4KBW

April 2022 Newsletter

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EOG and KTT v Secretary of State for the Home Department [2022] EWCA Civ 307: Court of Appeal confirms that confirmed victims of trafficking should be granted leave where their stay is necessary, but that there was no obligation to grant leave to potential victims while they waited for their conclusive grounds decision

EOG and KTT were two separate judicial review challenges brought by victims of trafficking as a result of their 'limbo' status. The process by which trafficking decisions are made in the UK requires the potential victim to be referred to the National Referral Mechanism. A reasonable grounds decision should then be made within 5 days to determine if the individual is a potential victim of trafficking. A final, conclusive grounds decision can then be made from 45 days after the conclusive grounds decision. If the conclusive grounds decision finds that the individual is a victim of trafficking, the SSHD then considers whether the victim should be granted leave as a victim of trafficking. The SSHD's policy stated that leave can be granted where it is necessary due to the victim's personal circumstances, where the victim is helping the police with their investigations, or where the victim is seeking compensation. In reality, there were very long delays both with the making of the reasonable and conclusive grounds decisions, and with confirmed victims not being granted a form of leave if they had other outstanding immigration matters which prevented their removal from the UK.

In EOG and KTT, the Court of Appeal confirmed that confirmed victims of trafficking should be granted leave where their stay is necessary in order for the Secretary of State for the Home Department ("SSHD") to comply with her intention to give effect to her obligations under the European Convention Against Trafficking in Human Persons ("ECAT"). ECAT did not however require potential victims of trafficking who had not yet received a conclusive grounds decision to be granted a form of leave while they waited for their conclusive grounds decision, despite the long delays in making these decisions.

Preliminary issue

In the High Court, the SSHD had raised the issue of whether or not the SSHD's failure to give proper effect to ECAT in her guidance was justiciable. Essentially, while international treaties are not in and of themselves justiciable by the English courts, except to the extent that they are incorporated, in a number of previous decisions, it had been held that, if the SSHD had stated that it was her intention to give effect to the UK's relevant obligations under ECAT in promulgating guidance, and if, on the Court's construction of the relevant provisions, she had failed to do so, she had misdirected herself as to a material consideration and was liable to judicial review on ordinary public law principles. In opening the case, the SSHD had confirmed that it was conceded for the purposes of the Court of Appeal hearing

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that, if in the relevant respects the policy of the Secretary of State was that the Guidance should comply with ECAT, it was open to the Court to decide whether it in fact did so and to hold that it was unlawful if it did not [§34]. While not in issue before the Court of Appeal, the Court did however make obiter comments that it considered that the SSHD's failure to comply with ECAT in guidance where she purported to give effect to ECAT was a justiciable issue [§35]. It was of course open for the SSHD to make clear if she did not intend to give effect to her obligations under ECAT in certain guidance [§36], and a court might well prefer an interpretation of ambiguous guidance which complied with ECAT over one which did not [§37]. It is worth noting that the SSHD might well seek to raise the justiciability issue again in future cases, particularly if cases with any similar issues progress to the Supreme Court.

The correct approach to cases where it was alleged that the guidance did not comply with ECAT was thus to ask: (1) was the guidance intended by the SSHD in the relevant respects to give effect to the requirements of ECAT, and; (2) whether the guidance did so give effect to the requirements.

Potential Victims of Trafficking remain in Limbo

EOG had received a positive reasonable grounds decision on 11 June 2019, but had not received a positive conclusive grounds decision until 28 April 2020, leaving her without any form of leave for a significant period. It was contended by EOG, and found at first instance, that Article 10.2 ECAT imposed an obligation on the UK not merely to "suffer [potential victims] to remain as overstayers, or as illegal immigrants" but to grant them leave to remain. The Court of Appeal however considered that this was an unsustainable construction. Article 10.2 required that prior to the making of the conclusive grounds decision the potential victim "shall not be removed from [the relevant state's] territory". That was a purely negative obligation, and could not be treated as requiring the state to grant any kind of immigration status (beyond irremovability) to potential victims [§46]. It was not legitimate to try to address the issues arising from the very long time taken to make decisions under the National Referral Mechanism by imposing such an obligation that was contrary to the express terms of ECAT [§48]. It was noted that in 2019, it took an average of 462 days from the reasonable grounds decision for a conclusive grounds decision to be made. The SSHD's appeal was thus allowed in EOG's case.

Confirmed Victims of Trafficking should be granted a form of leave if their stay is necessary

KTT on the other hand was a confirmed victim of trafficking, who had not been granted any form of discretionary leave as a victim of trafficking by the SSHD. She had an outstanding asylum appeal, and the SSHD considered that leave was not necessary because KTT was assisting the police, or in order "to protect and assist [her] recovery", or on medical grounds,

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or to enable her to pursue compensation, or because she was at risk of being re-trafficked on return. No reference was made to her pending asylum claim in the leave decision. KTT argued, and it was found at the first instance, that Article 14.1 (a) of ECAT required that a victim of trafficking be given a residence permit if the competent authority considered that "their stay is necessary owing to their personal situation"; that it was the Secretary of State's declared policy to comply with that obligation; and that her [sc. KTT's] stay in the UK was "necessary owing to [her] personal situation" because she needed to remain here in order to pursue her asylum claim, and the Secretary of State could not reasonably have considered otherwise.

The Court of Appeal considered that it was clear from the materials that the guidance purported to give effect to the relevant provisions of ECAT [§75]. It agreed with the findings of the High Court that Article 14 'clearly requires consideration of whether the stay is necessary in which case the permit must be issued. Indeed, the requirement to consider whether 'their stay is necessary' leaves room for it to be the case that the victim is staying in any event. The provision then asks whether the stay is necessary for a particular reason or purpose, in which case a residence permit, with attendant benefits and advantages, is required to be issued. The language does not appear to regard the residence permit as solely for the purpose of facilitating a stay which would not otherwise be possible, although this may be an important function of such a permit' [§80]. The SSHD's appeal was thus refused in KTT's case.

Discretionary leave applications should therefore be made for confirmed victims of trafficking who are awaiting decisions in other leave applications.

Karen Staunton (2020)

VERSION 11 Bail Policy Update:

GPS Tracking of all Foreign National Offenders and Those Subject to Deportation Proceedings

The Home Office continues to roll out GPS monitoring of those on immigration bail. Moving beyond only Foreign National Offenders (FNOs), the latest policy update reveals a presumption of monitoring all those who are subject to either deportation proceedings or a Deportation Order, even if they are already on bail.

Following the publication of Version 11 of the Home Office bail policy on 31 January 2022, it has become clear that the electronic monitoring policy is intended to apply to all those subject to deportation proceedings, unless doing so would breach Convention rights or would not be practical. The transition from the old technology of radio frequency tags (RFTs) to

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GPS tags allows for the constant and precise surveillance of an individual in real time, and the collection and storage of this information, referred to as "trail data". Despite recognition from the Ministry of Justice that such extensive surveillance is likely an infringement of Article 8 rights, Version 11 has widened the criteria for those subject to GPS tracking. The policy also states trail data will be held and used for a number of non-bail related purposes, raising concerns around data protection and misuse. For example, the Secretary of State intends to use trail data in the determination of Article 8 claims where the data might undermine claims made on the basis of family or private life. Rights groups have also expressed concerns about the long periods of time a person might spend subject to GPS surveillance, with damaging effects on health and wellbeing, and the relatively low hurdle faced by the Home Office in imposing electronic surveillance by GPS on individuals compared to the strict rules governing the use of the same in the criminal justice system.

The Technology

Prior to January 2021, those subject to electronic monitoring while on immigration bail were tagged with radio frequency tags, or RFTs, also traditionally used to enforce bail conditions in the criminal justice system. RFTs are able to determine if somebody has left or entered a predetermined area at a particular time, but cannot tell exactly where a person is or record their movement patterns. As such, RFTs are sufficient for enforcing inclusion or exclusion zone requirements, or curfews. In contrast, a GPS tag is capable of tracking an individual's precise location and movements. A GPS tag can also collect this data and send it on to be held and managed. The holder of the trail data collected under this policy will be the supplier of the GPS tags, Capita. This data will nonetheless be readily available and accessible to the Home Office, as set out below.

The Policy

The Home Office announced the transition from RFTs to GPS tracking in Version 7 of their bail policy, published in January 2021. While the criteria for eligibility for electronic monitoring by GPS had not yet been published, FNOs began to be fitted with GPS tags from this time, and it was reported that only FNOs who were at risk of deportation following criminal convictions of 12 months or more would be subject to GPS monitoring. Under this policy, by 14 June 2021 249 people had been fitted with GPS tags.

More recently, Version 11 has confirmed that electronic monitoring will be **considered** for all those on immigration bail who:

- Are subject to deportation proceedings or a Deportation Order
- Reside in England & Wales

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The Secretary of State has a duty to consider electronic monitoring for these individuals, pursuant to the Immigration Act 2016, Schedule 10, Part 1, paragraphs 2(2) and 2(3).

Regarding FNOs, Version 11 states that decision makers **must always** impose an electronic monitoring condition if a FNO is subject to the duty and to do so would not breach their Convention Rights or be impractical. Version 11 makes clear that the policy extends to those who were released on immigration bail prior to the introduction of GPS monitoring, and that the Secretary of State will reconsider whether GPS tracking ought to be imposed upon these individuals.

However, there are a limited number of GPS devices available, and so the policy provides for the following order of priority:

1. Foreign National Offenders in the following order:
   (a) those who are considered to pose very high harm to the public;
   (b) those who are considered to pose high harm to the public
   (c) those who are considered to pose medium harm to the public
   (d) those who are considered to pose low harm to the public.
1. Foreign nationals subject to deportation with assurances;
2. Foreign Nationals who have entered in breach of a deportation order;
3. EU nationals and/or their family members subject to deportation .

Foreign National Offenders who were released on bail prior to the policy coming into force will be prioritised according to not only their risk of harm, but also the length of time they have spent on bail and their compliance with their bail conditions during this time. Version 11 also sets out that bailed individuals who are considered suitable for electronic monitoring via GPS ought to be invited to make representations against this, with three working days' notice. Where a person was already subject to immigration bail on 31 January 2022 and the Home Office is not aware of any exemption, representations should be invited irrespective of whether additional conditions are considered appropriate.

There are a number of suggested factors for caseworkers to consider before imposing an electronic monitoring requirement, including whether a person is frail, lacks capacity, is in the late stages of pregnancy or is a person who has very recently given birth. Other factors are whether there is strong independent medical evidence to suggest that such a condition would cause serious harm to the person's mental or physical health, whether a claim of torture has been accepted by the Home Office or a Court, or whether there has been a positive conclusive grounds decision under the National Referral Mechanism. However, none of these are said to be decisive or prohibitive factors, and the policy states that even where there is some evidence of the above, maintaining the electronic monitoring condition "may still be

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appropriate".

The Threat of Data Misuse

Version 11 sets out that the Home Office may access the data held by Capita when one of the following conditions apply, and where it is "*proportionate and justified in the circumstances, in accordance with data protection law":*

1. A breach of immigration bail conditions has occurred, or intelligence suggests a breach has occurred to consider what action should be taken in response to a breach up to and including prosecution;
2. Where a breach of immigration bail conditions has occurred, which has resulted in the severing of contact via electronic marketing, data will be used to try to locate the person;
3. Where it may be relevant to a claim by the individual under Article 8 ECHR;
4. To be shared with law enforcement agencies where they make a legitimate and specific request for access to that data. [emphasis added]

The third condition is drafted extremely broadly, as the trail data only needs to potentially have some relevance to any facet of an Article 8 claim to come within its scope. No guidelines as to when this data may or may not be relevant have been published. The European Court of Human Rights has found that GPS tracking amounts to an interference with Article 8 rights, and such a broad justification for this interference has been met with concern and scepticism from rights groups. It has been suggested that the powers afforded to the Secretary of State under this condition will allow decision makers to undertake "fishing exercises" when determining Article 8 claims, trawling through highly personal and sensitive data to assess whether a person's day-to-day movements can be used to reject a claim. For example, a decision maker might check whether an individual claiming they have been religiously persecuted has visited a place of worship while in the UK - despite religious gatherings often taking place outside formal places of worship.

Further Concerns

Beyond concerns about the inappropriate storage and use of trail data, there are further concerns regarding the widespread use of GPS tagging. In the criminal justice system, the use of GPS tagging is extremely restricted, being imposed only as part of a suspended sentence or community order and not as a bail condition. As such, defendants subject to GPS monitoring have determinate sentences, limited to two years in the case of a suspended sentence or three in the case of a community order. The sentence will also be passed by a judge or lay bench after hearing from both the prosecution and the defendant and being satisfied that it is necessary. In contrast, there is no real upper limit to the length of time a person might spend on

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immigration bail, and there is no judicial oversight when GPS tags are imposed as a bail condition by the Secretary of State rather than bail being determined by the tribunal. The detrimental effect of GPS surveillance on mental health is well recorded, with users reporting increased anxiety, depression, social stigma and stress. As such, the lack of judicial oversight or barriers to GPS tags being imposed, and the indeterminate length of time they may then be imposed for, is likely to cause real harm to those on immigration bail.

Ciara Moran (2021)

R. v AAD [2022] EWCA Crim 106:

Case Comment

Conclusive findings by the Single Competent Authority ("the SCA") have been an issue of interest to immigration practitioners following the case of MS (Pakistan) v SSHD [2020] UKSC 9. Although R. v AAD is a criminal appeal some important parallels can be drawn that will be of use to immigration practitioners. It also sheds light on how the courts are interpreting these types of finding and the section 45 defence available under the Modern Slavery Act 2015 ("the Act").

Background

The case involved three appellants: AAI, AAH and AAD. Each appellant had received a conclusive finding from the SCA that they were victims of human trafficking. They appealed on the following grounds:

- AAI appealed that the prosecution was an abuse of process as there was a clear nexus between his exploitation and the commission of the offence (para.17).
- AAH appealed on the basis that her conviction was unsafe since she would not have been prosecuted if her trafficked status was properly considered or that she would have applied for a stay or pleaded not guilty (para.48).
- AAD said his conviction was unsafe because he had been acting under compulsion as a victim of trafficking so had a viable defence under section 45 of the Act and was incorrectly advised to plead guilty (para.69).

Ruling

The Court of Appeal ruled that:

- AAI's appeal as dismissed as there was nothing to suggest that he should not have been prosecuted, however due to psychiatric evidence his sentence was reduced

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(paras.159 &163).

- AAH's appeal was allowed as the prosecution should have never been pursued or, in the alternative, she could have argued it was an abuse of process (paras. 173-176).
- AAD's appeal was dismissed on the basis that the test following a guilty plea was not met (paras.181-182).

Reasoning

1. A conclusive grounds decision from the SCA could be adduced on application for leave to appeal or in the appeal itself, however the court would consider the factual context when deciding to admit it (paras. 81-82).
2. The salient conclusions in R. v Brecani [2021] 1 WLR 585 are that in a trial non-expert evidence will be inadmissible save for very limited circumstances. Case workers in the SCA are not experts so cannot give evidence on whether an appellant was trafficked or exploited. Expert evidence is only admissible in a criminal context if: it was relevant to a matter in issue, the witness was competent to give that opinion, and it was needed to provide the Court with knowledge outside of its own knowledge and experience (para. 85).
3. In obiter, expert evidence on trafficking and exploitation was inadmissible at trial unless evidence was required on the appellant's psychiatric or psychological state or for the detailed mores of people trafficking gangs operating in countries outside of the court's own knowledge and experience (para.87).
4. Brecani was consistent with previous case law it focussed on admission of the SCA grounds in the Crown Court context (para.94). Further, it was consistent the UK's international obligations as ECtHR case law focussed on the adequacy of the SCA grounds as part of the decision to prosecute and if the report maker was suitably qualified not the grounds admission into a Crown Court trial (para.104).
5. If the trafficking defence had not been explored at trial the appeal court may require oral evidence. If the parties could not agree to this, it should be referred to the Vice-President or presiding Lord Justice to give directions (para.109).
6. A section 45 defence would complement an abuse of process argument. Where the CPS has unjustifiably failed to account for that guidance or had no rational basis for departing from a favourable conclusive grounds decision the prosecution may be stayed on the grounds that it would be unfair and oppressive to continue (paras. 120, 126-127 and 140).
7. Under section 45 of the Act the appellant must be compelled to do the act, that compulsion must be attributable to the relevant slavery or exploitation, and a reasonable

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person in the same situation would have had no realistic alternative but to carry out the offence. A trafficker simply causing the appellant to commit the offence was not enough for an appellant to avail themselves of this defence (para. 145).

8. Where the appellant was a victim of trafficking, they could argue that a conviction following a guilty plea was unsafe if they had been deprived of a good defence in law which would have probably succeeded, an abuse of process rendered it unfair to try them at all, or they had committed no offence so the admission made by the plea was false (paras.155-158).

Commentary

In an immigration context this case would assist practitioners as it:

- Demonstrates the narrow grounds by which evidence on modern slavery would be admitted in a criminal context. This is useful in two ways. Firstly the criminal jurisdiction can be contrasted with the wide powers of the Immigration Tribunal to admit evidence. Secondly, it would help immigration practitioners in explaining to a tribunal why the grounds were not admitted in evidence during previous or parallel criminal proceedings.

- Reinforces the reasons why courts and tribunals, as set out in MS (Pakistan), are not bound by the SCA conclusive grounds decisions. R v AAD sets out that the grounds are drafted by junior civil servants carrying out an administrative function. Although the SCA conclusive grounds findings are admissible as evidence in an immigration context, it is a matter for the Judge to consider the question of weight to be given to the conclusive grounds as part of the decision-making process. Practitioners should therefore look at eliciting other evidence to support a positive conclusive finding made by the SCA (though in practice, the Home Office tends to accept that the Appellant has been a victim of trafficking if a conclusive grounds decision has been obtained).

- Sets out the high threshold of compulsion that an appellant would need to meet in order to avail themselves of a defence under section 45 of the Act. The emphasis is clear that a trafficker simply causing the appellant to commit an offence will not be enough. This is important for immigration practitioners as by gathering evidence of compulsion (that the appellant had no other realistic alternative to committing the offence) it will assist the appellant in utilising this defence in criminal proceedings. In turn this would support any immigration matters that could arise or are ongoing.

Alex Maunders (2017)

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The Nationality and Borders Bill:

Offshore Processing of Asylum Seekers

The Nationality and Borders Bill promises, according to the gov.uk website, the 'most comprehensive reform in decades to fix the broken asylum system' **(1).** One key aspect of the bill that has recently attracted significant media attention is the Home Secretary's attempt to achieve offshore processing of asylum seekers, specifically in Rwanda.

The bill has three stated key objectives: (1) to make the system fairer and more effective; (2) to deter illegal entry into the UK; and (3) to remove from the UK those who have no right to reside. The process of 'offshoring' appears to be most closely connected to the latter two objectives, especially the second. It appears highly debatable, however, whether offshoring will achieve any of these stated objectives. As evidenced from other countries with offshore processing, most notably Australia, offshoring is expensive, does not appear to deter illegal entrants, and most importantly, can lead to breaches of human rights and obligations under the Refugee Convention if sufficient safeguards are not in place.

Since September 2011, all asylum seekers are required to enter the UK to claim asylum (there was previously a discretionary policy in place which permitted assessment of applications for asylum made by individuals in third countries). Once they have claimed asylum, asylum seekers are currently generally protected from removal from the UK by virtue of Section 77 of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") which sets out as follows:

> **No removal while claim for asylum pending**
>
> (1) While a person's claim for asylum is pending he may not be—
>
> (a) removed from the United Kingdom in accordance with a provision of the Immigration Acts, or
>
> (b) required to leave the United Kingdom in accordance with a provision of the Immigration Acts.

The bill reinforces the current requirement for asylum to be claimed from within the UK: it must be claimed at a 'designated place' such as a port, airport, or immigration removal centre. More importantly, the bill aims to remove the protection afforded under Section 77 NIAA 2002 in order to permit offshore processing of asylum seekers who manage to enter the UK to claim asylum.

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Offshore processing of asylum seekers has long appeared to be an objective of the Home Secretary as part of her hardline stance on immigration. Enquiries have been made in recent years into potential suitable locations, such as Ascension Island, Albania, and Gibraltar. None of these enquiries were successful – until now. As of 13 April 2022, the Home Secretary has taken a significant step forward in respect of offshore processing. The UK and Rwanda have entered into a Memorandum of Understanding ("MoU") that will last for 5 years, the full text of which can be accessed below **(2).** Under this MoU, the UK will be responsible for the initial screening of relevant asylum seekers, before they are then relocated to Rwanda. Rwanda will then process their claims and settle or remove (as appropriate) the individuals after their claim is decided, '*in accordance with Rwanda domestic law, the Refugee Convention, current international standards, including in accordance with international human rights law and including the assurances [under the MoU]*'.

It is notable that the MoU is not stated as being applicable to all asylum seekers who claim asylum in the UK. According to the stated objectives of the MoU, it will apply to only those '*whose claims are not being considered by the United Kingdom'* (emphasis added). In addition, under paragraph 5 of the MoU, the UK will have responsibility for undertaking initial screening of those prior to relocation – though it is not clear how such screening will differ from the current asylum screening interviews that take place prior to substantive interviews.

The MoU does not specify which asylum claims will be deemed appropriate for UK-based processing, and which will be deemed appropriate for relocation to Rwanda; it remains to be seen how broadly the relocation option will be applied. It is evident that potentially all asylum seekers could be considered for relocation, regardless of vulnerability; paragraph 14 of the MoU explicitly provides that Rwanda shall take all necessary steps to accommodate the needs of victims of modern slavery and human trafficking. This is particularly striking, since the UK has agreed to resettle 'a *portion of Rwanda's most vulnerable refugees in the United Kingdom'* under paragraph 16 of the MoU. It seems counterintuitive, to put it mildly, to relocate vulnerable asylum seekers to Rwanda from the UK, whilst at the same time resettling vulnerable refugees from Rwanda to the UK. This dissonance also reflects concerns regarding Rwanda's human rights record **(3)** and the nature of conditions that would be faced by Relocated Individuals upon relocation.

Unsurprisingly, the MoU has attracted widespread criticism, not least due to the costs involved. Gillian Triggs, the Assistant High Commissioner for Protection of the UNHCR (the United Nations High Commissioner for Refugees) has condemned the MoU, stating: "*People fleeing war, conflict and persecution deserve compassion and empathy. They should not be treated like commodities and transferred abroad for processing*" **(4).** It seems inevitable that

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legal challenges will follow in due course.

Footnotes

1) https://www.gov.uk/government/collections/the-nationality-and-borders-bill

2) https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r

3) https://www.theguardian.com/world/2022/apr/14/rwanda-human-rights-fears-paul-kagame

4) https://www.theguardian.com/uk-news/2022/apr/14/uk-rwanda-plan-for-asylum-seekers-decried-as-inhumane-deadly-and-expensive

Jennifer Lanigan (2018)

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