
GARDEN COURT
CHAMBERS

NRM delays

Nicola Braganza KC

Garden Court Chambers

17 July 2023

Outline

- Current key statistics
- Legal framework
- Caselaw
- Where to go from here?

Key statistics, *January - March 2023*

- 4,746 potential victims of modern slavery referred to NRM Jan-March 2023
- => 7% increase compared with Oct-Dec 2022, (4,416)
- => 26% increase from Jan-Mar 2022 (3,773)
- Referrals received Jan-March 23 highest since the NRM began in 2009
- 79% (3,768) were sent to the Single Competent Authority (SCA)
- 21% (978) to the Immigration Enforcement Competent Authority (IECA), adult Foreign National Offenders, those detained in an IRC, those in the Third Country Unit/ inadmissible process
- Albanian nationals, most commonly referred nationality, followed by UK nationals
- SCA & IECA recorded their highest quarterly numbers since the NRM began
- 3,528 Reasonable Grounds decision (RG)
- 2,275 Conclusive Grounds decisions (CG) issued this quarter
- 58% of RG and 75% of CG decisions were positive

- *https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-january-to-march-2023/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-quarter-1-2023-january-to-march*

Key statistics on delay

- Average (median) time taken from referral to CG decisions in Jan-Mar 2023 = **566 days**
- Oct-Dec 2022 = **641 days**
- SCA CG decisions average time **654 days**
- IECA average **352 days**
- IECA shorter as fewer cases and only taken on referrals since 2021
- Times do not reflect the waiting time of all cases within the system
- Some cases that received decisions in this period may have taken longer to reach a decision than those in previous quarter

Average number of days to make CG decision ***by both CAs***

Year	Quarter	Number of days to decision	
		Median	Mean
2014	Q1	63	153
	Q2	119	193
	Q3	165	203
	Q4	80	140
2015	Q1	88	127
	Q2	104	178
	Q3	114	184
	Q4	112	170
2016	Q1	141	179
	Q2	160	201
	Q3	182	243
	Q4	186	260
2017	Q1	237	326
	Q2	291	406
	Q3	238	370
	Q4	228	324
2018	Q1	245	389
	Q2	340	458
	Q3	332	443
	Q4	560	556
2019	Q1	309	428
	Q2	266	423
	Q3	518	520
	Q4	425	488
2020	Q1	301	454
	Q2	322	429
	Q3	344	444
	Q4	426	523
2021	Q1	412	482
	Q2	436	532
	Q3	526	606
	Q4	437	588
2022	Q1	447	564
	Q2	536	676
	Q3	531	666
	Q4	641	761
2023	Q1	566	706

Average number of days to make CG decision ***by both CAs***

Year	Quarter	Number of days to decision	
		Median	Mean
2014	Q1	63	153
	Q2	119	193
	Q3	165	203
	Q4	80	140
2015	Q1	88	127
	Q2	104	178
	Q3	114	184
	Q4	112	170
2016	Q1	141	179
	Q2	160	201
	Q3	182	243
	Q4	186	260
2017	Q1	237	326
	Q2	291	406
	Q3	238	370
	Q4	228	324
2018	Q1	245	389
	Q2	340	458
	Q3	332	443
	Q4	560	556

Average number of days to make CG decision ***by both CAs***

Year	Quarter	Number of days to decision	
		Median	Mean
2019	Q1	309	428
	Q2	266	423
	Q3	518	520
	Q4	425	488
2020	Q1	301	454
	Q2	322	429
	Q3	344	444
	Q4	426	523
2021	Q1	412	482
	Q2	436	532
	Q3	526	606
	Q4	437	588
2022	Q1	447	564
	Q2	536	676
	Q3	531	666
	Q4	641	761
2023	Q1	566	706

Average number of days to make CG decision ***by SCA***

Year	Quarter	Number of days to decision	
		Median	Mean
2019	Q1	309	428
	Q2	266	423
	Q3	518	520
	Q4	425	488
2020	Q1	301	454
	Q2	322	429
	Q3	344	444
	Q4	426	523
2021	Q1	412	482
	Q2	436	532
	Q3	526	606
	Q4	437	588
2022	Q1	465	583
	Q2	580	720
	Q3	561	703
	Q4	697	804
2023	Q1	654	756

Average number of days to make CG decision ***by IECA***

Year	Quarter	Number of days to decision	
		Median	Mean
2022	Q1	113	112
	Q2	160	161
	Q3	217	176
	Q4	301	257
2023	Q1	352	298

Legal framework

- Article 4 ECHR
- 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
- Modern Slavery: Statutory Guidance - Chapter 7 & Annex E (NRM decision making process) (v3.3 updated 10/7/23)
- 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
- After positive CG decision, usually considered for discretionary leave to remain

Statutory Guidance

- 7.9. Conclusive Grounds decision should generally be made **as soon as possible**. However, a decision can only be made **when sufficient information** about the case has been shared or made available by interested parties to the relevant competent authority

- Annex E - 14.123 – **no target for CG decision** within a specific timeframe.
- Only once sufficient information available to the competent authority.

- When CA received sufficient information, decision *as soon as possible* but only **once a minimum of 30-calendar days** of **the Recovery Period** passed from RG decision, unless Request to delay the decision.

- 14.124. with a child, CG as soon as possible after at least 30 calendar days of the Recovery Period, providing there is sufficient information to make the decision and it is in the child's best interest.

- 14.125. Where possible, decision before the individual reaches the age of 18, but not at the expense of the child's best interests, eg if more info required and not available until after the child turns 18.

- 14.126. If the child is subject to criminal proceedings, the SCA should consider the child's case as a matter of urgency … decision only where sufficient information available, once the minimum 30 days RP

Legal framework

- Breach of ECAT = justiciable insofar as the UK has sought to implement the provisions through policy
- *R (Galdikas) v SSHD* [2016] EWHC 942 (Admin) at §66
- *PK (Ghana)* at §34
- *MN v SSHD* [2020] EWCA Civ 1746
- "*[s]ince* ***the NRM is avowedly intended to give effect to the UK's obligations under ECAT the Guidance must be construed so far as possible to give effect to those obligations***" *MN v SSHD* [2020] EWCA Civ 1746
- *EOG and KTT v SSHD* [2022] EWCA Civ 307, 34-36.

Delay

- *Rantsev v Cyprus and Russia* (2010) EHRR 1
  a "*requirement of promptness and reasonable expedition is implicit*"
  Art 4 ECHR obligation 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

O and H v SSHD – hearing 22-23/11/18, judgment 31/1/19,

- significant delays in recent years - D relied on "*exponential*" increase in referrals
- Modern Slavery Unit identified delays as frustrating people's ability to recover from exploitation
- Referrals dropped slightly in 2018, average time for making a CG decision fallen, steady rise in CG decisions in last year
- Concerns about delay for a number of years from all those working with victims

- "***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"***

- "*sensible steps are currently being taken … Resources have now been found*"
- "*… it appears from the evidence and the agreed statistics that the position is now improving*"
- No evidence that NRM "*routinely takes no action*"
- Evidence of Professor Katona that delays damaging to mental health and recovery accepted
- "*impossible*" to see irrational or unfair to prioritise support within the NRM on the basis of vulnerability, rather than expedition of CG decisions. Garnham J

EOG and KTT v SSHD [2020] (11/20 & 12/20)

- Average delays in CG decision => **356** in 2017, **462** in 2018 and 2019
- Backlog of 9,000 cases

"*..this table, and the underlying data, make for* ***very dispiriting reading....*** *remorseless increase in cases referred to the NRM. While it is true that the number of reasonable grounds decisions has matched the incoming caseload, the same cannot be said of conclusive grounds decisions. There was an increase in such decisions between 2017 and 2018 but the number in 2018 was only about half of what was needed to deal with the volume of incoming cases; and in 2019 it was only just over a third. Hence the increase in the backlog from 7,000 to 9,000 cases which* ***at the current disposal rate will take between two and three years to conclude. The present average (mean) number of 462 days (i.e. 15 months) to dispose conclusively of cases will inevitably worsen given the scale of the backlog****.*

28. ***The data also belies Garnham J's projection in [41], based on the statistical evidence before him, that in 2018 the number of referrals would fall to 4,245 as well as his projection in [43] that the average length of time for making a conclusive grounds decision was falling****. He estimated that for 2017 the average length of time for making such a decision had fallen to 327 days. In fact, it was 356 days, and rose sharply in 2018 to 462 days where it stayed for 2019.*" Mostyn J

EOG and KTT v SSHD [2022] (2/22 & 3/22)

"*The background to both these cases is the* ***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… We do not have updated figures but* ***we were not told that there had been any improvement****. It is likewise notorious that there are very long delays in the asylum system. …[* ***counsel for the Secretary of State] in his oral submissions frankly acknowledged these delays and made no attempt to suggest that they were acceptable****. But he urged us not to fall into the trap of distorting the meaning of ECAT in order to provide a solution to a problem which its provisions were not designed to address. He said that there were* ***other and more appropriate legal routes potentially available to victims of trafficking who were adversely affected by delay …*** *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."***

FH v SSHD CO/4781/2022 (6/23)

- Kenyan national, moved to Oman, then Qatar
- Trafficked into the UK by Qatari employer in 2018
- Exploited, subjected to severe abuse as domestic worker

- **Start of August 2019** referred into NRM, positive RG 15 days later
- October 2022 PAP on CG delay

- Start of November 2022 – D decision "within 8 months" (ie around **end June**/ start July 2023) (after asylum interview)
- JR issued 12/22
- AoS 1/23 – "decision by 11 **August** 2023" (needed information from C)
- 23/1 – D says "decision in 6 months by **11 June** 2023" (accepted had all the info needed)
- 2/23 – D says "3 months from February 2023 by **10 May** 2023" (said asylum i/v in Feb, i/v rebooked)

- 23/2/23 – Permission refused – renewal hearing 8/3 listed for 21/4
- **April 2023 - Positive CG decision (3 years 8 months later) – as predicted, pre-hearing**
- 9/6/23 – Permission granted

FH v SSHD CO/4781/2022

- D does not answer how it comes to chopping and changing dates
- Refers to "*ongoing legal challenges*" "*issued on alleged delay*" being "*a factor*"
- Unpublished policy? Evidence pointed to a practice.
- 9/6/23 – Permission granted, Eyre J, grounds raising systemic and individual delay
  - "*bringing of a claim triggers a decision*"
  - "*moved up the queue*"
  - "*system operated in such a way*" that those "*starting proceedings, reduce the time to get a decision*"
  - "*arguably irrational*"

Next steps from here?

- Pre-pre-action letter, build the audit trail
- PAP with reference to *FH*, latest stats, also setting out the impact on your client
- If the reply is decision within 3 months, consider issuing on breach of timetable
- Press on explanations for offered timescales; appear to come from thin air
- *FH* due end of 2023
- If you have cases with the same pattern of litigation, triggering a decision, please let us know!

[ATLeP] CG delay JR - permission granted! 13/6/23

Hi

Fyi, our client has been granted permission to proceed with their JR that the current delays (both systemic and their individual delay of 3 years 8 months) in making Conclusive Grounds decisions for victims of trafficking are unlawful *(R (FH) v Secretary of State for the Home Department; CO/4781/2022*).

In particular, the Court found it was arguable that the Home Office is acting unlawfully in their practice of expediting Conclusive Grounds decision-making when legal challenges are brought, despite that not featuring in published Home Office policies. Latest statistics show that survivors are waiting for over 700 days for a decision.

We are currently putting together further evidence. Thanks to the many organisations that assisted our client with evidence so far (**particular thanks to ATLEU, Big Leaf Foundation, Birnberg Pierce, Kalayaan, Migrant Legal Project, Simpson Millar and Unseen**) and our barristers Nicola Braganza KC (Garden Court Chambers) and Miranda Butler (Landmark Chambers).

For info (or referrals) email Bryony Goodesmith bgoodesmith@dpglaw.co.uk and UHayter@dpglaw.co.uk

Thanks

Ugo Hayter
Partner
Deighton Pierce Glynn
www.dpglaw.co.uk

Thank you

020 7993 7600 | info@gclaw.co.uk | @gardencourtlaw

Obligations to victims of trafficking

Convention against trafficking

1. Council of Europe Convention on Action against Trafficking in Human Beings, 2005 ('ECAT') gives regional effect to and builds upon the Palermo Protocol to the UN Convention against Transnational Organised Crime. ECAT defines trafficking and imposes an array of obligations on states to prevent and combat trafficking; to protect the human rights of victims and to promote international cooperation on action against trafficking: art 1.

2. Chapter III of ECAT sets out 'Measures to Protect and Promote the Rights of Victims, Guaranteeing Gender Equality'. They include:

    a. article 10 – an obligation to identify victims of trafficking and an obligation not to remove a person in respect of whom there are reasonable grounds to believe the person has been a victim of trafficking until the identification process is complete;

    b. article 12 – obligation to adopt such measures 'as may be necessary to assist victims in their physical, psychological and social recovery', including at least accommodation, support, medical treatment;

    c. article 13 – an obligation to provide a 'recovery and reflection period of at lest 30 days' where there are reasonable grounds to believe the person is a VoT. During that period, the person may not be removed, but art 13(3) provides: 'the parties are not bound to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly';

    d. article 14 – an obligation to issue a residence permit to a VoT if the competent authority considers that their stay is necessary (a) owing to their personal situation or (b) for the purpose of cooperating with the competent authorities in investigation or criminal proceedings;

e. article 15 – obligation to enable VoTs to pursue claims for compensation

f. article 16 – obligation when removing a VoT to ensure it is done 'with due regard for the rights, safety and dignity of that person' and to 'make its best effort to favour the reintegration of victims into the society of the State of return'.

3. Note that the only one of these obligations that is qualified by reference to the conduct of the VoT is article 13.

Effect of ECAT in domestic law

4. ECAT is an unincorporated treaty and thus not directly effective in domestic law. However, 'its obligations have been implemented by a variety of measures' including the National Referral Mechanism ('NRM'). The NRM 'is designed to fulfil the obligations in articles 10, 12 and 13' of ECAT and 'the Secretary of State has consistently accepted that the NRM should comply with ECAT' and that 'it would be a justiciable error of law if the NRM Guidance did not accurately reflect the requirements of ECAT': *MS (Pakistan) v Secretary of State for the Home Department* [2020] UKSC 9, §20.

5. The current iteration of the NRM guidance is *Modern Slavery: Statutory Guidance for England and Wales (under s. 49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland,* version 3.3, July 2023.

6. Modern Slavery Act 2015, s. 49 obliges the Secretary of State to issue guidance to public authorities about (a) the sorts of things which indicate that a person may be a VoT; (b) arrangements for providing assistance and support to persons where there are reasonable grounds to believe they are VoTs; (c) arrangements for determining whether there are reasonable grounds; and (d) whether the person is a VoT.

Article 4 ECHR

7. A further and more compelling means by which ECAT may be relied on is through article 4 of the ECHR. Article 4 says '(1) No one shall be held in slavery or servitude. (2) No one shall be required to perform forced or compulsory labour. (3) …'.

8. In *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, §282 the court concluded that trafficking within the meaning of article 4(a) of ECAT fell within the scope of article 4 of the ECHR and it was not necessary to decide whether it was slavery, servitude or forced labour. This was confirmed by the Grand Chamber in *SM v Croatia* (2021) 72 EHRR 1, §297.

9. ECHR Article 4 imposes a number of positive obligations upon states and they are, by virtue of Human Rights Act 1998, s. 6 'for practical purposes binding as a matter of domestic law': *MN and IXU v Secretary of State for the Home Department* [2020] EWCA Civ 1746, §49

10. 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. (GRETA is the 'Group of experts on action against trafficking in human beings' set up by Chapter VII of ECAT to monitor the implementation of the Convention).

11. Whilst there is 'no automatic read-across' between ECAT and article 4 (*TDT v Secretary of State for the Home Department* [2018] EWCA Civ 1395, §31, '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. Thus, 'obligations under Chapter III of ECAT will be directly enforceable to the extent that they correspond to positive obligations under article 4 of the ECHR': *MN and IXU,* §85.

12. The positive obligations fall under three broad headings.

(1) The systems duty

13. First, 'the systems duty', i.e. 'a general duty to implement measures to combat trafficking': *TDT,* §17. It is a 'duty to put in place a legislative and administrative framework to prohibit and punish trafficking': *SM v Croatia,* §306. As well as criminal law measures to punish traffickers 'article 4 requires member states to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore, a state's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking': *Rantsev* §284.

14. Examples of actual or possible breaches of the systems duty include:

    a. GRETA has expressed concern that the offence of illegal working and the measures constituting the hostile environment operate as drivers of exploitation of undocumented migrant workers, securing impunity for exploitative employers who will not be challenged by vulnerable workers: Third Evaluation Report on UK, §§34-36;

    b. the absence of policy explaining that primary regard was to be had to the objectives of ECAT (in particular, assisting VoTs recovery) when considering whether to permit employment outside the SOL was unlawful. It was also discriminatory in breach of articles 14 (in the ambit of 4 and 8) as between asylum seekers who were and were not VoTs: *R (IJ)(Kosovo) v Secretary of State for the Home Department* [2020] EWHC 3487 (Admin)

    c. the immigration rules, by allowing young, asylum seeking VoTs to be left for an indeterminate period of years in limbo, fail to 'address relevant concerns relating to encouragement, facilitation or tolerance of trafficking' – c.f. *Rantsev,* §284

(2) The operational duty

15. Second, 'the operational duty' which is a duty 'to take steps to protect individual victims of trafficking': *TDT,* §17. In *Chowdury* described the operational measures required by reference

to ECAT and as consisting of 'preventive measures' and 'protection measures'. Protection measures 'include facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery': *Chowdury* §110. In *VCL v United Kingdom* (2021) 73 EHRR 9, §159 the Court said the duty to take operational measures has 'two principal aims: to protect the victim of trafficking from further harm; and to facilitate his or her recovery'.

16. Examples of actual or possible breaches of the operational duty include:

    a. releasing a possible VoT from detention without having arranged for him to be released into safe accommodation was a breach of article 4 because there were grounds for a reasonable suspicion that he was a victim of trafficking and thus at real and immediate risk of being trafficked again: *TDT*

    b. prosecution of a VoT may be at odds with the state's operational duty to protect because 'it is axiomatic that the prosecution of victims of trafficking would be injurious to their physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in the future': *VCL,* §159. Therefore, where there are circumstances giving rise to a credible suspicion that a person suspected of committing an offence may have been trafficked, the person should be referred to the NRM and a decision to prosecute should only be taken once a trafficking assessment has been made by a qualified person: *VCL,* §161

(3) The investigation duty

17. Third, 'the investigation duty' or 'the procedural duty' which is a duty to investigate situations of potential trafficking': *TDT,* §17. The requirement to investigate does not depend on a complaint being made by the victim: 'once the matter has come to the attention of the authorities they must act of their own motion'. The investigation must be prompt (or urgent if there is a possibility of removing the victim from the harmful situation), effective and 'capable

of leading to the identification and punishment of individuals responsible, an obligation not of results but of means': *Rantsev,* §288.

Standard of proof

18. The 'operational duty' arises in a particular case if the 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 real and immediate risk of being trafficked or exploited within the meaning of … article 4 (a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk': *Rantsev* §286:

    a. as in the context of article 2 ECHR, 'real and immediate risk' is one that is a 'substantial or significant risk and not a remote or fanciful one': *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, §37;

    b. 'immediate' means 'present and continuing': *Rabone* §39. It does not 'not necessarily mean "imminent"': *TDT* §45

19. Front line staff are obliged to refer cases to the Competent Authority where there is 'any suspicion or any claim': *TDT,* §31(1).

Legislative provision

20. Now, a number of the obligations under ECAT have been given partial effect by primary legislation.

    <u>Article 12</u>

21. The Modern Slavery Act 2015, s. 50A obliges the Secretary of State to 'secure that any necessary assistance and support is available to an identified potential victim', necessary meaning 'necessary for the purpose of assisting the person in their recovery from any physical, psychological or social harm arising from the conduct' that resulted in the RG decision.

Article 13

22. Nationality and Borders Act 2022, s. 61 – gives effect to art 13: where a positive RG decision has been made, the person may not be removed until the later of 30 days after the RG decision or the making of a CG decision.

Article 14

23. Nationality and Borders Act 2022, s. 65 – gives some effect to ECAT art 14. Where a non British citizen who does not have leave to remain receives a positive CG, the Secretary of State must grant limited leave if the SS considers it is necessary for the purpose of:

    a. assisting the person in their recovery from any physical or psychological harm arising from the relevant exploitation;

    b. enabling the person to seek compensation in respect of the relevant exploitation, or

    c. enabling the person to co-operate with a public authority in connection with an investigation or criminal proceedings in respect of the relevant exploitation.

24. Note that that is somewhat narrower than art 14 which requires a grant of a residence permit if the person's stay 'is necessary owing to their personal circumstances'. Also, it is not a condition for art 14 to apply that the person does not have limited leave.

Public order disqualification

25. However, if Nationality and Borders Act 2022, s. 63(2) applies to a person then the following cease to apply:

    a. the prohibition on removal of the person 'arising under s. 61 or s. 62' (i.e. during the recovery and reflection period – ECAT art. 13) (s. 62(2)(a));

    b. 'any requirement under s. 65 to grant the person limited leave to remain' (cf ECAT art 14) (s. 62(2)(b));

    c. 'any duty under' Modern Slavery Act 2015, s. 50A(1) or (4) to provide support and assistance to a potential VoT (Modern Slavery Act 2015, s. 50A(5) (cf ECAT art 12).

26. In addition, according to the Statutory Guidance, §14.236, if the public order disqualification applies, a conclusive grounds decision will not be made.

27. Section 63(1) gives to a competent authority *a discretion* to determine that section 63(2) applies if it is satisfied that the person is either:

    a. a threat to public order or

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

28. The competent authority is not *obliged* by the primary legislation to determine that s. 63(2) applies, even if the person is a threat to public order or claimed to be a VoT in bad faith.

29. Section 63(3) specifies the circumstances in which a person is a threat to public order. They include:

    a. having been convicted of an offence in Modern Slavery Act 2015, Schedule 4;

b. various kinds of association with terrorism related activities or measures;

c. being a foreign criminal within the meaning of UK Borders Act 2007, s. 32(1), i.e. sentenced to imprisonment for at least 12 months or being imprisoned for an offence on Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004/1910 which includes, e.g.

   i. possessing a class A or B drug with intent to supply;

   ii. occupying premises where the production or supply of a controlled drug is knowingly permitted

   iii. theft

   iv. burglary

d. being excluded from the Refugee Convention under article 1F;

e. otherwise posing a threat to national security.

30. The statute does not explain what it means by 'has claimed to be a victim of slavery or human trafficking in bad faith'. The Statutory Guidance says at §14.281

> An individual may be considered to have claimed to be a victim of modern slavery in bad faith where they, or someone acting on their behalf, having knowingly made a dishonest statement in relation to being a victim of modern slavery.

31. The Explanatory Notes to the bill at §597 indicate that the public order disqualification is thought to be justified on the basis that ECAT

contains provisions for an exemption to the protections conferred during the recovery period on public order grounds or if it is found that victim's status is being claimed improperly. This clause puts these disqualifications into primary legislation.

32. Clearly that is a reference to ECAT art 13. All that that permits is the withholding of the recovery and reflection period on public order or impropriety grounds. It does not affect any of arts. 10, 12, 14, 16.

The discretion to determine that a person is to be disqualified under s. 63(2)

33. The Statutory Guidance at §§14.231ff describes how and according to what criteria the discretion to make a public order disqualification decision is to be exercised.

34. Procedural steps include:

a. issuing to the a British citizen or non-detained 'foreign offender' whose disqualification is being considered a letter saying 'the Home Office is 'minded to apply' the public order disqualification subject to any relevant information being provided within ten working days': §14.245

b. 'it is not possible to seek an extension to this timeframe unless exceptional circumstances apply': §14.245

c. information received outside that timeframe will not be considered unless an extension was granted: §14.246

d. BUT 'the ten day window to provide information does not apply for Foreign National Offenders who are detained under immigration powers or who are serving custodial a sentence where the Competent Authority is satisfied that there is sufficient accessible

information on which to base their decision without the need to write out for further information': §14.249;

e. the policy in the guidance providing for reconsideration of negative trafficking decisions does not apply to Public Order Disqualification Decisions: §12.274

35. As to how the discretion is to be exercised §14.260 says:

> The starting point is that an individual who meets the public order definition is a threat to public order. The decision maker must then consider, on the evidence available, whether the individual's need for modern slavery specific protections outweighs the threat to public order posed by the individual. There is a high bar for the need for modern slavery protections or support to outweigh the threat to public order with more weight given to the public interest in disqualification.

Conclusion

36. There are good arguments that a decision to apply a public order disqualification would be incompatible with ECAT obligations, and thus positive obligations under article 4:

a. to complete the process of identifying a person as a victim of trafficking (art 10);

b. not to remove the person pending completion of the identification process (art 10);

c. to support and assist the person in their physical, psychological and social recovery (art 12);

d. to grant leave to remain if the person's stay is necessary owing to their circumstances or in relation to an investigation or prosecution (art 14);

e. not to remove a VoT unless compatible with that person's dignity, safety and having made best efforts to favour the person's reintegration (art 16).

37. There are good arguments that the Statutory Guidance is unlawful because it directs the Secretary of State to exercise the statutory discretion in a way that is incompatible with article 4.

38. Moreover, the Statutory Guidance requires the Secretary of State to make decisions about public order disqualification in a way that is procedurally unfair to incarcerated non-British citizens.

The Illegal Migration Bill

39. If clause 2(1) applies so that SS must make arrangements for the person's removal (person requiring leave to enter or remain who entered unlawfully on or after 7.3.2023, not having come directly from a country of feared persecution) then even if there are RGs to believe the person a VoT:

a. the prohibition on removal under NABA s. 61, 62 does not apply (clause 21(2)) unless SS satisfied that the person is cooperating with an investigation or prosecution; their presence is necessary to provide that cooperation and the public interest in that cooperation outweighs any risk of harm to the public posed by the person;

b. SS may revoke a person's leave granted under NABA s. 65(2) if that leave is the only reason that the person is not one to whom clause 2(1) applies: (clause 21(9))

c. the obligation to provide support and assistance to a person with a positive RG does not apply if clause 2(1) applies (unless the person's presence is necessary to cooperation with an investigation or prosecution): (clause 22);

40. Clause 28 of the Bill amends NABA s. 63 so that public order disqualification becomes mandatory, not discretionary (substituting must for may in s. 63(1)) unless the CA thinks there

are compelling circumstances which mean that the public order disqualification should not be applied.

41. Clause 28 also extends the range of circumstances that make a person a threat to public order so as to include: any non-British person convicted in the UK and sentenced to a period of imprisonment or a person liable to deportation.

Ronan Toal
Garden Court Chambers 17th July 2023