Welcome and Keynote – Children's Rights Summer Conference

Trafficked Children – The Family and Care Jurisdiction

We begin this sessions on child victims of trafficking with the reminder that the UK is bound by several regional and international anti-trafficking instruments,[1] human rights treaties, and labour conventions[2] relevant to human trafficking and modern slavery and the Palermo Protocol and ECAT definition of trafficking is largely incorporated in the Modern Slavery Act [ss 2,3(5)] and adopted and explained in the associated Statutory Guidance and the ECAT model for the assessment whether a person is a victim of trafficking and the protections to be accorded to them (ECAT articles 10,12,13 & 14) form a core part of the Statutory Guidance.

The UK cannot derogate from Article 4 rights including in times of emergency. Under these international laws, States are required to prevent trafficking, to investigate and prosecute perpetrators and identify, assist and protect its victims.

Trafficking cases feature in immigration, asylum, criminal, family, employment, care, housing and education proceedings. In this Conference Chambers provides insights and critiques of such practice in all these jurisdictions. I will briefly focus on practice in the family jurisdiction. I predict that for trafficked children penalised by the IMB arrangements – the family care jurisdiction may be engaged more frequently.

First – a consideration of the damage wrought by IMB. In the absence of a government impact statement concerning the IMB, the Refugee Council estimates (conservatively) that if IMB becomes law that within the first 3 years after the legislation comes into effect some 235,347 to 257,101 people will have their claims deemed inadmissible. These figures include between 39,500 and 45,066 children. At the end of the 3 years between 161,147 and 192, 670

[1] These include the International Covenant on Civil and Political Rights in 1976; the Convention on the Rights of the Child in 1991; and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography in 2009.
[2] The UK has ratified International Labour Organization conventions, including the Convention Concerning Forced or Compulsory Labour in 1931; the Convention on the Abolition of Forced Labour in 1957; the Worst Forms of Child Labour Convention in 2000; and the Protocol of 2014 to the Forced Labour Convention in 2016

people will have their asylum claims deemed inadmissible but not have been removed.[3] It is safe to assume the Bill will exacerbate trafficking and add significantly to the numbers of trafficking victims. These victims penalised for their travel to the UK, including in circumstances where their journeys were dictated by their trafficker will not see their escape from trafficking as a route to protection and care.

The family jurisdiction has the tools. Recently Chambers (Amanda Weston and Naomi Wiseman) sought wardship orders in respect of children missing from Home Office hotels – and assumed to be in the control of traffickers. [*Article 39 v Secretary of State for the Home Department* [2023] EWHC 1398 (Fam)] The Court denied the relief sought noting (at [33]; [37]):

> Although the inherent jurisdiction is a very broad one which can be used flexibly to protect children in very different circumstances, it cannot and should not be used where there are statutory powers in place that can essentially do the same job. Lying behind this proposition is the fundamental constitutional principle that where there is a statutory scheme, the Court should only use the inherent jurisdiction if there is a lacuna. … I should make clear, that even if there were issues around how actively efforts were being made to find the children, this would not give a proper basis for the Court to exercise the inherent jurisdiction. If the relevant agencies were not exercising their statutory powers correctly, and there is no evidence that is the case, then the remedy would be judicial review and not the use of the inherent jurisdiction. There is no lacuna in the statutory scheme which would justify the exercise of that jurisdiction.

As an aside, I note that the IMB may be taken to create that lacuna in respect of children denied protection and security under those provisions.

As it stands authorities are required by ECAT Article 10 to take into account the special situation of child victims.[4] Child trafficking cases are often first identified by teachers, social

---

[3] Refugee Council Briefing Illegal Immigration Bill – Assessment of Inadmissibility, Removals, Detention, Accommodation and Safe Routes.

[4]ECAT Art 10(3) states that when the age of a victim is uncertain and there are reasons to believe that the victim is a child, they shall be presumed to be a child and accorded special protection measures pending verification of their age. Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, 2005, [106-107], [127], [136-137]. See below at …

workers or concerned family or adults. Where the possibility of removing the child from the harmful situation is available, the investigation must be undertaken as a matter of urgency.[5]

The Department for Education guidance regarding the care requirements of unaccompanied and trafficked children[6] emphasises that where there is a high risk that the child will go missing from care the child's care plan should include the steps to be taken by carers, the local authority, schools and police to reduce the risk of the child going missing, and to recover the child if they do go missing, in accordance with local Runaway and Missing from Home and Care protocols. Such children should be placed in safe and suitable accommodation, with particular care given to ensuring that the particular placement is fully risk-assessed. The child's description and photographs should be kept on file and shared with the police where necessary. Where a trafficker knows of the child's placement, the guidance makes clear that the child should be transferred to the care of another authority.

Family care proceedings may become an important protection option for these risk and younger trafficked children who are within the excluded cohort. It is currently sparingly used.

The care option was carefully considered by then Mr Justice Jackson in respect of young unaccompanied Afghani boys believed to be ten and nine years old, their fathers deceased and, on the children's account, there was frightening oppression by the Taliban towards their family. In this care case social workers had taken steps to seek to verify the boys' stories, and to contact their mothers but – in the light of the Afghan conflict - such family contact proved impossible and no family members were notified of the care proceedings. [*J Child Refugees* [2017] EWFC 44; [2017] 4 WLR 192]

The Court findings and guidance resonates for child refugee care proceedings – particularly those excluded from protections via the IMB. The Court noted (at [16]) that it had jurisdiction

---

[5] Modern Slavery Act s49; Modern Slavery: Statutory Guidance for England and Wales (under s49 of the *Modern Slavery Act* 2015) and Home Office, Non-Statutory Guidance for Scotland and Northern Ireland, June 2022; *Siliadin v. France*, 73316/01 [2005] ECHR 545; (2006) 43 EHRR 16, [89 and 112]; *Rantsev*, cited above, at [279, 288]; *J. and Others v. Austria* - 58216/12 (Judgment (Merits and Just Satisfaction) : Court (Fourth Section)) [2017] ECHR 37 at [107]; *C.N. v. The United Kingdom* - 4239/08 - HEJUD [2012] ECHR 1911, (2013) 56 EHRR 24 at [80]; *Chowdhury v Greece* (21884/15), [2017] ECHR 300 at [88]

[6] Department for Education Guidance, Care of unaccompanied migrant children and child victims of modern slavery Statutory guidance for local authorities, 2017 at [60-70]

in care proceedings in respect of asylum-seeking children in cases of this kind - noting the tragedy of children in this position – is that they lose their habitual residence in their home country without gaining another. The essential rootlessness of the situation of the children in each case led to the conclusion that they lacked a habitual residence and in such circumstances the court had undoubted jurisdiction.[7]

As to the care issue in *J* the Court was also satisfied that the threshold criteria had been crossed because the children had "certainly faced and, through their unaccompanied journey, suffered significant harm". The judgment makes clear: "Whether the children are to be described as abandoned or just sent out into the world makes no difference. … the fact that the children may have been sent out of Afghanistan for their own benefit does not prevent the threshold for care proceedings being met. …The fact that the children might have suffered worse harm by staying does not mean they have not suffered significant harm and risked suffering significant harm by going." (at [15])

The *J* court (at [20-23]) scrutinised the proposed care plan for the children to be placed in a long term foster home and with the future possibility that a special guardianship order may be the appropriate outcome. The Court- noting that consideration of such family order "caused …the most thought." The Court supported the Guardian's request to be given the opportunity to re-enter the scene if there are future proceedings concerning the boys, and in particular if an application for a special guardianship order is made when the boys' position in their foster household is assured, and their asylum status is known.

The Court also expressed hope that any improvement in the local Afghani situation might make it safe to investigate their local origins as " even if the boys' future is to lie in England, that is not their whole story. Among their emotional needs will be a need as they grow up to make sense of what happened to them and why" and agreed that if there is to be a future special guardianship application, "it should be transferred to a judge sitting under section 9 of the Senior Courts Act so that there can be confidence that the difficult issue of the boys' background is not lost from sight if they are being handed over into a more private family framework."

[7] Family Law Act 1986 s3; See discussion in B (A child), Re [2016] UKSC, [2016] AC 606

As to the wider issues raised by the case, the Court (at [21]) noted that the local authority's decision to take care proceedings for the protection of children as young as ten and nine with no relatives in this country " was obviously correct" – and outlined the benefits of a care order for such young or traumatised or special need child asylum seekers. The listed benefits include that the local authority would have parental responsibility for the child, allowing it to make and carry through care arrangements; provide better access to specialist therapy or medical care and educational resources for the child; their social worker would be obliged to take an active role in relation to the child's asylum application and, most important, a care order would be most likely to provide the child with a plan for a permanent and established family life.