





Children's Rights Summer Conference: Children & Trafficking

Tuesday 11 July 2023



GARDEN COURT CHAMBERS



Garden Court Chambers



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Session 1: Duties owed to child victims of trafficking to stop re-trafficking and re-victimisation

Chair: Kate Aubrey-Johnson,
Garden Court Chambers

11 July 2023



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TOP TIER SET
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Accommodating UASCs pending a case-law compliant age assessment:
Statutory Guidance, eligibility and challenges

Georgie Rea, Garden Court Chambers

11 July 2023



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Securing Accommodation

1. **The Statutory Guidance** for Local Authorities on Care of Unaccompanied Migrant Children and Child Victims of Modern Slavery, published in November 2017:

“...that where the person’s age is in doubt, they must be treated as a child unless, and until, a “case-law compliant age assessment” shows the person to be an adult.”

2. Following **R(S) v Croydon LBC [2017]** EWHC 265, it is unlawful for a Local Authority not to treat an age disputed person as a child, pending the determination of their age assessment. The Local Authority may not depart from the Statutory Guidance unless they provide cogent reasons for doing so.
3. Compliance with the **Age Assessment Guidance** ("the ADCS Guidance") will be relevant to whether the reasons given are "cogent".
4. It is essential that advisors seek to secure section 20 accommodation as soon as possible where the child is approaching their 18th birthday (on the basis of their claimed age) to ensure they can become an **eligible child under Schedule 2, Paragraph 19B Children Act 1989**.



Re-trafficking Risk – Independent Anti-Slavery Commissioner

Re-trafficking: The current state of play November 2021

- A re-trafficking survey was launched via the IASC website and via the Human Trafficking Foundation and received responses from Universities/Education Centres/Institutes, Independent (consultant/survivors), Non-Governmental Organisations and Law enforcement
- *Noted:* Neither the NRM guidance and statutory guidance on the care of unaccompanied migrant children neither of these documents specifically refer to “re-trafficking”.
- The cases showed those that those who appeared to be most vulnerable to re-trafficking were women, children and young adults and those who were initially trafficked under the age of 18.
- Survivors were frequently re-trafficked within two years or less of having exited a trafficking situation and when re-trafficking occurs it was not uncommon for it to be to a different destination or for a different purpose of exploitation.
 - International Organization for Migration’s (IOM) database showed that there was cross-over between international and internal trafficking.
- Children not being correctly identified as victims in the first instance, going missing from care and being subjected to age disputes were identified as factors that could facilitate re-trafficking in a UK context.

Jobe, A. (2010). The Causes and Consequences of Re-Trafficking: Evidence from the IOM Human Trafficking Database. International Organization for Migration (IOM): Geneva.



Section 20 Children Act 1989

Section 20: Provision of accommodation for children: general.

(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—

(a) there being no person who has parental responsibility for him;

(b) his being lost or having been abandoned; or

(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

- Under s20 of the Children Act 1989, the local authority has a statutory responsibility to accommodate unaccompanied, asylum seeking children (UASC).
- Where the child is accommodated for more than 24 hours they become a ‘looked after’ child
 - the local authority where the child presents has a statutory duty to safeguard and promote the child’s welfare in the same way as any other looked after child.
 - The UASC will be entitled to the same local authority provision as any other looked after child.
 - Assessment and care provisions for the child should commence immediately as for any looked after child, irrespective of whether an application (e.g. an asylum claim) has been submitted to the Home Office. (Statutory Guidance at [10])



Securing Accommodation Pending Age Assessment: Trafficking Considerations

The ADCS Guidance:

Page 7: Many trafficked children and young people go missing within 48 hours of becoming looked after.

Page 10: Other than in exceptional circumstances, children and young people will be looked after under Section 20 of the Children Act 1989 whilst the age assessment process continues.

Page 11: All children and young people need safe and supportive accommodation, but particular care must be given to planning accommodation for potential victims of trafficking who may be at risk of going missing very soon after discovery. Specialist placement should be considered for these children and young people.

Page 41: Social workers need to give consideration to the particular needs and vulnerabilities of unaccompanied children, including those who have been trafficked. The following principles should guide decision making on placements for unaccompanied children and young people:

- Special consideration should be given to children and young people who may be trafficked; they may need additional support and monitoring in placement. That may include moving them out of the area in which they were exploited
- Placement staff and foster carers should receive training on meeting the specific needs and vulnerabilities of unaccompanied and trafficked children.



Presumption About Age

Modern Slavery Act 2015: Section 51 “Presumption about age”

(1) This section applies where—

- (a) a public authority with functions under relevant arrangements has reasonable grounds to believe that a person may be a victim of human trafficking, and
- (b) the authority is not certain of the person’s age but has reasonable grounds to believe that the person may be under 18.

(2) Until an assessment of the person’s age is carried out by a local authority or the person’s age is otherwise determined, the public authority must assume for the purposes of its functions under relevant arrangements that the person is under 18.

ACDS, page 23: In accordance with the EU Directive on Trafficking in Human Beings and the Modern Slavery Act, 15 particular care should be given where there is any possibility that a child or young person has been trafficked, and in these cases the presenting child or young person should be presumed to be under 18 years of age.

The statutory guidance by the Department for Education for the care of unaccompanied and trafficked children states on p. 4, point 7: *“Note that, where the person’s age is in doubt they must be treated as a child unless and until a full age assessment shows the person to be an adult.”*



Interim Relief: Mandatory section 20 Accommodation

A v Croydon LBC [2009] UKSC 8

[53]...the definition of “child” in section 105(1) applies to the Act as a whole, without qualification or exception. The question whether the child is “in need” is for the social worker to determine. But the question whether the person is or is not a child depends entirely upon the person’s age, which is an objective fact. The scheme of the Act shows that it was not Parliament’s intention to leave this matter to the judgment of the local authority.

R (the Application of BG) v Oxfordshire County Council [2014] EWHC 3187 (Admin)

[33] Parliament, as explained by the Supreme Court, has imposed in the present area a heightened duty on the reviewing court to evaluate objective facts for itself...once the court has reached the position at the permission stage filter that there is a properly arguable case which ought to proceed to a hearing, the court is squarely seized of a matter which falls within what can properly be described as a primary judgment of the court.



R(S) v Croydon LBC [2017]

- ***R(S) v Croydon LBC [2017] EWHC 265***: Section 7 of the Local Authority Social Services Act 1970 applies to age assessments carried out by local authorities, with the result that, when conducting such an assessment, the local authority is obliged to follow and apply any relevant statutory guidance absent cogent reasons for not doing so (at [36]).
- If a local authority departs from this Statutory Guidance, and refuse to treat the Claimant as a child pending the determination of his age assessment it must provide cogent reasons for doing so (at [38]).
- Confirmed the binding effect of the Statutory Guidance, ‘Care for unaccompanied and trafficked children’ issued in July 2014 required the defendant to accommodate the claimant pending an assessment of his age. The material passage from that guidance was: *“Note that, where the person’s age is in doubt, they must be treated as a child unless, and until **a full age assessment** shows the person to be an adult.”* (at [30]).
 - Note: New version of that guidance, issued in November 2017 which requires that, where the person’s age is in doubt, they must be treated as a child *“unless, and until, **a case-law compliant age assessment** shows the person to be an adult”* (Statutory Guidance 2017 at [8]).
- The ADCS guidance is relevant to any consideration of whether a Local Authority has cogent reasons for departing from the statutory guidance (at [50])



Addendum or Supplementary Assessments

ADCS [31]: ...Other information may come to light at a later stage, for example, in the form of documentation or as professionals get to know the child or young person over time, which leads them to believe that the assessed age is wrong. Where you believe that a *significantly different conclusion might be reached* and that the child or young person may be notably older or younger than initially assessed, then a new assessment should be undertaken.

ADCS [10]: local authorities will “need to plan for suitable accommodation before, during and after the assessment.

ADCS [33]: “in many cases it will not be possible to know definitively the age of the child or young person with whom you are working. Where there is doubt about whether or not the young person is a child, the dangers inherent in treating a child as an adult are in almost all cases far greater than the dangers of taking a young adult into your care.”



The Statutory Guidance: Care Leaver Support

Local Authorities on Care of Unaccompanied Migrant Children and Child Victims of Modern Slavery, published in November 2017

11. The Care Planning, Placement and Case Review (England) Regulations 2010 set out local authorities' duties with regard to providing for looked after children and care leavers who are eligible children. The Care Leavers (England) Regulations 2010 likewise set out duties regarding care leavers who are relevant or former relevant children. These Regulations were amended in 2014 to require that those duties are fulfilled with particular regard to the child's circumstances and needs as an unaccompanied or trafficked child. The Regulations apply to all children, regardless of their immigration status, nationality or documentation.

94. If the care leaver's immigration status remains *unresolved*, pathway plans should consider the implications for them if their outstanding application or appeal is refused. Subject to a Human Rights Assessment by the local authority, the care leaver *may* then cease to be eligible for care leaver support under the restrictions on local authority support for adults without immigration status (in **Schedule 3 to 30 the Nationality, Immigration and Asylum Act 2002**).

- On 9 November 2021, NRPf published a new human rights assessment template and accompanying practice guidance to assist councils with the process of undertaking a human rights assessment when **Schedule 3 of the Nationality, Immigration and Asylum Act 2002** applies to an adult with care needs, family, or care leaver (age 18+) who is receiving or applying for social services' support.
- Although the Home Office provides local authorities with funding to support UASCs, the weekly amount significantly reduces once a child turns 18 and ends three months after a care leaver becomes 'Appeal Rights Exhausted'.



Support for Care Leavers

Category	Requirements	Entitlements
<p>Eligible Child Schedule 2, Paragraph 19B CA 1989</p>	<ul style="list-style-type: none"> • Aged 16 or 17 • Looked after by children’s services for a period of 13 weeks since the age of 14 • Currently looked after 	<ul style="list-style-type: none"> • A Personal Advisor • A Needs Assessment • A Pathway Plan • Receive all the care and support they normally receive until they leave care
<p>Relevant Child Section 23A CA 1989 Section 23B CA 1989</p>	<ul style="list-style-type: none"> • Aged 16 or 17 • Looked after by children’s services for a period of 13 weeks since the age of 14 • Looked after for a period of time after their 16th birthday • No longer looked after 	<ul style="list-style-type: none"> • A Personal Advisor • A Needs Assessment • A Pathway Plan • Accommodation and maintenance • financial support to meet education, training and employment needs
<p>Former Relevant Child Section 23C CA 1989 Section 23CZA CA 1989 Section 23CA CA 1989</p>	<ul style="list-style-type: none"> • Aged between 18 and 25 • Previously an eligible child and/or a relevant child 	<ul style="list-style-type: none"> • A Personal Advisor • A Pathway Plan, kept under regular review • Assistance with employment, education and training • Assistance with accommodation • Help with living costs
<p>Qualifying Care Leaver Section 24 CA 1989</p>	<ul style="list-style-type: none"> • Aged between 16 and 25 • Looked after by children’s services on, or after, their 16th birthday and no longer looked after • Spent less than 13 weeks in care since 14th birthday, i.e. do not fulfil criteria for eligible or relevant child 	<ul style="list-style-type: none"> • Help with living expenses and if they are in higher education they may also help with securing vacation accommodation • advice and assistance from Children’s Services, which may, be in cash



Thank you

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Trafficking: Support for child victims

Grace Capel, Garden Court Chambers

11 July 2023



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Council of Europe Convention on Action against Trafficking in Human Beings

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. standards 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. [...]



Council of Europe Convention on Action against Trafficking in Human Beings

[...]

(5) Each Party shall take measures, where appropriate and under the conditions provided for by its internal law, **to co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims.**

(6) Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.

(7) For the implementation of the provisions set out in this article, each Party shall ensure that services are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care.



Council of Europe Convention on Action against Trafficking in Human Beings

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.**
- (3) The Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victims status is being claimed improperly.



Article 4 ECHR

- **Article 4 ECHR: (i) systems duty; (ii) operational duty; (iii) investigation duty.**
- Operational duty = duty *‘to take steps to protect individual victims of trafficking’*: *R (TDT) v SSHD* [2018] EWCA Civ 1395, §17.
- Although no automatic read across, *‘the case law shows that the content of the [protection] duty is to be derived from the provisions of ECAT’*: *MN and IXU v Secretary of State for the Home Department* [2020] EWCA Civ 1746, §97.
- The positive obligations *‘must be construed in the light of [ECAT] ... the Court is guided by [ECAT] and the manner in which it has been interpreted by GRETA’*: *Chowdury v Greece* (2017) App No 21844/15, §104.
- Protection measures *‘include facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery’*: *Chowdury* §110.



Domestic arrangements – National Referral Mechanism

- UK's international obligations implemented in domestic law through NRM.
- Section 50A Modern Slavery Act 2015 ('MSA 2015') requires the SHD to secure that '*any necessary assistance and support is available to a potential victim*'.
- Section 49 MSA 2015 provides that the Secretary of State must issue guidance to such public authorities and other persons as the SSHD considers appropriate about ... (b) arrangements for providing assistance and support to persons who there are reasonable grounds to believe [are] victims of slavery or human trafficking ... and (c) arrangements for determining whether there are RGs to believe that a person is a VoT
- MSASG sets out the NRM arrangements that implement Articles 10, 12 and 13 ECAT. SSHD has consistently accepted that the NRM should comply with ECAT and that it would be a justiciable error of law if the MSASG did not reflect ECAT requirements: *MS (Pakistan) v SSHD* [2020] UKSC 9, §20.



Domestic arrangements – MSASG - Adults

Adult victims

- SSHD has consistently made contractual arrangements for adults' recovery support – currently MSVCC, with Salvation Army as Prime Contractor.
- Part 8 states that the recovery support provided through mixture of mainstream and specialist support, including via the MSVCC.
- Detailed guidance provided in Annex F as to the recovery support available to adult victims through the MSVCC which covers each of the Article 12 ECAT categories.
- Entails at a minimum: allocation of a support worker, support for social recovery, assistance to access counselling and psychological treatment.
- Financial support which is directed at meeting trafficking related recovery needs and which is distinct from support provided to meet victims' essential living needs.



Domestic arrangements – MSASG - Children

Child victims

- Part 9 of the MSASG states that local authorities are the “*primary service provider for safeguarding and responding to the needs of a child victim of modern slavery*”.
- Local Authorities do not have access to the arrangements under the MSVCC - no centralised funding provided to Local Authorities to meet child victims’ trafficking related recovery needs.
- Cf. the position for adults, Annex G provides limited direction to LAs on the arrangements specifically for meeting trafficking recovery needs of child victims.
- Annex G focused on looked after children, does not touch upon position of children not in the care of the LA.
- Does not deal with the provision of material assistance specifically to meet trafficking recovery needs.



The Children Act 1989

Section 17(1) CA 1989

Provision of services for children in need, their families and others.

(1) It shall be the **general duty** of every local authority (in addition to the other duties imposed on them by this Part)—

- (a) to safeguard and promote the welfare of children within their area who are in need; and
- (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.

[...]

(6) The services provided by a local authority in the exercise of functions conferred on them by this section **may** include providing accommodation and giving assistance in kind or in cash.

See also:

- *Working Together to Safeguard Children* (2018) (statutory guidance)
- *Safeguarding Children who may have been trafficked* practice guidance



The Children Act 1989

Section 20 CA 1989

Provision of accommodation for children: general.

(1) Every local authority **shall provide** accommodation for any child in need within their area **who appears to them** to require accommodation as a result of—

(a) there being no person who has parental responsibility for him;

(b) his being lost or having been abandoned; or

(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

[...]

(3) Every local authority **shall provide** accommodation for any child in need within their area who has reached the age of sixteen and whose welfare **the authority consider** is likely to be seriously prejudiced if they do not provide him with accommodation.

(4) A local authority **may provide** accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) **if they consider** that to do so would safeguard or promote the child's welfare.



The Care Planning, Case Review and Placement Regulations 2010

- **The Care Planning, Case Review and Placement Regulations 2010** set out the care planning process for looked after children.
- Amended in 2014 by the **The Care Planning and Care Leavers (Amendment) Regulations 2014** to “bring greater attention and focus to the particular needs of these children” to enable them to receive specialist support and care”.
- Require local authorities to record the fact of a ‘looked after’ child’s trafficked victim status in the care plan (reg 5(1)(f)).
- Continues in the preparation of pathway plans for leaving care (regs 42(2)(ba), 43), and in pathway plan reviews (Care Leavers (England) Regulations 2010, reg 7).

See also:

- *Children Act 1989 guidance and regulations, volume 2: care planning, placement and case review (statutory guidance)*
- *Care of Unaccompanied Migrant Children and Child Victims of Trafficking (statutory guidance)*



Impact on child victims

- Obvious support gap for children who are not “looked after” by the Local Authority.
- Even for those who are looked after, provision of recovery needs support is left to chance – “post code lottery”.
- Provision of recovery needs support a matter of discretion and assessment, not entitlement.
- Failure to identify and assess trafficking specific recovery needs.
- Lack of centralised funding for child victims of trafficking (c.f. the position for unaccompanied asylum-seeking children)
- Provision of generic support – lack of trafficking specific recovery needs support.



Illegal Migration Bill - support to child victims

- Cl. 21: Deems persons subject to removal who may be victims of modern slavery “threats to public order” disqualified from protection unless they are cooperating with an investigation or criminal proceedings
- Cl.22: Disapplies SSHD’s duties under Section 50A to provide necessary assistance and support to potential victims during the recovery period.
- Accompanied children subject to the Cl. 2 duty to remove – disqualified from modern slavery protections – exemption for those cooperating with an investigation.
- Where the discretion under Cl. 3 is exercised to remove an unaccompanied child before their 18th birthday – disqualified from modern slavery protections.
- Where the discretion under Cl. 3 is not exercised,- able to access modern slavery protections.
- **However**, only until their 18th birthday where the Cl.2 duty to remove them from the UK bites.

See Child’s Rights Impact Assessment 5 July 2023



Thank you

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Protecting Children with Special Educational Needs from trafficking

Nicola Braganza KC & Ollie Persey

Garden Court Chambers

11 July 2023



GARDEN COURT CHAMBERS



Garden Court Chambers



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SEND and Trafficking/Modern Slavery/ Child Criminal Exploitation

- *“Excluded, exploited, forgotten: Childhood criminal exploitation and school exclusions”*, Just for Kids Law, August 2020
- *“Child Criminal Exploitation and The Need for Consistency”*, Human Trafficking Foundation, April 2022
- *“Internal trafficking and exploitation of children and young people with special educational needs and disabilities (SEND) within England and Wales”*, University of Portsmouth, an ongoing research project (31/5/22-31/8/23)



Exploitation as a driver of exclusion - “Key points” of the JfK report

- Children who are outside of mainstream education are more vulnerable to becoming the victim of childhood criminal exploitation.
- Children who have experienced exploitation will be more vulnerable to exclusion and may be disproportionately impacted by exclusion.
- Existing evidence and evidence from Just for Kids Law's casework suggests that some behaviour that leads to exclusion can be orchestrated by criminal actors as a part of furthering that child's exploitation.
- In its rewrite of the statutory guidance, the Department for Education (DfE) should include provisions that mitigate the risk that victims of exploitation will be excluded and protect the children most vulnerable to exploitation in the future.



Zero tolerance as a driver of exploitation

*“We understand that behaviour resulting from exploitation will likely be concerning for schools – if a child or young person is trafficked or otherwise criminally exploited it will typically be to carry a weapon, drugs or both. **Many schools have a zero tolerance approach to either.** However, whilst that may be considered appropriate in cases where a child or young person has taken it upon themselves to engage in this activity without coercion, in cases of CCE, it furthers that young person’s exploitation and punishes them for what is clearly a critical safeguarding issue.”*

JfK report, August 2020



Child Criminal Exploitation and The Need for Consistency

Human Trafficking Foundation report, April 2022

- Multi-agency collaboration evident in good practice example ⇔ joined up working was not seen as the norm. Working in silos meant children get lost between the margins and the boundaries of support => easy targets for exploiters
- Boundaries of childhood and adulthood so sharply defined in support provision. End of support at the age of 18 a '**cliff edge**' for victims. Lack of commitment to transitional safeguarding => support young people receive fragments as they reach the age of 18
- Since the inception of the Modern Slavery Act in 2015, child trafficking steadily risen, accounting for 43% of all NRM referrals in 2021. Reason for this is criminal exploitation of, primarily, British children.
- Issues of systemic racism repeatedly raised & the need for far greater representation throughout the young person's experience



Human Trafficking Foundation report - Schools

- *“While schools offer opportunities for identifying potential exploitation of students and can be sites of both prevention and early intervention, **the correlation between school exclusions and child criminal exploitation** is well documented.”*
- *“Outside the mainstream education system, a child’s vulnerability to exploitation is far greater... ‘**once you are excluded you are an easy target.**’*
- *“Multiple Serious Case Reviews of child victims of CCE .. exclusions escalated the risk and created the environment for exploitation.”*
- *“**Pupil Referral Units (PRUs)** have **far less supervision** than mainstream schools - children exposed to ‘violence, drugs and gang associations’, a ‘process of institutionalisation”*
- *“**Exclusions** a key root of problems – should not be used **where children are vulnerable to exploitation. Suspension/ exclusion must always trigger a vulnerability assessment.**”*



Internal trafficking and exploitation of children and young people SEND report

- ***“Children and young people with SEND face increased risks of Modern Slavery.”***
- A study evidencing gaps in safeguarding policy & guidance, and wider domestic & international legal frameworks, which do not adequately support the identification of this group.
- Current policy & guidance does not provide appropriate mechanisms for multi-agency planning/ child protection responses.
- Modern Slavery Act 2015 covers criminal offences of 'human trafficking' and 'exploitation'.
- Internal trafficking (within UK borders) = a significant and increasing portion of UK national statistics on human trafficking in the UK each year, particularly due to an increase in criminal exploitation of children.



Internal trafficking and exploitation of children and young people SEND report

- *“Children and young people with SEND not only have vulnerabilities as children, but they also have **additional vulnerabilities due to impairments and issues** including **high levels of school exclusion, bullying and social isolation.** “*
- *These increased risks and vulnerabilities are often not well understood by multi-agency services who rarely receive training in protection of disabled children and young people.*
- *Responses and requirements under the MSA rarely recognises these additional vulnerabilities and risks, addresses this group's needs, nor provides appropriate policy and practice responses.*
- *This group of children are **often invisible to agencies**, and signs and indicators of trafficking/harm can be **missed or misattributed to an impairment**. Such complexity often means that this group fall though gaps in services or between service provision - rarely receiving a holistic response which is tailored to meet individual and specific needs.”*



Greater risk of exclusion

2017 Statutory Guidance on Permanent Exclusions

“Statutory guidance to the head teacher on the exclusion of pupils from groups with disproportionately high rates of exclusion

*21. **The exclusion rates for certain groups of pupils are consistently higher than average.** This includes: **pupils with SEN**; pupils eligible for free school meals; looked after children; and pupils from certain ethnic groups. The ethnic groups with the highest rates of exclusion are: Gypsy/Roma; Travellers of Irish Heritage; and Caribbean pupils.*



Protection duty under Article 4 ECHR

Prohibition of slavery and forced labour,

- 1. No one shall be held in slavery or servitude.*
- 2. No one shall be required to perform forced or compulsory labour...”*

Article 4 ECHR imposes positive obligations on the State, as summarised by Underhill LJ in *R (TDT) v SSHD* [2018] EWCA Civ 1395 at §17 (emphasis added):

“...the duties which the Court has held to be imposed by article 4 as regards human trafficking can be classified under three headings:

- (a) a general duty to implement measures to combat trafficking – “the systems duty”;*
- (b) a duty to take steps to protect individual victims of trafficking – “the protection duty” (sometimes called the operational duty”;*
- (c) a duty to investigate situations of potential trafficking – “the investigation duty” (sometimes called the ‘procedural duty’).”*



Article 4 ECHR Protection Duty

The **protection duty** is triggered where it is “*demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been or was at a real and immediate risk of being, trafficked*” (per Underhill LJ at §18, citing *Rantsev v Cyprus and Russia (2010) 51 EHRR 1*).

As held in *TDT* at §35, the reference to “*the State authorities*” in *Chowdhury v Greece* (21884/15) is broad enough to “***embrace front-line staff as much as the authorities further up the chain of refusal***”. What is required in order to discharge the protection duty are “*reasonable steps to protect the individual*” (*TDT*, §36).

The duty to take operational measures under Article 4 has two principal aims: “*to protect the victim of trafficking from further harm; and to facilitate his or her recovery*” (*VCL v UK* [2021] 73 EHRR 9, §159).

The duty to investigate situations of potential trafficking is also triggered where there is “credible suspicion” and “does not depend on a complaint from the victim or next-of-kin: once the matter has come to the attention of the authorities they must act of their own motion” (*Rantsev* at §288).



Key issues

- Poor systems for identification of SEND and ensuring support is put in place
- Academisation and lack of multi-agency approach
- Lack of integration of Article 4 ECHR/Modern Slavery Act 2015 duties into the school exclusion process.
- Schools are not First Responders
- Zero tolerance policies
- Pupil Referral Units and Alternative Provision are often unsafe



Thank you

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Bringing damages claims under the Human Rights Act 1998 for maladministration and delay

Nicola Braganza KC & Nadia O'Mara

Garden Court Chambers

11 July 2023



GARDEN COURT CHAMBERS



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Outline

- Legal framework
- Reported cases on awards
- Top tips



Legal framework

- Article 4 ECHR, effective protection and support, meeting recovery needs
- EU Anti-Trafficking Directive 2011/36/EC
- European Convention on Action against Trafficking, Article 10 (identification); Article 12 (assistance)
- Principal mechanism by which the UK discharges this obligation is the NRM
- Statutory Guidance - Chapter 8 and Annex F
- VoT referred into the NRM by designated 'First Responders'
- Within the NRM, reasonable grounds decision within 5 working days - recovery period of at least 30 days – until Conclusive Grounds decision



Delay

- *Rantsev v Cyprus and Russia* (2010) EHRR 1
a “*requirement of promptness and reasonable expedition is implicit*” in the obligation under Article 4 ECHR to investigate situations of potential trafficking or modern slavery
- *O and H v SSHD* [2019] EWHC 148
“*impossible to argue that there was no constraint at all on the period of time the competent authority could spend deciding any individual case ... decisions must be taken in a reasonable time. What is reasonable, however, will turn on ... all the circumstances of the case*”
- *EOG and KTT v SSHD* [2022] EWCA Civ 307
“*extraordinary length of time which it now takes for the Secretary of State to reach both conclusive grounds decisions in the case of victims of trafficking and decisions in asylum claims... I am sure that the Secretary of State is aware that solving the problem of those delays would clearly be in the interests of potential and confirmed victims of trafficking, asylum-seekers, the Home Office and the Courts.*”
- *R (ota FH) v SSHD* CO/4781/2022 [9/6/23] Eyre J, permission granted
Decision triggered only once litigation threatened/ initiated



HRA 1998 damages

- Section 8 HRA 1998 – *award necessary to afford just satisfaction to the person in whose favour it is made*
- *Anufrijeva v London Borough of Southwark [2003] EWCA Civ 1406*

“..where ... culpable delay in the administrative processes necessary to determine and to give effect to an art 8 right, the approach of both the Strasbourg court and the Commission has been not to find an infringement of art 8 unless substantial prejudice has been caused to the applicant ..

“... the threshold of art 8 ..necessary to have regard ... to the extent of the culpability of the failure to act and to the severity of the consequence... the more glaring the deficiency in the behaviour of the public authority, the easier it will be to establish the necessary want of respect.”

“S8(4) of the HRA requires the Court to take into account the principles applied by the ECtHR when deciding whether to award damages and the amount of an award... to vindicate human rights and to achieve just satisfaction, damages should be awarded. ..

“levels of damages .. as reflected in the guidelines issued by the Judicial Studies Board, the levels of awards made by the Criminal Injuries Compensation Board and by the Parliamentary Ombudsman and the Local Government Ombudsman may all provide some rough guidance”



HRA 1998 damages (continued)

Secretary of State for the Home Department v Said [2018] EWCA Civ 627

Applying *Anufrijeva*, the Court of Appeal held *inter alia* at [134] that:

- there is a “*disinclination to recognise that maladministration resulting in delay engages article 8 at all, unless this has led to serious consequences*”; and
- “*there are good reasons why, where a breach arises from maladministration, damages should be modest*”
- “**however**, awards should not be minimal as this would undermine the respect for Conventions rights, but a ‘restrained or moderate approach to quantum would provide the necessary degree of encouragement to public authorities...’”

And therefore, at [138]:

“... it seems to me that the judge was fully entitled to find that what happened in this case crossed the threshold of ‘mere’ maladministration and into ‘manifestly excessive’ delay and that a trial of the causation and other damages issues might give rise to an award of significantly more than ‘nominal’ compensation ...”



Awards

OOO v Commissioner of Police of the Metropolis [2011] 5 WLUK 587

- Article 4 ECHR damages
- Police failure to investigate trafficking by victims
- Claimants suffered frustration and anxiety over a period of approximately 12-15 months
- Award of £5000 to each Claimant

Rantsev v Cyprus and Russia (2010)

- Situation of death and Article 2 breaches alongside Article 4
- Award of €40,000

Siliadin v France (2005)

- €30,000 including pecuniary and non-pecuniary
- Non-pecuniary at €15,000



Awards

CN v United Kingdom (2012)

- Treated as a pure procedural violation of Article 4 ECHR
- Defect in criminal law (and so arguably a systems breach)
- €8,000

LE v Greece (2016)

- Detention, delays in protecting, deficiencies in procedural obligations
- €12,000

Choudury v United Kingdom (2017)

- €16,000

SM v Croatia (2018)

- Procedural breach
- €5,000



Awards

VCL & AN v United Kingdom (2021) 73 EHRR 9

- Strasbourg Court looked for the first time at when the prosecution of a human trafficking victim might violate Article 4
- Pre-dated the statutory trafficking defence in section 45 of the Modern Slavery Act 2015, but nonetheless provides important guidance
- Both applicants, Vietnamese nationals, who were arrested at cannabis farms while in their teens.
- One applicant identified as a VoT by the Single Competent Authority prior to conviction
- The other after conviction
- Applicants complained of violations of the operational duty under Article 4 ECHR and the right to a fair trial under Article 6 ECHR.
- In finding violations in both cases, the ECtHR sharply criticised the CPS for prosecuting victims of trafficking and rebuked the domestic judicial authorities for permitting the prosecutions (both applicants had appeals to the Court of Appeal dismissed).
- Recognising that the applicants no doubt “*suffered on account of the criminal proceedings and have faced certain obstacles on account of their criminal records*”, the Court nevertheless concluded that the violations were “*essentially procedural in nature*” and therefore considered it appropriate to award each applicant €25,000 in respect of non-pecuniary damages.



Top TEN Tips - on claiming damages - from start to finish

1. Flag early!
 - in your preparation with the client (witness statement, other witnesses, expert evidence, GP records? School reports , SAR)
 - In pre-action and pre-pre-action correspondence, detail the impact, don't treat it as an after-thought
2. Plead it fully - if starting by a JR application
3. Press on disclosure - relevant to liability, but also boosting aggravated and exemplary damages, compare what is disclosed via SAR(s) and disclosure, duty of candour, question redactions



Top TEN Tips

4. Use all opportunities for negotiation - pre-action, ADR, negotiation between lawyers, maintain momentum
5. Don't be put off! - standard practice on opening offers, ridiculously low
6. Be aware of the timescales - prepare the client; anticipate obtaining updating reports
7. Reasonable adjustments – Equal Treatment Bench Book – not just for the hearing

<https://www.judiciary.uk/wp-content/uploads/2023/04/Equal-Treatment-Bench-Book-April-2023-revision-2.pdf>



And final Top Tips ...

8. Be aware of what is reported - and what goes on behind closed doors. Build a bank of settlement figures, share/ exchange information with colleagues.

9. Use Judicial College Guidelines for the Assessment of General Damages in Personal Injury cases (16th ed.) - but not too rigidly – a starting point. ‘Vento’ damages - lower band £1,100 to £11,200 (less serious cases); middle band of £11,200 to £33,700 (cases that do not merit an award in the upper band); and upper band of £33,700 to £56,200 (the most serious cases), with the most exceptional cases capable of exceeding £56,200.

10. Hold your nerve !



Thank you

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GARDEN COURT CHAMBERS



Session 2: Criminalisation and treatment of trafficked children

Chair: Gráinne Mellon,
Garden Court Chambers

11 July 2023



GARDEN COURT CHAMBERS



Garden Court Chambers



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Children's Rights Conference 2023: Offences and decisions to prosecute under the Nationality and Borders Act 2022

Sonali Naik KC, Garden Court Chambers

11 July 2023



GARDEN COURT CHAMBERS



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Nationality and Borders Act 2022, s40

Section 40 NABA 2022 inserted a number of new offences under section 24 Immigration Act 1971

It also amended section 25 Immigration Act 1971 (assisting unlawful migration) added the words “or arrive in” after “enter”

This came into effect from 28 June 2022

Was in response to Court of Appeal judgments of *R v Kakaei* (Fouad) [2021] EWCA Crim 503 and *R v Bani* (Samyar Ahmadii) [2021]EWCA Crim 1958 as to illegal entry



New Section 25 Immigration Act 1971

Assisting unlawful immigration to member State or the United Kingdom

(1) A person commits an offence if he—

(a) does an act which facilitates the commission of a breach or attempted breach of immigration law by an individual who is not a national of the United Kingdom,

(b) knows or has reasonable cause for believing that the act facilitates the commission of a breach or attempted breach of immigration law by the individual, and

(c) knows or has reasonable cause for believing that the individual is not a national of the United Kingdom.

(2) In subsection (1) “immigration law” means a law which has effect in a member State or the United Kingdom and which controls, in respect of some or all persons who are not nationals of the State or, as the case may be, of the United Kingdom, entitlement to—

(a) enter **or arrive in** the State or the United Kingdom,

(b) transit across the State or the United Kingdom, or

(c) be in the State or the United Kingdom.



New section 24 (D1) Immigration Act 1971

“(D1)A person who—

(a)requires entry clearance under the immigration rules, and

*(b)knowingly arrives in the United Kingdom without a valid entry clearance,
commits an offence.”*

Ruling by Mr Justice Cavanagh 21 Dec 22

<https://www.judiciary.uk/judgments/r-v-mohamed-and-others/>

Court of Appeal: *R v Mohammed and Others*, [2023] EWCA Crim 311



Who is being Prosecuted?

“The Crown Prosecution Service considers each case and then determines whether it will be in the public interest to charge and to proceed to trial. In practice, criminal proceedings under section 24(D1) and/or section 25 are taken against only a small proportion of the migrants.

In cases in which the individual is believed to have been piloting the boat, it is more likely, though not certain, that he (it is almost always a he) will be charged with an offence under section 24(D1) and/or section 25. The section 25 offence is the more serious offence. There are other circumstances in which a migrant might be charged, for example, if it is believed that he is one of the organisers of a trafficking operation, or if it is believed that the migrant is attempting to return to the UK having already been deported after a previous attempt to enter.”

Paragraph 5 of Cavanagh Judgement



Age-disputed minors

- The CPS guidance is silent on age-disputed minors
- No guarantee that any prosecution will be stayed pending the outcome (though you can make reps and JR if refused)
- Unclear whether those who properly await the outcome of such assessment will get credit if they later plead guilty



Sentencing Remarks of HHJ James: 28 September 2022

Offences under section 24 (D1)

There is public concern about channel crossings

Most Defendants will be seeking asylum

They should usually expect 12 months after trial (which in turns mean they are subject to auto deport under section 32 of the UK Borders Act 2007

It will usually be a sentence of immediate custody

If they plead guilty, that will be “substantial mitigation” and they will usually stay in the Magistrates’ Court. (Is that still true, now Magistrates Court sentences are reduced?)



Compatibility with the Refugee Convention

Article 31(1) of the Refugee Convention provides:

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

Section 31 of the Immigration and Asylum Act 1999 provides for defences for certain offences (s31(3)) based on Article 31. This has not been amended.

Section 31(10) grants a power to the Secretary of State by order to add offences to the list in section 31(3). It does not include s24 or 25 IA 1971 (as amended). Could challenge the SSHD’s failure to amend the list.



Compatibility with the Refugee Convention

“it is not necessary, in order to ensure that the United Kingdom complied with its international obligations in the Refugee Convention, to identify a provision in NABA 2022 which creates a new statutory defence, applicable to section 24(D1), which replicates Article 31 of the Convention.

This is because there is a different mechanism for giving effect to the United Kingdom’s obligations. This is done by means of the guidance given to prosecutors in the CPS Policy Guidance, set out above.”

Para 119
Cavanagh Judgement



Compatibility with Refugee Convention

“The clear combined effect of rule 24 read with rule 6.2 is that visa nationals, such as a citizen of Sudan, require entry clearance before arrival in the UK for any purpose. That is so irrespective of whether they have an intention to claim asylum on arrival. That is hardly surprising. Ultimately it may be decided that a migrant does not fall within the definition of a refugee for one or more reasons and their claim for asylum rejected quite properly. For example, it may be decided that a claimant could reasonably have been expected to have sought protection under the Refugee Convention in another country in which he stopped before arriving in the UK. Alternatively, the claim for asylum may not be based upon a genuine ground falling within the Convention or may be fabricated.”

Paragraph 58 Court of Appeal Judgment



Relevance of Human Rights Act 1998

Para 13 of the Cavanagh judgement – the court declined to express a view on whether the legislation is compatible with the HRA, as the Crown Court has no jurisdiction to make a declaration of incompatibility.

Articles 6, 7, 8 and 14 ECHR were raised.

Aldaw ultimately pleaded guilty (basis of plea that D did not admit boat steering) and received an 8 month sentence. The sentencing judge HHJ Weekes:

“some people think you should not be prosecuted but I have to apply the law...”

Prosecutorial Discretion

“Even though section 31 of the 1999 Act does not apply to offences under sections 24 and 25 of the IA 1999, it is accepted that it would not be appropriate to impose penalties on refugees for committing offences under section 24 or 25, if to do so would breach the United Kingdom’s obligations under Article 31(1) of the Refugee Convention. This is dealt with primarily by the application of a “public interest” test to prosecutorial decisions by the CPS”.

Paragraph 52 of Cavanagh Judgement



CPS Policy on Article 31 Refugee Convention

“In cases where there is no statutory defence, prosecutors should have regard to circumstances which are relevant to Article 31 of the Refugee Convention when considering the public interest stage.”



Challenging Decisions to Prosecute

Abuse of Process:

“However, there is a further backstop protection for Defendants, in that the court has jurisdiction to stay proceedings under 24(D1) if the judge takes the view that, in light of Article 31 of the Refugee Convention, it would be an abuse of process for the case to proceed to trial.”

Paragraph 122 of the Cavanagh judgement

R v AAD [2022] 1 WLR, paras 120 onwards, and in particular para 142



Judicial Review as a remedy?

Judicial Review

Paragraph 123 of the Cavanagh Judgment

Should be used “in exceptional cases” (*R v AAD*)
Section 6 HRA :“(1)It is unlawful for a public authority to act in a way which is incompatible with a Convention right.”



Thank you

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Trafficking: Disqualification from Protection under the Nationality and Borders Act 2022

Gemma Loughran, Garden Court Chambers

11 July 2023



GARDEN COURT CHAMBERS



Garden Court Chambers



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Nationality and Borders Act 2022

63 Identified potential victims etc: disqualification from protection

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

(a) is a **threat to public order**, or

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

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

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

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



Bad Faith: Modern Slavery Statutory Guidance, 18 May 2023

Exemption for Children

14.315. Those aged under 18 at the time of the relevant Reasonable Grounds decision will not be eligible for disqualification on grounds of bad faith.

14.316. Section 51 of the Modern Slavery Act 2015 puts on a statutory footing the presumption that, where there are reasonable grounds to believe a person is a victim of modern slavery, and it is not certain but there are reasonable grounds to believe that the person may be under 18, then the person is to be treated as being under 18 years of age for the purposes of the public authority's functions under relevant arrangements until an age assessment is carried out by a Local Authority or the person's age is otherwise determined. See the section on Presumption of Age for further information regarding age assessments.

14.317. If the age assessment reveals that the individual was under 18 at the time of the relevant Reasonable Grounds decision, they should not be considered for disqualification on grounds of bad faith. In cases where an individual's age is disputed, it must be established whether an individual is a child or an adult before the decision on whether to apply the disqualification can be made.



Threat to Public Order

Section 63

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

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

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

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

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



Threat to Public Order

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

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

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

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

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



Definition of Foreign Criminal

Automatic Deportation Provisions in the UK Borders Act 2007

Section 32(1) defines a ‘foreign criminal’ as a person who is not a British citizen and is convicted in a court in the UK of an offence for which either the person is sentenced to a period of imprisonment of at least 12 months or the person is sentenced to a period of imprisonment for an offence specified in an order made under Nationality, Immigration and Asylum Act 2002, s. 72(4).

Section 33 – Exception to automatic deportation

(3)Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction.



Decision Making Process: Modern Slavery Statutory Guidance, 18 May 2023

Public Order Disqualification [14.231]

Evidence Gathering and decision making process [14.247]

- Issue a letter/email informing PVOT they are minded to apply a public order disqualification subject to any relevant information being provided within ten working days
- Decision should be made within 30 working days of the public order request being accepted by the competent authority, where possible.

Making a public order disqualification [14.257]

Make a reasonable assessment as to whether, in respect of receiving modern slavery specific protections only:

- the individual is a high, or low threat to public order.
- the individual has a high or low need for modern slavery specific protections.

Public Order Decision Making Framework [14.268]

- A non-exhaustive list of indicators to be used by Competent Authority decisionmakers on a case-by-case basis.



Threat to public order (Rating: LOW)

Indicator

The age and maturity of the individual at the time of their offence where the individual is under the age of 18 at the time of their referral into the NRM and at the time of the offence

Detail

Age and maturity assessment has been conducted by a qualified medical professional indicating the individual's age and maturity mitigate the individual's threat to public order.

To note: age and maturity should only be considered when the individual is currently under the age of 18 for their current NRM Referral.



Need for modern slavery specific protections (Rating: HIGH)

Indicator

The age and maturity of the individual at the time of their exploitation, where the individual is aged under 18 at the time of referral

Detail

We have a due regard to safeguard and promote the welfare of children who are in the United Kingdom and so the threshold of a child not having recovery needs is high;

In cases of potential child victims where the offences committed are linked directly to their exploitation only, competent authority staff must remember that it is not possible for a child to give informed consent to engage in criminal or other exploitative activity



Making a public order disqualification for a child

14.271. To determine whether there are, on balance, grounds to apply the public order disqualification to a child, competent authority staff need knowledge and understanding about child victims of modern slavery, as characteristics and issues may be different to adult victims.

14.272. In cases of potential child victims where the offences committed are linked directly to their exploitation only, competent authority staff must remember that it is not possible for a child to give informed consent to engage in criminal or other exploitative activity if linked to their period of exploitation.

14.273. Competent authority decision makers must also keep in mind the child's:

- added vulnerability
- developmental stage and maturity
- possible grooming by the perpetrator



Making a public order disqualification for a child

14.274. No child's case should be considered without contacting individuals who specialise in children from the Local Authority with responsibility for the area where the child resides. This is to gather any further information around the circumstances leading to the offence that prompted the disqualification request, and specific vulnerabilities of the child that should be considered and any particular needs the child has that would not be provided through the local authority duty of care.

14.275. In the specific circumstances that an individual under consideration for a public order disqualification is subject to the Borders, Citizenship and Immigration Act 2009, case workers should bear in mind that they must consider the best interests of that child as a primary, but not the only, consideration in line with Section 55 of that Act and Article 3(1) of the United Nations Convention on the Rights of the Child 1989 ('UNCRC').



Challenges to Public Order Disqualifications

- No reconsideration or right of appeal
- Important to front load any referrals to the National Referral Mechanism
- Judicial Review
 - Challenge individual decision and statutory guidance
 - Incompatible with Council of Europe Convention on Action against Trafficking in Human Beings and Article 4 ECHR.

Garden Court Chambers Free Webinar - Victims of Trafficking: Challenging Public Order Disqualifications and NRM delay, Monday 17 July 2023 at 5pm

<https://www.gardencourtchambers.co.uk/events/free-webinar-victims-of-trafficking-challenging-public-order-disqualifications-and-nrm-delay>



Thank you

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Prosecuting Trafficking Children

Jennifer Twite, Garden Court Chambers

11 July 2023



GARDEN COURT CHAMBERS



Garden Court Chambers



@gardencourtlaw

The Code for Crown Prosecutors

The CPS can only bring a prosecution if it meets the Full Code Test, two stages:

- 1. Evidential Test**
- 2. Public Interest Test**

“4.10 It has never been the rule that a prosecution will automatically take place once the evidential stage is met.”

Para 4.14 sets out the factors to consider in the public interest test:

- 1. Seriousness of the Offence**
- 2. Culpability**
- 3. Harm Caused**
- 4. Age and Maturity of the Offender**
- 5. Impact on the Community**
- 6. Is prosecution a proportionate response?**



Public Interest Test: Children

- The criminal justice system treats children and young people differently from adults and significant weight must be attached to the age of the suspect if they are a child or young person under 18.
- The best interests and welfare of the child or young person must be considered, including whether a prosecution is likely to have an adverse impact on their future prospects that is disproportionate to the seriousness of the offending.
- Prosecutors must have regard to the principal aim of the youth justice system, which is to prevent offending by children and young people. Prosecutors must also have regard to the obligations arising under the United Nations 1989 Convention on the Rights of the Child.
- Prosecutors should consider the suspect's maturity, as well as their chronological age, as young adults will continue to mature into their mid-twenties.
- As a starting point, the younger the suspect, the less likely it is that a prosecution is required.



CPS guidance: Children as suspects and Defendants

<https://www.cps.gov.uk/legal-guidance/children-suspects-and-defendants>

“Child First’ justice [...] is the belief that children coming to the attention of the Youth Justice System (YJS) are seen as ‘children’ first and ‘offenders’ second. The primary focus of this approach is prevention, diversion, and a clear commitment to developing interventions to avoid unnecessary prosecutions and criminalisation of children.”

Principal Aim of Youth Justice System is prevent children from offending (Section 37 Crime And Disorder Act 1998).

Section 44 of the Children and Young Persons Act 1933: every court dealing with a child shall have regard to their welfare



CPS Guidance on Modern Slavery

<https://www.cps.gov.uk/legal-guidance/modern-slavery-human-trafficking-and-smuggling>

Four-stage test to prosecution:

1. Are they a credible victim of trafficking, smuggling or modern slavery?
2. Is there clear evidence of a credible common law defence of duress?
3. Is there clear evidence of a statutory defence under the Modern Slavery Act?
4. Is it in the public interest to prosecute?



Challenging Prosecutions

R v Chief Constable of Kent and Another ex parte L, R v DPP ex parte B [1991] 93 Cr App R 416: whilst rare, decisions to prosecute can be overturned upon judicial review where they are made regardless of or contrary to a settled policy of the DPP.

Section 6 Human Rights Act 1998 makes it unlawful for a public body to act in a way that is incompatible with a person's rights under the European Convention of Human Rights.

Consider Articles 4, 6, 8 ECHR

“If (in what will be likely to be a most exceptional case) there has been a failure to have due regard to CPS guidance or if there has been a lack of rational basis for departure by the prosecution from a conclusive grounds decision then a stay application may be available. It will then be assessed by the court, by way of review on grounds corresponding to public law grounds.”

R v AAD [2022] EWCA Crim 108 para 142(4)



Age Disputes: Deeming Age in Criminal Courts

The Criminal Courts have the power to “deem” a person’s age. Section 99 Children and Young Person’s Act 1933

“The Court shall make due inquiry as to the age of that person, and for that purpose shall take such evidence as may be forthcoming at the hearing of the case, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly states to the court, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age of that person..”

Courts should usually adjourn to make those due inquiries: *R v L, HVN, THN, T* [2013] EWCA Crim 99 and

R v Steed [1990] 12 Cr App R (S) 230

Criminal Court makes its own decision, but a properly carried out age assessment will carry significant weight: *N v Staines Magistrates Court* [2009] EWHC 3081 (Admin)



Everyone Owes a Duty to the Child

“This appeal against conviction must obviously be allowed. We would put it most simply on the footing that the common law and Article 6 of the European Convention on Human Rights alike require far higher standards of procedural protection than were given here. There was no fair trial. We hope that such a shameful set of circumstances never occurs again. Prosecutors must be aware of the protocols which, although not in the textbooks are enshrined in their Code. Defence lawyers must respond by making enquiries, if there is before them credible material showing that they have a client who might have been the victim of trafficking, especially a young client. Where there is doubt about the age of a defendant who is a possible victim of trafficking, proper inquiries must be made, indeed statute so required.”

Para 26, *R v O* [2008] EWCA 2835



Practical Issues

Adjournments will often be necessary to determine age, need to consider:

- Credit for guilty plea
- Bail – if a child is denied bail, the court must remand to local authority accommodation,
- Delay
- R(M) v Hammersmith Magistrates' Court [2017] EWHC 1359 (Admin) – court remanded a putative child to local authority accommodation pending an age assessment.

A deeming decision is amenable to judicial review (R (M) v Hammersmith) but would need to consider whether to judicially review a decision or ask the criminal courts to revisit the matter themselves.

Courts are not bound by previous age assessments, and the Crown Court can now remit a case back to the Youth Court.

A mistake as to age does not invalidate a decision or a sentence, but that does not mean it cannot be appealed.

It is important that age disputes are raised during proceedings, as appealing a case afterwards due to a mistake as to age is time-consuming. Guilty pleas in Magistrates Court cannot ordinarily be appealed and an application needs to be made to the CCRC under section 11 Criminal Appeals Act 1995.



Thank you

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GARDEN COURT CHAMBERS



Charging and Remand into Adult Prison of Age Disputed Putative Children

Maria Moodie, Garden Court Chambers

11 July 2023



GARDEN COURT CHAMBERS



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Treatment of age disputed putative children who arrive in small boats

3 main contributing factors to putative children spending prolonged periods of time in an adult prison:

1. HO approach to disputing age – immediately on arrival
2. Police / CPS prioritisation of a speedy charging regime of NABA 2022 offences
3. Lack of awareness within CJS of age disputes – age not raised / limited understanding by criminal representatives and the court of the cursory / unreliable nature of HO's age determination / appropriate steps not taken to ensure age is lawfully assessed



Home Office Age Determination

- Cursory age assessment conducted pursuant to the HO's Assessing Age policy:
 - 16 /17 year olds with no documentary evidence of age / DOB
 - Conducted within hours of arrival without any time to recover from traumatic journey
 - Conducted by two Home Office officials and/or Home Office Social Worker
 - Brief meeting – usually 10 minutes or less
 - Known cases where interpreter not provided either in person or via phone
 - Based entirely on physical appearance and demeanour (receding hairline, nasobial folds, wrinkles, loss of volume in cheek, development and size of nose and jawline, height, shoulders, facial hair)
- HO allocate DOB making YP an adult



Arrest and CPS charging

- Individual transferred to immigration detention at Manston
- Within 24 hours – arrested by Kent Police and taken into police custody
- Charged with illegal arrival, facilitation and/or manslaughter offences
- Access to duty criminal solicitor – not always alert to issue of age being disputed
- 1st appearance at Folkstone Magistrates Court
- Bail not sought - remanded into custody – treated as an adult – placed in adult prison

- Early stages of CJS: Age not raised with police, court or prison
- Relevant CJS paperwork records HO allocated DOB without indication of age dispute / claimed DOB



Practical steps if involved in these cases:

- **Safeguarding referral to prison** to alert them to age dispute – request interim safeguarding measures / access to health services
- **Urgent Referral to Local Authority:**
 - Conduct a welfare visit of YP in prison
 - Accept claimed age or agree to undertake full age assessment treating YP as putative child in meantime
 - Agree to provide s.20 CA 1989 accommodation in support of bail
 - Make NRM referral if indicators of trafficking
- **Collect evidence in support of age assessment**
- **Collaborative working with criminal legal representatives:**
 - Obtain disclosure of relevant criminal justice documents
 - Understand what stage has been reached in criminal proceedings – relevant to expedition of AA
 - Age to be raised in criminal proceedings – seeking stay pending age enquiry by judge (informed by LA AA)
 - Support criminal representative in making submissions to criminal judge on inherent unreliability of HO age determination - based on physical appearance only which is no more reliable than “dock assessment” not permissible by criminal judge
 - Application for bail - supported by Local Authority willing to offer bail address and agree to conduct age assessment. If bail refused – application for YP to be remanded into LA care



Remand into custody

- Intake information / data recorded on prison system displays only HO allocated DOB – no indication of age dispute or different claimed age
 - Prison not aware / informed of age dispute
 - Placed in shared cell with an adult – no Cell Sharing Risk Assessment undertaken
 - No wider risk assessment undertaken
 - No referral by prison to LA for lawful age assessment
- YP - remanded into prison within 2 – 3 days of arrival – has limited awareness of rights, of consequences of HO age determination, limited access to advice to raise age / seek referral to LA



Legal issues

- **Age assessment conducted in adult prison** (if bail refused / not sought) – concerns over procedural fairness
- **No HMPPS policy** on treatment / safeguarding of putative children remanded in adult prison *pending* lawful AA:
 - Inconsistent responses to safeguarding referrals made concerning remand of a putative child – i.e., refusal to take any steps on basis that the criminal court’s remand decision dictates the venue for remand and is binding and prevents the prison from implementing any safeguarding measures
 - lack of understanding that venue for remand isn’t necessarily challenged
 - lack of awareness / refusal to engage with wider statutory framework that applies - s.11 CA 2004 / benefit of the doubt in age dispute cases / cursory / unreliability nature of HO determination / s.51 MSA 2015 presumption of age for PVoT
 - Policies that do exist do not provide guidance to prison staff on referral pathways / risk assessments / interim safeguarding measures for this specific cohort of “*age disputed putative children pending lawful determination of their age*”.
- **HMPPS Modern Slavery Guidance** for prisons in England and Wales (March 2023)
 - Non compliance with provisions relating to referral to a First Responder / Cell Sharing Risk Assessment / implementation of safeguarding measures / Age Disputed Claims involving PVoT - referral by prison to LA
- **HO approach to age determination** – Coram Children’s Legal Centre has collecting data on this – so please do let them know if you come across these cases involving age disputed putative children.



Thank you

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Missing asylum-seeking children and Home Office policy

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