition conceded in **PK (Ghana)** was conceded again on the basis that the Defendant was constrained to do so, presumably because she accepted that that decision was binding.

Other cases which consider the effect of ECAT

32. Mr Buttler identified other cases in which the point was made and/or conceded that, in the light of the Defendant's policy of giving effect to ECAT, failure to give effect to ECAT is a justiciable error of law. It is not necessary to examine the details of these decisions here, but see:

    i) **R (FM) v Secretary of State for the Home Department** [2015] EWHC 844 (Admin) where, at [11(i)], Mr Philip Mott QC, sitting as a Deputy High Court judge, noted as established principles, even before **Galdikas** and **PK (Ghana)**, both the factual and the legal concessions referred to above. He also reflected the Defendant's policy commitment to make decisions in accordance with ECAT when he said:

    > *"Insofar as the Guidance purported to give effect to the terms of the CAT and failed to do so, that would be a justiciable error of law. In general, it is not disputed, as I found in the case of **R (E) v SSHD** [2012] EWHC 1927, that the Defendant has adopted the CAT in her published Guidance. The exception in **Atamewan** in respect of Article 27 of the CAT no longer applies because of changes in the wording of the Guidance, as set out below, which clearly now purport to give effect to Article 27 of the CAT, as the Defendant accepts."*

    ii) **H v Secretary of State for the Home Department** [2018] EWHC 2192 (Admin) [52] and **K and AM v Secretary of State for the Home Department** [2019] 4 WLR 92 [7], both of which proceeded on the basis that the decision in **PK (Ghana)** is correct.

MS (Pakistan) v Secretary of State for the Home Department [2020] 1 WLR 1373

33. The cases referred to above, and the policy commitment of successive governments to adopt and comply with ECAT and the international legal framework relating to people trafficking more generally, are also reflected in the following passage at [20] of the

judgment of Baroness Hale (with which the other Supreme Court Justices agreed) in **MS (Pakistan)**:

> *"ECAT as such has not been incorporated into UK law. Its obligations have been implemented by a variety of measures. The NRM is designed to fulfil the obligations in articles 10, 12 and 13; immigration rules have been modified in the light of article 14; and various criminal offences are created by the Modern Slavery Act 2015. The NRM does not, however, give private law rights to individuals. There is no right of appeal against an adverse decision or against a failure to provide the expected assistance. The only remedy lies in judicial review. However, the Secretary of State has consistently accepted that the NRM should comply with ECAT. In* ***R (Atamewan) v Secretary of State for the Home Department*** *[2014] 1WLR 1959, para 55, it was accepted that it would be a justiciable error of law if the NRM Guidance did not accurately reflect the requirements of ECAT and a decision based on that error would accordingly be unlawful. The same was common ground in* ***R (PK (Ghana)) v Secretary of State for the Home Department*** *[2018] 1WLR 3955."*

34. Although the issue was of a different nature in **MS**, it is of note that in this passage the Supreme Court did not question the concession in earlier cases that where a measure or guidance is intended to implement ECAT it will be a justiciable error of law for it to do so incorrectly.

R (EOG) v Secretary of State for the Home Department [2020] EWHC 3310 (Admin)

35. Finally, in the **EOG** case Mostyn J also relied on **PK (Ghana)** and [20] **MS (Pakistan)**. In view of the fact that it is not necessary for me to do so, and **EOG** is currently before the Court of Appeal, with respect to him I do not propose to comment or rely on Mostyn J's summary of the position at [2] and [3] in coming to my decision. My references to "the **PK (Ghana)** line of cases" below therefore do not include **EOG** or, indeed, **MS (Pakistan)** given that the latter was not concerned with the issue in the present case.

Provisional conclusion on the justiciability issue

36. Subject to the arguments about **SC**, I would have little hesitation in holding that **Galdikas** was correctly decided for the reasons which Sir Stephen Silber gave and that the concessions of law as to the question of justiciability, referred to above, were correctly made by the Defendant and accepted by the courts in those cases. The critical point in the **PK (Ghana)** line of cases is that the source of the public law obligation contended for was the declared policy of the Defendant rather than ECAT itself. In each case it was decided or conceded that, as a matter of fact - this was in fact the Defendant's policy - and construction - this is what her policy documents said - the Defendant had committed to making the relevant decision in accordance with the requirements of the relevant article(s) of the ECAT. It was therefore permissible for the court, applying conventional public law principles, to consider what the requirements of those articles were with a view to deciding whether the policy correctly stated their effect and whether a given decision, taken in accordance with that policy, was lawful. This did not involve direct enforcement of an unincorporated treaty as the treaty was not the source of the obligation contended for. Nor did it involve the filling of lacunae, as Mr Tam submitted, given that the claimants in those cases relied on what was said in the policy documents.

37. At the same time the other point made by Mr Eadie, and accepted by the Divisional Court in**Atamewan** , that an international treaty cannot be used to fill a lacuna in a statement of policy, is important. This is an example of direct reliance on the international treaty, which is not permitted. I therefore also agree with Sir Stephen Silber that for the Claimant to succeed in the present case she must also show that, on its true construction, the MSL Policy was intended to commit the Defendant to making decisions as to MSL in accordance with Article 14(1)(a), ECAT before going on to show that the Defendant has done so incorrectly and that the decision in the Claimant's case is therefore in breach of the MSL Policy and unlawful.

R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26, [2021] 3 WLR 428

38. The issue in **SC** was, broadly, whether the so-called "two-child limit" on child tax credit for a child born on or after 6 April 2017, under section 9 of the Tax Credits Act 2002 as amended by section 13 of the Welfare Reform and Work Act 2016, was compatible with various articles of the ECHR including Article 14. The claims were brought by adult and child claimants. In relation to the Article 14 claims, a seven Justice Supreme Court held, amongst other things, that there was a prima facie case of indirect discrimination against the child claimants but that the Court would not go behind the view of Parliament that the two child limit was a proportionate means of achieving a legitimate aim.

39. In addressing the "justification" issue under Article 14 ECHR, Lord Reed, with whom the rest of the Court agreed, said that where the issue concerns a child, the best interests of the child would be a relevant consideration but that it was not appropriate for the court to apply the United Nations Convention on the Rights of the Child ("UNCRC") in reaching its determination, or to make a decision as to whether, in adopting the two-child limit, the United Kingdom had complied with its obligations under that Convention, given the fundamental principle of constitutional law that an unincorporated treaty does not form part of the law of the United Kingdom. Nor was there any basis in the case law of the ECHR for any departure from that rule where the claim is brought under the Human Rights Act 1998.

40. At [73], Lord Reed identified three issues of some importance which were raised by the case and Mr Tam relies on what he said about the first of these, namely:

> *".... whether it is appropriate for our domestic courts to determine whether the United Kingdom has violated its obligations under unincorporated international law when considering whether a difference in treatment is justified under the Human Rights Act."*

41. At [74] Lord Reed then noted that:

> *"According to the statement of facts and issues agreed between the parties, the issue which has to be determined, in relation to the question of justification, is "whether the UK's obligations under the UNCRC have been breached in the present case, and if so whether in the circumstances the two child limit is compatible with Convention rights". The primary question for the court to decide is therefore supposed to be whether, by introducing the limitation on entitlement to child tax credit, the United Kingdom has breached its obligations under the UNCRC."*

42. At [75], he said that this approach was mistaken for reasons which he went on to explain. But essentially this because the UNCRC is an unincorporated international treaty and the approach suggested in framing the issue in this way was therefore contrary to the **Rayner** principles, which principles had been endorsed by an 11 Justice court in **R (Miller) v Secretary of State for Exiting the European Union** [2018] AC 61.

43. Lord Reed then considered whether the Human Rights Act 1998 had given domestic legal effect to unincorporated treaties and noted that clearly it had not. The only treaty to which the 1998 Act gives effect is the ECHR. He then noted that a misunderstanding appeared to have arisen from the fact that the European Court of Human Rights frequently has regard to other international treaties when interpreting the ECHR. It does so for a number of reasons including, so far as possible, to achieve a consistency of approach as between international treaties and to reflect any consensus on a given issue insofar as it is evidenced by Council of Europe texts and other materials [80]. But when it does so the European Court is not treating those treaties as if they were directly incorporated into the ECHR itself so as to impose specific obligations on contracting states.

> *"Nor does [the Court] refer to international materials for the purpose of determining whether contracting states have complied with their obligations under unincorporated international treaties, recognising that it possesses no jurisdiction to make such a determination."* [83].

44. At [84] Lord Reed concluded that:

> "*There is, accordingly, no basis in the case law of the European court, as taken into account under the Human Rights Act, for any departure from the rule that our domestic courts cannot determine whether this country has violated its obligations under unincorporated international treaties."*

45. He then went on to analyse **X v Austria** (2013) 57 EHRR 14, in which the European Court of Human Rights considered the UNCRC in the context of the issue of justification under Article 14 ECHR, but he emphasised that [85]:

> "*The case is an example of the court's treating international instruments as relevant to its application of the Convention, rather than of its directly applying or "passporting" the UNCRC."* (emphasis added)

46. He added, at [86]:

> *"The judgment does not suggest that domestic courts should approach the question of justification by applying the provisions of the UNCRC, or by deciding whether, in adopting the measure in question, the national authorities complied with their obligations under the UNCRC. That approach has, however, been adopted, obiter or in dissenting judgments, in a number of domestic cases."*

47. Lord Reed then considered certain decisions of the Supreme Court, including **Mathieson v Secretary of State for Work and Pensions** [2015] 1 WLR 3250, in which parts of the reasoning came close to treating the question of the compatibility of

a given measure with the UNCRC as determinative of the issue of justification under Article 14 ECHR. He said that such an approach would be wrong and per incuriam:

> *"As I have explained, for a United Kingdom court to determine whether this country is in breach of its obligations under an unincorporated international treaty, and to treat that determination as affecting the existence of rights and obligations under our domestic law, contradicts a fundamental principle of our constitutional law."* [91] (emphasis added)

48. Mr Tam relied on passages from **SC**, including the ones which I have set out at paragraphs [40-41], [44] and [46-47] above, to submit that **SC** decided that it is impermissible to interpret an unincorporated treaty with a view to deciding whether a given approach is consistent with its terms or in breach of them, and/or to treat such a determination as *"affecting"* the existence of rights and obligations. However, with respect, his argument ignored the context for Lord Reed's remarks. Lord Reed was not suggesting that it is never permissible to interpret an international treaty, or to consider whether a given act or decision is consistent with the terms of a treaty, absent legislative incorporation. Nor would it have been consistent with **Rayner** or subsequent cases on the status of international treaties for him to do so. The passages which I have cited above actually show that his point was that the issue for the Court in **SC** was "justification" under Article 14 ECHR, and that there was no basis in law or in fact for equating this issue with the question whether the introduction of the measure in question was or was not consistent with the obligations of the United Kingdom under the UNCRC. Such an approach would give direct effect to an unincorporated treaty and was therefore impermissible.

49. It is also worth noting that **SC** was concerned with the approach to the question of justification under Article 14 ECHR in the case law of the European Court of Human Rights, and the relationship between that issue and the UNCRC. The Supreme Court therefore was not considering the question addressed in the **PK (Ghana)** line of cases as to the compatibility with **Rayner** principles of considering the meaning and effect of an unincorporated treaty where a public body has committed itself in a published policy document to make a given decision in accordance with the terms of that treaty. As I have said, in such a case the source of the alleged obligation is the policy statement rather than the treaty itself: there is a basis for equating the issue of compatibility with the relevant international treaty obligation with the issue in the case. There is no "passporting" and the relevant articles of the treaty are not given direct effect. There therefore does not appear to me to be any inconsistency between the **PK (Ghana)** line of cases and **SC**.

50. Mr Tam also argued at the Hearing that the second **Rayner** principle, that the Royal Prerogative cannot alter the law or create rights and obligations unless incorporated by legislation, is also infringed by the approach in the **PK (Ghana)** line of cases. Incorporation by policy statement will not do. I reject this submission. As Lords Sales and Burnett point out at [3] of their judgment in **A** *"Policies are different from law. They do not create legal rights as such."*. They may, however, be enforceable in the context of judicial review. A policy statement that decisions will be taken in accordance with a given international treaty does not incorporate the treaty into law. It identifies the approach which will be taken to the relevant type of decision subject to there being valid reasons not to do so and/or any change of policy.

51. Insofar as Mr Tam's written submissions were arguing that in **A** and **BF (Eritrea)** the Supreme Court was holding that statements of policy cannot found claims in public law unless they are setting out the position in law (whereas ECAT is not domestic law), their Lordships clearly were not addressing this issue. As Mr Buttler submitted at the Hearing, in the MSL Policy, the Defendant has stated the approach which she will take to exercising her statutory powers to grant or refuse discretionary leave to remain to victims of modern slavery. Conventional public law principles establish that a claimant is entitled to complain that a given decision does not comply with the stated policy of a public body.

Conclusion as to the effect of **SC** on the **PK (Ghana)** line of cases

52. For all of these reasons, then, I do not accept that the decision in **SC** renders the question raised by Ground 1 non justiciable or even casts doubt on the correctness of the principles which underpin the decisions in the **PK (Ghana)** line of cases. I agree with Mr Buttler that **SC** was a straightforward application of the **Rayner** principles in the context of a materially different legal issue to the present one. It is important to bear in mind the constraints which the **Rayner** principles place on the Claimant in advancing Ground 1, and the aspects of **SC** discussed above serve as a useful reminder of these. But, with respect, they do no more than this in the context of the present case.

Precedent

53. Although Mr Buttler did not wish me to decide the **SC** point on the basis of precedent alone, and I have not done so, I regard myself as bound to follow **Galdikas** and **PK (Ghana)** in any event. In relation to **Galdikas**, Mr Tam did not dispute Mr Buttler's submission that I should only depart from Sir Stephen Silber's decision if I was persuaded that he was *"clearly wrong"*: **R v Greater Manchester Coroner ex parte Tal** [1985] QB 67. However, he did not come close to meeting that test.

54. In relation to **PK (Ghana)**, there was no issue before me that the concession of law made by the Defendant was essential to the decision in that case and therefore formed part of the ratio. The question was whether the concession was assumed to be correct in the relevant sense, and therefore was not binding. The principle stated by Browne Wilkinson VC in **re Hetherington** [1990] Ch 1, 10 is well known:

> *"In my judgment the authorities therefore clearly establish that even where a decision of a point of law in a particular sense was essential to an earlier decision of a superior court, but that superior court merely assumed the correctness of the law on a particular issue, a judge in a later case is not bound to hold that the law is decided in that sense."* (emphasis added)

55. However, as is also well known, it is open to a court to accept a concession of law or reject it and/or to reserve its position as to the correctness of such a concession. I therefore would not lightly accept that a previous court has failed to apply its mind to the correctness or otherwise of a concession particularly where, as here, the concession was expressly made and recorded in the judgment of the previous court. My reluctance to do so is heightened in the present case given the Defendant's repeated concessions on one of the central (potential) issues in the cases referred to above and given the distinguished judges who decided **PK (Ghana)**. In **R (Khadim) v Brent London**

Borough Council Housing Benefit Review Board (supra) the Court of Appeal considered the relevant authorities, including **In Re Hetherington**, and held at [33]:

> *"not without some hesitation, that there is a principle stated in general terms that a subsequent court is not bound by a proposition of law assumed by an earlier court that was not the subject of argument before **or** consideration by that court."* (emphasis added)

56. However, at [38] Buxton LJ said:

> *"Like all exceptions to, and modifications of, the strict rule of precedent, this rule must only be applied in the most obvious of cases, and limited with great care. The basis of it is that the proposition in question must have been assumed, and not have been the subject of decision. That condition will almost always only be fulfilled when the point has not been expressly raised before the court **and** there has been no argument upon it....And there may of course be cases, perhaps many cases, where a point has not been the subject of argument, but scrutiny of the judgment indicates that the court's acceptance of the point went beyond mere assumption. Very little is likely to be required to draw that latter conclusion: because a later court will start from the position, encouraged by judicial comity, that its predecessor did indeed address all the matters essential for its decision."* (emphasis added)

57. I do not accept that the Defendant's concession of law in **PK (Ghana)** was merely assumed by the Court of Appeal to be correct and was not the subject of consideration by the Court. As I have pointed out, the implications of the **Rayner** principles were considered by both Mr Eadie and the Court in **Atamewan** and this decision was cited in argument in **PK (Ghana)**. It is also clear that the question whether the point was conceded was expressly addressed before the Court of Appeal and instructions on the matter were taken before the concession was confirmed. I am confident that if the Court had doubts about the correctness of the concession it would have said so.

58. Given my views about **SC**, expressed above, the issue of per incuriam does not arise because there is no inconsistency between the decision in **SC** and the **PK (Ghana)** line of decisions. Mr Tam was, in effect, using **SC** as a "hook" to run the per incuriam argument but, in truth, the relevant aspects of the decision in **SC** did no more than apply the well-established **Rayner** principles of which the Court was well aware in **Atamewan**, **Galdikas** and, no doubt, **PK (Ghana)**. There is no question of these decisions having been taken in ignorance or forgetfulness of any relevant principles of law or, more broadly, through lack of care. And, even assuming that the doctrine of per incuriam may be relied on where a decision is made subsequently, Mr Tam did not persuade me that had the courts in the **PK (Ghana)** line of cases been referred to **SC** they *"must"* have reached a different decision (**Duke v Reliance Systems Limited** [1988] QB 108, 113) or that their decisions were *"demonstrably wrong"* in the light of **SC** (**Morelle v Wakeling** [1955] 2 QB 379, 406). In truth, Mr Tam needed to establish that **SC** had, in effect, overruled the **PK (Ghana)** line of cases and he did not do so.

59. For all of these reasons, then, I consider that the question whether the Defendant's decision was compatible with Article 14(1)(a) ECAT is potentially justiciable provided that the Defendant's stated policy was to make decisions in relation to discretionary

leave in accordance with the requirements of that provision. It is to this question that I now turn.

Was it the Defendant's stated policy to make decisions as to discretionary leave in accordance with Article 14(1)(a) ECAT?

60. As I have noted, the general proposition that the policy of the government is to comply with its obligations under ECAT was never in doubt in the **PK (Ghana)** line of cases. Indeed, Mr Tam emphasised at the beginning of his submissions that this remains the policy of the Defendant, albeit this policy is achieved by a range of measures.

61. Following on from this, in the **PK (Ghana)** line of cases, with the exception of **Galdikas**, it was conceded by the Defendant that, as a matter of fact the policy statements under consideration were intended, and purported, to commit the Defendant to make the relevant decisions in accordance with ECAT. Indeed, specifically in relation to Article 14(1)(a) and the MSL Policy, the point was conceded in **PK (Ghana)** and positively pleaded and relied on in the **JP** case. Nor was this point put in issue in the Defendant's pleaded case in the present proceedings. Indeed, whilst the Defendant's skeleton argument took the **SC** point, paragraph 3.2 stated:

> *"ECAT is a multilateral international treaty that has not been incorporated into the United Kingdom's domestic law. ECAT obligations are given effect by the SSHD's policy and not by domestic legislation – see* ***MS (Pakistan) v Home Secretary*** *[2020] UKSC 9, [2020] 1 WLR 1373 at [20]"*

62. It therefore was not apparent that the Defendant was withdrawing the concession which it had made in previous cases, which concession is expressly noted at **MS (Pakistan)** [20], as I have pointed out above. But it emerged in Mr Tam's oral submissions that he was indeed submitting that the MSL Policy did not in fact state that it was giving effect to Article 14 ECAT. This issue therefore arises for determination.

63. As noted above, the version of the MSL Policy which was in force at the time of the decision to postpone the determination of the Claimant's application for MSL was Version 2. In **JP** Murray J held that it was in principle permissible to postpone decisions on MSL until the outcome of the applicant's asylum application. However, the fact that there were, in practice, substantial delays between the making of a positive conclusive grounds decision and the determination of the victim's application for asylum/protection gave rise to a material risk that, in a significant number of cases, victims would lose basic trafficking support and be reduced for a considerable period of time to support from the National Asylum Support Service, the level of which was not consistent with the United Kingdom's obligations under Articles 12(1) and (2) and 14(1) ECAT.

64. In response to the **JP** decision, the MSL Policy was amended to modify the scheduling rule, although not until 9 October 2020 (Version 3). The relevant version at the time of the Decision under challenge in these proceedings is therefore Version 2. The Policy was amended again on 10 December 2020 (Version 4).

65. Mr Tam accepted that, in addressing the question whether the MSL Policy adopted Article 14(1)(a), I should apply a domestic law, objective, approach to interpretation. I should therefore construe the words of the Policy in context and from the stand point

of the reasonable reader of the document, whether that be a caseworker who was required to determine an application for MSL or a member of the public who wished to understand the approach which the Defendant would adopt to her application.

66. For reasons which will become apparent, in my view a relevant part of the context is what the Court of Appeal said about the interpretation of Article 14(1)(a) ECAT in **PK (Ghana)**. At [44] Hickinbottom LJ said:

> *"Necessary", in this context, means required to achieve a desired purpose, effect or result…. In article 14(1)(a), the purpose is not express: but the provision is deep within the Trafficking Convention which (as Miss Bretherton rightly accepted) must be construed purposively. Thus, "necessary" in article 14(1)(a) has to be seen through the prism of the objectives of the Convention: and the competent authority has to consider whether the person staying in the country is necessary in the light of, and with a view to achieving, those objectives."* (emphasis added)

67. At [50] he held that:

> *"Article 14(1)(a) of the Convention requires the identification of the individual's relevant personal circumstances, and then an assessment by the competent authority of whether, as a result of those circumstances and in pursuance of the objectives of the Convention, it is necessary to allow that person to remain in the United Kingdom. Leaving aside the Convention purposes of facilitating the investigation of criminal proceedings and/or a civil claim by the victim…., the only relevant objective of the Convention is the protection and assistance of victims of trafficking. As I have described, this is one of the primary objectives of the Convention, as expressed in the Preamble and article 1…. Whether the claimant's personal circumstances were such as to make it necessary for him to stay in the United Kingdom could only be assessed by reference to that objective."* (emphasis added)

68. The problem with the relevant policy was stated at [51] as follows:

> *"…the Secretary of State's guidance is entirely silent as to the purpose for which it must be necessary for the victim to remain. That is understandable if the Secretary of State shares the view set out in Miss Bretherton's submissions that article 14(1)(a) gives the competent authority an open-ended discretion. However, in my view it is fatal if, as I consider, the provision does not give an open-ended discretion, but rather requires an assessment of whether it is necessary for the purposes of protection and assistance of the victim of trafficking (or one of the other objectives of the Convention) to allow him to remain in the country. In this case, the Secretary of State's guidance neither requires nor prompts any such engagement. As a result, in my view, it does not reflect the requirements of article 14(1)(a) and is unlawful."* (emphasis added)

69. Turning to the text of Version 2 of the MSL Policy, the purpose of the guidance is explained in its first paragraph as follows:

> *"This guidance explains the circumstances in which it may be appropriate to grant discretionary leave to remain (DL) to individuals confirmed as victims of modern slavery by the National Referral Mechanism (NRM), and the considerations that*

must be made before such a decision is made. It also deals with extending DL or curtailing leave as necessary. The term "modern slavery" includes human trafficking, slavery, servitude and forced or compulsory labour."

70. On the same page there is then a section headed ***"Changes from last version of this guidance"*** which states:

"Clarification that section 4 of the Human Trafficking and Exploitation (Scotland) Act 2015 replicates section 1 of the Modern Slavery Act 2015 (England and Wales) and section 1 of the Northern Ireland legislation."

71. And there is then a section headed ***"Related external links"*** which contains the following links:

"PK (Ghana) v SSHD

Council of Europe Convention on action against trafficking in human beings"

72. The section entitled ***"When to consider a grant of discretionary leave"*** identifies three categories of case where discretionary leave may be considered in relation to a victim of modern slavery and they are not eligible for any other form of leave. These categories are:

- *"leave is necessary owing to personal circumstances*
- *leave is necessary to pursue compensation*
- *victims who are helping police with their enquiries"*

73. Under the heading ***"Leave is necessary owing to personal circumstances"*** the following passage then appears:

"When deciding whether a grant of leave is necessary under this criterion an individualised human rights and children safeguarding legislation - based approach should be adopted. <u>The aim should be to protect and assist the victim and to safeguard their human rights</u>. In seeking to do so decision makers should primarily:

• assess whether a grant of leave to a recognised victim is <u>necessary for the UK to meet its objective under the Trafficking Convention - to provide protection and assistance to that victim, owing to their personal situation</u>" (emphasis added)

74. Examples are then given of the circumstances in which MSL may be appropriate and there is then a discussion of cases where the application for MSL is based on the need for medical assistance in this country. The relevant passage includes the following:

"In terms of needing to stay in the UK to have such treatment you may wish to consider that <u>the UK's international obligations do not extend to a requirement that treatment must be provided by specialists in trafficking</u>, or that it be targeted towards one aspect of an individual's needs (the consequences of trafficking) as opposed to his or her overall psychological needs <u>as set out in the case of EM v SSHD</u>...." (emphasis added)

75. It seems to me to be inescapable that the *"Leave is necessary owing to personal circumstances"* category in the Version 2 of the MSL Policy is intended to reflect Article 14(1)(a) ECAT, although I discuss whether it does so accurately below. Moreover, the passage which explains how this issue is to be approached was clearly intended to reflect Article 1(b) ECAT which states that one of the purposes of the Convention is:

> *"to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution"*

76. It also reflects what Hickinbottom LJ said about Article 14(1)(a) at [44] and [50] of his judgment in **PK (Ghana)**, cited above, and it seeks to address the criticism made at [51]. This is apparent from the words of the passage, which echo the words of Hickinbottom LJ, but it is also apparent from the provision of a link to **PK (Ghana)** itself. The reasonable reader would, in my view, conclude from this, and from the inclusion of a link to ECAT, that the Defendant's policy was to comply with the law relating to people trafficking (whether international or domestic) and that these materials were provided as a reference point in the event that a case worker wished to look at the relevant sources in more detail. The impression that the Policy is intended to ensure that decisions are taken in accordance with the law relating to people trafficking, and to assist decision-makers in doing so, is also reinforced by the references to the United Kingdom meeting its objective under the Trafficking Convention and to relevant legislation and international obligations which I have highlighted at paragraphs [70] and [73]-[74], above.

77. These points also need to be seen in the wider context of the fact that it is indeed the Defendant's policy to comply with ECAT and other international law relating to people trafficking, as Mr Tam confirmed. Pursuant to this policy other guidance has been issued which, in the **PK (Ghana)** line of cases, the Defendant accepted and indeed contended was seeking to give effect to those obligations and did give effect to them. The Defendant has also issued statutory guidance pursuant to section 49, Modern Slavery Act 2015, dated March 2020, which is clearly intended to reflect domestic and international law, including ECAT, and which refers the reader to the MSL Policy for *"full guidance"* in relation to the issue of support available for adult victims of modern slavery (see paragraph 15.156), as its predecessor guidance did. It would therefore be surprising if, exceptionally, the intention was that ECAT did not apply under that particular Policy.

78. The factual concession made in **PK (Ghana)** and pleaded in **JP** is therefore unsurprising and, in my view, correct. In coming to this view, I have considered Mr Tam's submission that it would require a very clear commitment or, indeed, explicit reference to Article 14 ECAT for Mr Buttler's argument to run. I am not sure why this is so. It seems to me that the question is one of interpretation in respect of which the approach is as set out at paragraph [65], above. There was an interesting discussion at the Hearing as to whether it made a difference if the treaty was written out in full in the form of a policy document, at one extreme, or simply stated that the policy of the government was that decisions as to discretionary leave would be taken in accordance with ECAT, on the other. My view is that the form does not matter. What matters is the

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

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.

80. I therefore turn to the question of the effect of Article 14(1)(a) ECAT before considering whether the Decision in the present case was taken in accordance with its terms.

The correct interpretation of Article 14(1)(a) ECAT

81. It was common ground that in interpreting ECAT itself I should apply the approach stated in **Nautical Challenge Ltd v Evergreen Marine (UK) Ltd** [2021] 1WLR 1436 where, at [38], Lords Briggs and Hamblen JJSC said that international conventions should be interpreted by reference to *"broad and general principles of construction rather than any narrower domestic law principles"*:

> *"39 Such general principles include the general rule of interpretation set out in article 31.1 of the Vienna Convention on the Law of Treaties 1969, which provides that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

82. Mr Buttler submits that Article 14(1)(a) *"mandates"* the grant of MSL in the Claimant's case. He points out that the wording of Article 14(1) is mandatory. A residence permit *"shall"* be issued where the case falls within either or both of the categories identified in limbs (a) and (b). Both limbs raise the question whether the "*stay"* is necessary for the specified reason or purpose. If it is, the permit is required to be issued. As a matter of language, Article 14(1) does not require consideration of whether *the issue of the permit* is necessary and it is therefore nothing to the point to argue, as Mr Tam does, that such a permit is unnecessary where the victim of trafficking will not be removed in any event, as is the effect of sections 77 and 78 of the Nationality, Asylum and Immigration Act 2002.

83. On Mr Buttler's case, the only question is whether a need to stay in order to pursue a claim for asylum/protection falls within the phrase *"necessary owing to their personal situation"*. He submits that this will be the case where the applicant for asylum is a victim of people trafficking and their asylum/protection claim is based on fear of re-trafficking if they were to be returned to their country of origin. This, he says, is consistent with the purposive approach which was recognised to be required at [44] and

[50]-[51] of **PK (Ghana)** namely to promote the objectives of ECAT and, in particular, the protection and assistance of victims of trafficking.

84. Mr Buttler's argument that his construction of Article 14(1)(a) is consistent with the aims of ECAT is also based on the contrast, noted above, between the benefits and advantages available to the victim of trafficking if MSL is granted and what is available to them if it is not. He emphasises the delays in processing asylum applications and points out that it took 2 years and 3 months for a decision to be made on the Claimant's application and will, his solicitor estimates, take until at least October 2022 to conclude the appeals process. He also relies on evidence which, he says, shows that the additional security in terms of immigration status which is afforded by the grant of MSL is beneficial to the mental health of the victim. And he relies on evidence that access to the labour market, education and training is also beneficial to the well-being of victims of trafficking and may assist with their recovery and enable them to engage fully with, and benefit from, such therapeutic care as is available. He relies for this last point on evidence from Professor Katona which, he says, was accepted in Murray J in **JP** at [81] and [138] in holding that the scheduling rule was not compatible with Article 14 ECAT.

85. Mr Buttler also seeks to garner support from the Explanatory Memorandum to ECAT, the decision in the **EOG** case and a broader survey of Chapter III ECAT including Article 16:

i) He points out that in paragraph 183 of the Explanatory Memorandum to ECAT it is suggested that the test under Article 14(1)(a) is whether *"the victim's personal circumstances [are] such that it would be unreasonable to compel them to leave the national territory"* and he argues that the Defendant effectively accepts that this is the position where a claim for asylum has been made given the statutory bar on removal under sections 77 and 78 of the 2002 Act. He also points out that paragraph 184 of the Explanatory Memorandum states that *"The personal situation requirement takes in a range of situations, depending on whether it is the victim's safety, state of health, family situation or some other factor which has to be taken into account."*. Thus, he submits, a broad and purposive approach is required.

ii) He says that although he does not need to rely on the decision in the **EOG** case (supra), this bolsters his argument. In **EOG** Mostyn J held that, where a positive reasonable grounds decision has been made, the person should be given interim leave to remain pending the outcome of the conclusive grounds determination albeit on such terms, to be determined by the Defendant, as are appropriate both to their existing leave positions and to the likely delay that they will face [48]. Mr Buttler's submission was, in effect, that the position where a positive conclusive grounds decision has been made is *a fortiori*.

iii) He relies on various points about the text of Articles 10-14 ECAT to which I will return. In relation to Article 16, he argues that this contemplates that the person will be returned to the country of which they are a citizen and/or where they have a right of permanent residence subject to safeguards being in place. The scheme of ECAT does not contemplate a halfway house, he argues, between a victim of trafficking being lawfully in the receiving country and them being removed, whereas the effect of sections 77 and 78 of the 2002 Act, without leave to remain, is just such a halfway house.

86. Mr Tam argues that there is nothing in Article 14 ECAT to suggest that a stay in order to pursue a claim for asylum based on fear of re-trafficking is *"necessary"* so as to require the issuing of a residence permit. Mr Buttler's argument is that the fact that such a claim is being pursued is, of itself, sufficient to require a permit to be issued and the argument assumes that there may be no other reason for them to remain in the United Kingdom, such as for the purposes of trauma related treatment. The argument therefore requires such a permit to be issued even where the applicant is in materially the same position as any other asylum seeker save for their history of being trafficked. Mr Buttler's argument therefore seeks to put victims of trafficking into a more privileged position than other asylum seekers who are awaiting the outcome of their applications for asylum. Even in the case of victims of trafficking who rely on the fact that they have been trafficked, and the risk of re-trafficking, argued Mr Tam, there is no warrant for treating them differently to other asylum seekers who may have suffered at least as much, if not more, albeit in ways not amounting to trafficking.

87. Mr Tam argued that Mr Buttler's interpretation is based on an inappropriately expansive and technical analysis of Article 14 ECAT and he accused Mr Buttler of *"parsing sub-paragraphs (a) and (b) so as to disengage the adjective 'necessary' from the primary obligation to issue a residence permit"*. He submitted that, applying the approach required by Article 31.1 of the Vienna Convention, the clear intention of Article 14(1) is to require the issuing of a residence permit *"in order to facilitate a stay which is necessary for one of the reasons set out in sub-paragraphs (a) or (b) <u>but will be possible only if a residence permit is issued</u>."* A residence permit therefore is not required where the victim has statutory protection from removal, as is the case here. This is consistent with the aims of ECAT and it ensures that victims of people trafficking are not put in a better position than other asylum seekers when there is no substantive reason to do so and all asylum seekers are seeking the same outcome, namely leave to remain on that basis.

88. Mr Tam also submitted that:

i) The Explanatory Memorandum does not support an argument that a residence permit should be issued to a person who is irremovable in any event and/or simply on the basis that they are making a people trafficking related application for asylum;

ii) **<u>EOG</u>** does not assist given that Mostyn J was considering a different issue and did not in fact hold that a full Article 14 compliant residence permit should be issued to potential victims of trafficking. Nor did the claimant in **<u>EOG</u>** have statutory protection from removal, although she was not removable as a matter of policy. And, in any event, **<u>EOG</u>** was based on an incorrect interpretation of ECAT, as well as being per incuriam in that Mostyn J purported to fill a *"lacuna"* in existing policy [48], and therefore contrary to **<u>SC</u>**.

iii) Article 16 ECAT does not contemplate a binary distinction between being lawfully in the United Kingdom and being removed and, in any event, Vietnam is not party to ECAT. Article 16 therefore has no relevance.

89. On balance, I prefer Mr Buttler's interpretation of Article 14 ECAT, which is based on an ordinary reading of the text of the provision and, in my view, consistent with its purpose. The reality of Mr Tam's argument on interpretation is that Article 14(1) should

be read as if it says that the issuing of the *residence permit* must be necessary, whereas the language of the provision clearly requires consideration of whether *the stay* is necessary in which case the permit must be issued. Indeed, the requirement to consider whether *"their stay is necessary"* leaves room for it to be the case that the victim is staying in any event. The provision then asks whether the stay is necessary for a particular reason or purpose, in which case a residence permit, with attendant benefits and advantages, is required to be issued. The language does not appear to regard the residence permit as solely for the purpose of facilitating a stay which would not otherwise be possible, although this may be an important function of such a permit. Rather, the point of the residence permit is at least in part to trigger additional advantages, as will be discussed below.

90. I do not consider that applying the language of Article 14 is an overly technical approach, or inconsistent with the approach required by the Vienna Convention. Moreover, the approach suggested by the language is consistent with the aims of ECAT including the aim of protecting and assisting the victims of trafficking. Mr Tam's suggested interpretation of Article 14 is significantly less likely to further those aims given that it has the consequence of reducing the likelihood that a residence permit will be issued, with the beneficial consequences to which Mr Buttler refers.

91. Indeed, the effect of Mr Tam's argument is that ECAT contemplates that provided that a signatory state has a policy of not removing victims of trafficking, or perhaps a law to this effect, they never need issue residence permits pursuant to Article 14. In the context of the United Kingdom, asylum seekers who relied on fear of re-trafficking would rarely, if ever, be eligible for MSL because such leave would not be necessary to facilitate their stay given sections 77 and 78 of the 2002 Act. And this position would hold good under Article 14 however powerful their case based on other personal circumstances, such as the need for medical or other assistance for reasons related to their experiences of being trafficked. (I appreciate that, in practice, in the United Kingdom they would have access to healthcare in any event, but the point holds good for the purposes of interpreting Article 14, which is not country specific). Mr Tam's argument would also hold good in a case where the victim's stay was *"necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings"* (i.e. under limb (b) of Article 14(1) as well). On his approach, the fact that such a person had made a claim for asylum would disentitle them from a residence permit pursuant to Article 14(1)(b).

92. Mr Tam did not put forward specific arguments as to the meaning of *"is necessary owing to their personal situation"* if that phrase is applicable to the stay, or specifically submit that a stay which was necessary to pursue an asylum/protection claim based on the fear of re-trafficking on returning the country from which the victim was trafficked cannot fall within this phrase. Nor did he place reliance, in this connection, on the fact that one of the findings in the Decision letter is that there would not be significant risk of the Claimant being re-trafficked or subjected to other trafficking related harm if she were to be returned to Vietnam. I accept Mr Buttler's submission that the fact that a victim is pursuing an asylum/protection claim based on the fear of re-trafficking may be an aspect of the victim's personal situation for the relevant purposes given that this interpretation would be in accordance with the aims of ECAT, including to protect people from trafficking or the risk of trafficking and to assist victims more generally. Paragraph 184 of the Explanatory Memorandum also suggests that the personal

situation requirement has a broad application. Indeed, I note that the MSL Policy includes, as examples of the personal situation of the victim, the risk of re-trafficking or other harm or ill treatment from their traffickers if they were to return. This seems to me to be consistent with the broad meaning which should be given to *"personal situation"* applying the approach stated in **PK (Ghana)**, and with the proposition that the fact that a person is seeking to establish a right to asylum/protection on this basis is part of their *"personal situation"* for these purposes.

93. I also agree with Mr Buttler that paragraph 183 of the Explanatory Memorandum tends to support the view that the broad intention of Article 14(1)(a) is to require that a residence permit be issued to confirmed victims of trafficking when it would be unreasonable to compel them to leave the relevant territory, and I accept it is implicit in the fact that Parliament has accepted that a person should not be removed whilst their asylum/protection claim is outstanding, that a stay for this purpose is generally necessary. That would have been my view in any event. It follows from this that a stay in order to pursue a claim for asylum based on the fear of being re-trafficked may be *necessary owing to the victim's personal situation*.

94. In addition to these points, reading Articles 10, 12 and 14 ECAT together it seems to me to be clear that ECAT draws a distinction between those who merely may not be removed and those who are lawfully here. This distinction is important because it means that Article 14(1) advisedly requires the issuing of a residence permit where a victim qualifies under limbs (a) and/or (b), and it contemplates that a recognised victim of trafficking who needs to stay for one of these specified purposes will have greater advantages than would otherwise be the case. If their stay is necessary for the relevant purposes it therefore is not sufficient merely to refrain from removing them, and nor is it permissible to withhold the advantages which would otherwise accrue to them if they were lawfully here. If that is so, the fact that the focus of Article 14(1)(a) and (b) is on whether the stay is necessary, rather than whether the issuing of a permit is necessary, is consistent with the scheme of the Convention as well as the words of Article 14 itself.

95. Thus, Article 10(2), which is concerned with the identification of victims, provides that:

> *"Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2."* (emphasis added)

96. Article 12 provides, so far as material that:

> *"**Article 12 – Assistance to victims***
>
> *1 Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:*

> *a standard of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;*
>
> *b access to emergency medical treatment;*
>
> *c translation and interpretation services, when appropriate;*
>
> *d counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;*
>
> *e assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;*
>
> *f access to education for children.*
>
> *2 Each Party shall take due account of the victim's safety and protection needs.*
>
> *3 In addition, each Party shall provide necessary medical or other assistance <u>to victims lawfully resident within its territory</u> who do not have adequate resources and need such help.*
>
> *4 Each Party shall adopt the rules under which victims <u>lawfully resident within its territory</u> shall be authorised to have access to the labour market, to vocational training and education.*" (emphasis added)

97. *"Victim"* is defined by Article 4(e) as follows:

> *"Victim" shall mean any natural person who is subject to trafficking in human beings as defined in this article."*

98. As noted above, Article 14(1) requires the issuing of a residence permit to victims in two specified situations. Articles 14(2)-(5) then contain further provisions relating to such residence permits.

99. It is thus apparent that ECAT maintains a distinction between being lawfully here and merely not being liable to removal. The primary reason for this distinction is to determine whether the person should be provided with the benefits and advantages specified in Article 12(1)-(4) or limited to the benefits referred to in Articles 12(1) and (2). Lawful residence may be conferred by the issuing of a residence permit, as required by Article 14, which is concerned with facilitating access to Article 12(1)-(4) benefits/advantages where the person's stay is necessary for specified purposes, as well as facilitating the stay itself.

100. Mr Tam's analysis proceeds on the basis that the role of Article 14 ECAT is limited to facilitating a stay and he argues that it has no role where the person is able to stay in any event. But that ignores the fact that the Article also seeks to ensure that the defined subgroups of victims of trafficking who need to stay in the relevant country have access to the additional benefits/advantages in Articles 12(3)-(4).

101. I appreciate that Article 13 is less clear. This provides, so far as material, that

> *"Article 13 – Recovery and reflection period*
>
> *1 Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period, it shall not be possible to enforce any expulsion order against him or her. This provision is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. During this period, the Parties shall authorise the persons concerned to stay in their territory.*
>
> *2 During this period, the persons referred to in paragraph 1 of this Article shall be entitled to the measures contained in Article 12, paragraphs 1 and 2."* (emphasis added)

102. In **EOG**, at [41], Mostyn J took the view that both of the sentences in Article 13(1) which I have highlighted refer to the same period of time – the recovery and reflection period – but it is not necessary for me to decide this point. The important point is that the distinction between being protected from removal and entitled to Article 12(1) and (2) benefits, on the one hand, and being issued with a residence permit which has the effect that the person is lawfully here and entitled to additional benefits/advantages, on the other, is maintained in Article 13.

103. I did not get a great deal of assistance from the other points relied on by Mr Buttler:

    i) I am not sure that **EOG** does logically lead to the conclusion that the position under Article 14 ECAT is *a fortiori*. Mostyn J was considering the position under Article 10.2. Although he held that interim discretionary leave should be granted where a positive reasonable grounds decision has been made, he did not appear to hold that full Article 12(1)-(4) benefits should be conferred at this stage. There is also a tension between aspects of my analysis of the relevant provisions at paragraphs [92]-[100], above, and the analysis of Mostyn J.

    ii) Nor did I find the arguments based on Article 16 compelling. It seems to me that there is room for a middle ground as between staying and being removed where, for example, a victim of trafficking claimed asylum but not on a basis related to that fact, and they had no other trafficking related reason to remain. In such a case, Mr Buttler accepted, they would not be able to establish a case under Article 14 ECAT even if they were protected from removal by sections 77 and 78 of the 2002 Act and therefore remained here.

104. Nor, however, did I accept Mr Tam's argument that Mr Buttler was arguing for an unwarranted privilege or "windfall" for victims of trafficking as compared with other asylum seekers. Mr Buttler was clear that his case was that Article 14(1)(a) is capable of applying to recognised victims of people trafficking where their claim for asylum/protection is based on their status as victims of trafficking: in the present case, where the claim is based on the fear of re-trafficking. It would not apply where the asylum/protection claim had some other basis. To the extent that this puts victims of trafficking in a better position than asylum seekers generally, that it is a function of the

fact that they have the benefit of a protective regime which is specific to them and based on the particular considerations which apply to the problem of people trafficking.

Does the MSL Policy accurately reflect Article 14(1)(a) ECAT?

105. In my view Version 2 of the MSL Policy does not accurately reflect the requirements of Article 14 ECAT, essentially because it reflects Mr Tam's analysis of Article 14, with which I disagree. This is most obvious in the passages which I have quoted at paragraphs [72]-[73], above, which state that the question is whether *"leave is necessary"* for the relevant purpose rather than whether the victim's stay is necessary. There is also no statement that the fact that a victim of people trafficking has made an asylum/protection claim may be a ground for granting discretionary leave, or example to this effect. On the contrary, under Version 2 the scheduling rule was to the opposite effect given that it meant that MSL would not be granted where an asylum/protection claim had been made because the decision as to the grant of MSL would be postponed in such a case. The fact of the asylum/protection claim was therefore a reason to defer an application for MSL rather than to grant it.

106. Under Version 3, the focus on the question whether leave rather than the stay is necessary is maintained, although the fact that the scheduling rule has been modified means that there is scope to grant discretionary leave notwithstanding that there is an outstanding application for asylum/protection. It remains the case that the examples of when the victim's personal situation may be a reason to grant MSL do not include the fact that they have made a claim for asylum/protection, whether based on fear of re-trafficking or otherwise.

107. The scheduling rule has been modified as follows in the section entitled ***"Actions to take following a positive conclusive grounds decision"***:

> *"If the confirmed victim has an outstanding asylum claim and the deferral of a decision on whether to grant discretionary leave would not itself result in the withdrawal of any NRM support which the victim receives and still needs, then the asylum claim should normally be decided before any consideration is given to whether the victim is eligible for DL under this policy."* (emphasis added)

108. The examples of situations in which it may be appropriate to consider granting MSL are explained as follows:

> *"However, in some cases it may nonetheless be appropriate to consider a grant of DL under this policy in advance of consideration of the asylum claim. Each case should be considered carefully on its own facts, but examples of where this would be appropriate include:*
>
> *• It is clear that the victim is assisting the police with enquiries and is therefore likely to qualify for discretionary leave to remain under this policy.*
>
> *• It is clear that the victim is pursuing a claim for compensation and is therefore likely to qualify for discretionary leave to remain under this policy.*
>
> *• It is clear that due to personal circumstances the victim is likely to qualify for discretionary leave to remain under this policy, regardless of the outcome of the*

> *asylum of humanitarian protection claim. For example, there is strong evidence that the victim has a medical need to help them recover from their experience of being a victim of modern slavery and it is also clear that the assistance they require is unlikely to be available outside the UK (regardless of any issue about whether they would be safe in that country, which would fall to be considered as part of their protection claim).*" (emphasis added)

109. The same passages appear in Version 4.

110. It is therefore apparent that Versions 3 and 4 do not take the stance taken by Mr Tam given that they contemplate that there may be cases where a grant of MSL is appropriate notwithstanding that there is an outstanding asylum/protection claim. However, I agree with Mr Buttler that the reasonable reader of Versions 3 and 4 as a whole would conclude that the fact of an asylum/protection claim based on the fear of being re-trafficked is relevant to the question whether to defer a decision on MSL but is not, of itself, a potential reason to grant MSL. On the basis of this interpretation, then, the MSL Policy remains misleading as to the effect of Article 14(1)(a) ECAT and will induce decisions by caseworkers which are inconsistent with its requirements and, therefore, inconsistent with the Defendant's policy of compliance with Article 14(1)(a).

Is the MSL Policy internally contradictory?

111. This was a secondary argument which was not pleaded until the Claimant's skeleton argument and I did not see what it added. It seems to me that this case turns on the arguments which I have addressed above. The essence of the arguments about the MSL Policy was that it was internally contradictory because, in effect, it announced an intention to make decisions in accordance with the requirements of Article 14(1) ECAT but its exposition of aspects of these requirements was misleading and wrong. To this extent it was internally contradictory. I can see, however, that this might be described as an irrational policy.

Was the decision in the Claimant's case contrary to the Defendant's policy of compliance with Article 14(1)(a) ECAT?

112. On the basis of the analysis set out above, I consider that it was. Essentially, this is because the Decision letter of 17 August 2020 considers whether the grant of MSL is necessary to protect and assist the Claimant's recovery and concludes that it is not. The decision-maker found that such treatment as she requires is available in Vietnam and there were therefore no medical grounds for discretionary leave. The decision-maker also considered the risk of re-trafficking or becoming a victim of modern slavery if the Claimant were to return to Vietnam and concluded that the degree of risk was not such as to warrant MSL. The decision maker did not consider whether the fact that the Claimant had made an asylum/protection claim based on the fear of re-trafficking, and therefore needed to stay in this country to pursue that claim, was a basis for granting MSL. The approach taken by the decision-maker was therefore broadly in accordance with the aspects of Version 3 of the MSL Policy which I have highlighted above, although that document had not yet been promulgated.

Conclusion on Ground 1

113. I therefore uphold Ground 1.

Ground 3.

114. Mr Buttler confirmed that this Ground only arises if he is wrong on Ground 1. However, I will consider it briefly for completeness.

115. Mr Buttler took me to [30]-[34] of the judgment of Mr Philip Mott QC in **FM** (supra) and submitted that this is an *"anxious scrutiny"* case. Accordingly, the Defendant would bear the burden of justifying the decision, and greater detail and thoroughness of reasoning would be required than in other cases, although the degree of detail would depend on the circumstances. He also referred me to **R (MN) v Secretary of State for the Home Department** [2021] 1 WLR 1956 [242]-[243]. Mr Tam did not dispute that this is an anxious scrutiny case.

116. As noted above, Mr Buttler's complaint about the Decision letter was ultimately limited to a complaint that it did not address, whether sufficiently or at all, an argument by the Claimant that the grant of leave pending the outcome of her asylum/protection claim would ameliorate her mental health and encourage her to engage with therapy. Mr Tam's position was that this was because this argument was not put forward on her behalf. I was therefore taken through the correspondence which led to the Decision, and some of the evidence submitted on behalf of the Claimant with a view, primarily, to deciding whether the argument was raised with sufficient clarity and cogency that it required to be addressed by the Defendant. Mr Tam's case was, in effect, that the Claimant had argued that she needed to remain in this country in order to receive treatment and to avoid the risk of harm if she returned: this was the issue which the Decision letter addressed.

117. Having considered the correspondence and the evidence submitted in support of the application for MSL, which the Decision letter states was taken into account, I am satisfied that the broad argument was raised by the Claimant. It was set out in some detail in the letter from Duncan Lewis written on 27 May 2020 which stated for example that:

> *"We submit that our client should be granted discretionary leave to remain as a victim of trafficking/modern slavery immediately on the basis of her personal circumstances. It is submitted that any deferral of this decision, pending an outcome of her asylum claim, would be of significant detriment to her mental health."*

118. The letter went refer to the views of Murray J in **JP** and his references to expert evidence. It also summarised evidence submitted to the effect that the Claimant's insecure immigration status was having a detrimental effect on her mental health and on her ability to engage with treatment. That evidence included evidence from a case worker at City Hearts dated 13 May 2020 which stated in terms that:

> *"A grant of leave would undoubtedly alleviate the stress and anxiety, and also provide that glimmer of hope she is so desperate for in order to encourage her to toward overcoming her PTSD"*

119. There were also medico legal reports which emphasised the Claimant's poor mental health, and the detrimental effect of her insecure immigration status. These included a

report dated 18 May 2020 from a consultant psychiatrist, Professor Abou-Saleh, to which I was taken at the Hearing.

120. The 27 May 2020 letter from Duncan Lewis also included the following passage:

> *"It is therefore submitted both that our client suffers from serious mental health conditions for which she requires treatment in the UK, and that the lack of certainty surrounding her immigration status is preventing her from accessing all required treatment, from benefitting from the treatment that she is accessing, and is causing her continued suffering. She should therefore be granted discretionary leave to remain for a period of 30 months due to her personal circumstances, while she awaits the outcome of her asylum case."*

121. The letter of 22 July 2020 which sought a review of the original refusal of MSL was less detailed on this issue but it clearly referred to the letter of 27 May 2020, listed the evidence which had been submitted and complained that these representations and the evidence had not been considered. Moreover, as I have noted, the Decision letter stated that the letter of 27 May 2020 had been taken into account as had the various medico legal reports and the letter from City Hearts referred to above.

122. I am satisfied that the case that the grant of MSL would be beneficial to the Claimant's mental health was made, albeit the thrust of her representations and evidence on this issue was to the effect that her mental health was being undermined by her insecure immigration status pending the outcome of her asylum/protection claim. I therefore accept that the issue ought to have been addressed and that the Decision letter, which was essentially to the effect that she could access the relevant treatment in Vietnam and was not at sufficient risk of re-trafficking or other ill treatment if she were to return there, did not do so.

123. But I would not have given relief on this Ground given that the evidence did not establish that MSL pending the outcome of the Claimant's asylum/protection claim would have made a material difference to the Claimant's mental health: her immigration status would still have been insecure until such time as her asylum/protection claim was granted (if that was the outcome). The answer which would have been given by the decision-maker, had the point been addressed, is fairly obvious and the point would not have made any difference to the Decision.

124. I have also considered the point that if it was the case that the Claimant needed to access treatment and needed to remain in the United Kingdom to pursue her asylum/protection claim, it would not be rational to refuse MSL on the basis that the requisite care could be accessed in Vietnam. She was not able to return to Vietnam given her asylum/protection claim. However, this does not take the case anywhere given that the Claimant was able to remain in the United Kingdom and to access healthcare in any event, given her asylum/protection claim.

125. In relation to Ground 3 then, I would have granted permission but refused relief.

ANNEXE A: OUTLINE CHRONOLOGY

November 2016: Claimant encountered by UK police soon after arrival in the back of a lorry and transferred into the care of Bedfordshire Social Services on the basis that she claimed to be a minor.

November 2016-March 2018: Claimant subjected to forced labour and sexual exploitation in brothels and cannabis production.

20 March 2018: Claimant re-encountered by the authorities, returned to the care of social services and referred to the NRM but leaves accommodation after 5 days and returns to prostitution and work in cannabis production.

17 April 2018: positive reasonable grounds decision made in the Claimant's absence.

1 October 2018: Claimant pleads guilty, at Preston Crown Court, to conspiring to produce cannabis.

11 December 2018: Claimant sentenced to 28 months' imprisonment.

11 January 2019: Claimant served with Stage 1 deportation decision.

22 January 2019: in response to the Stage 1 letter, Greater Manchester Immigration Aid Unit write on the Claimant's behalf confirming she wishes to claim asylum and (unaware of the reasonable grounds decision in April 2018) urge an NRM referral.

18 March 2019: Ministry of Justice notify the NRM that the Claimant has been re-encountered and imprisoned.

18 April 2019: Claimant undergoes a substantive asylum interview.

May 2019: Duncan Lewis comes on the record and urges an NRM referral. The Defendant maintains that she has no record of the Claimant on the NRM system.

23 July 2019: Defendant informs Duncan Lewis that, contrary to earlier correspondence, a record of the Claimant's first NRM referral and reasonable grounds decision has been located.

22 October 2019: Claimant detained under immigration powers.

31 October 2019: Defendant makes a positive conclusive grounds decision that the Claimant is a victim of trafficking and postpones MSL decision pending the determination of her asylum/protection claim.

6 November 2019: Claimant issues proceedings challenging the legality of her detention (CO/4369/2019).

14 November 2019: in her Acknowledgement of Service, the Defendant concedes that the entire period of her administrative detention was unlawful. Claimant released to a safe house, arranged pursuant to the Defendant's Victim Care Contract with the Salvation Army.

7 May 2020: Defendant agrees, in light of **JP and BS**, to promulgate an MSL decision no later than 7 August 2020.

27 May 2020: Duncan Lewis submit representations to the Defendant in support of the grant of MSL to the Claimant.

21 July 2020. Defendant refuses MSL.

22 July 2020: pre-action protocol letter challenging the legality of the refusal.

30 July 2020: Defendant agrees to reconsider the MSL decision.

17 August 2020: Defendant issues a revised decision but maintains refusal of MSL for essentially the same reasons.

24 August 2020: pre-action protocol letter challenging the legality of that decision.

29 September 2020: Claimant issues the current claim for judicial review.

21 October 2020: Defendant's Acknowledgement of Service and Summary Grounds of Defence.

23 November 2020: Mostyn J grants permission on Ground 1 and directs a rolled-up hearing in respect of Grounds 2 and 3.

11 January 2021: Detailed Grounds of Defence.

23 April 2021: Defendant refuses the Claimant's asylum and human rights claims.

17 May 2021: Claimant lodges an appeal at the First Tier Tribunal.