UT Neutral Citation Number: [2025] UKUT 00092 (IAC)

R (on the application of KM (Nigeria)) v Secretary of State for the Home Department
(ECAT: where stay necessary)

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Heard at Field House

Hearing date: 4 February 2025
Date of judgment: 28 February 2025

Before:

UPPER TRIBUNAL JUDGE STEPHEN SMITH

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Between:

THE KING
on the application of
KM (Nigeria)
(ANONYMITY DIRECTION MADE)

Applicant

- and -

Secretary of State for the Home Department

Respondent

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Mr C. Buttler KC and Ms Z. McCallum
(instructed by South West London Law Centre) for the applicant

Mr W. Irwin
(instructed by Government Legal Department) for the respondent

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(1) Where a recognised victim of modern slavery is prosecuted for offences arising out of the forced criminality that formed a basis for the Competent Authority's recognition of his or her status as a victim of modern slavery, the Secretary of State is not required by Article

14(1)(a) of the Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT) to consider that their "stay is necessary owing to their personal situation" in order for the individual to rely on the Article 26 non-punishment provision, or otherwise defend the criminal charges on the basis of being a victim of modern slavery.

(2) Where the Secretary of State is satisfied that the Competent Authority referred a positive conclusive grounds decision to the police, and where the police have confirmed that the individual's presence in the United Kingdom is not required for the purposes of investigating or prosecuting any criminal offences, no further steps are required by the Secretary of State when determining whether a person's stay is necessary for the purposes of cooperating with the police and prosecuting authorities in investigation or criminal proceedings for the purposes of Article 14(1)(b) of ECAT.

J U D G M E N T

Upper Tribunal Judge Stephen Smith:

1. The applicant seeks a declaration that he is entitled to damages under Article 8 of the European Convention on Human Rights ("the ECHR") consequential to errors of domestic public law in a decision of the Secretary of State dated 12 December 2022 ("the 12 December decision"). By that decision the Secretary of State decided not to grant discretionary leave to the applicant under her Modern Slavery Discretionary Leave policy, version 5.0, dated 10 December 2021 ("the DL policy"). That decision followed a conclusive grounds decision of the Competent Authority dated 10 August 2022 ("the CG decision") to recognise the applicant as a victim of modern slavery.

The issues

2. This application for judicial review raises three principal issues, each of which turns on the interpretation and application of the Council of Europe Convention on Action Against Trafficking in Human Beings ("ECAT"):

    a. Issue (1): where a recognised victim of modern slavery is prosecuted for offences arising out of the forced criminality that formed a basis for the Competent Authority's recognition of him as a victim of modern slavery, is the Secretary of State required by Article 14(1)(a) of ECAT to consider that "their stay is necessary owing to their personal situation" in order for the individual to defend criminal charges on the basis of being a victim of modern slavery?

    b. Issue (2): where the Competent Authority only highlighted one of the victim's two recognised periods of modern slavery to the relevant police force, does Article 14(1)(b) require the Secretary of State to consider that the victim's stay remains "necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings" until

the relevant police force has confirmed that the victim's presence in the UK is not required for the purposes of investigating and prosecuting the phase of modern slavery that was identified in the CG decision but not expressly highlighted to the police in the accompanying correspondence?

c. Issue (3): whether, in the circumstances of this case, the applicant's mental health conditions and claimed prospective difficulties in accessing healthcare and medication in Nigeria, mean that the Secretary of State should have considered that his stay is "necessary" owing to his "personal situation" for the purposes of Article 14(1)(a)? The applicant's case in this respect is premised on the footing that the Secretary of State's examination of this issue unlawfully failed to apply anxious scrutiny.

3. These issues raise a further, overarching, issue which arises as a consequence of the manner in which this claim has been pleaded: was Article 8 ECHR engaged by the decision of the Secretary of State?

Factual background

4. The applicant is a citizen of Nigeria, born in 1994. He has, on any view, had to endure the most unimaginable suffering through being subjected to two periods of modern slavery, both of which took place against a background of family tragedy and trauma.

5. The applicant's first period of modern slavery took place in 2013. The applicant had moved to the United Kingdom on 30 January 2010 with his parents upon his father being posted here as a diplomat. Very sadly, his father died in the summer of 2012 in Nigeria. The applicant's mother subsequently abandoned him and his siblings, and they were sent to live with a family friend, B. In 2013, the applicant was subjected to domestic servitude by B in circumstances which the CG decision now accepts amounted to modern slavery.

6. The second period of modern slavery took place in 2020. The applicant was groomed by a "county lines" gang and was forced to engage in the supply of Class A drugs. He was arrested and, on 6 April 2021, was charged with two counts of the possession with intent to supply a Class A drug.

7. Upon accepting that the applicant was a victim of modern slavery, the Competent Authority referred the applicant's case to the police. The scope and effect of that referral is a disputed issue in these proceedings, to which I shall return.

8. The DL policy also required the Secretary of State to consider whether to grant discretionary modern slavery leave ("MS leave") to the applicant. The applicant made representations to the Secretary of State in support of such a decision by a letter dated 8 September 2022. MS leave was said to be necessary to enable the applicant's mental health to recover from his trafficking experiences and as a form of restitution. To that end, the applicant relied on a psychological report by Dr Rachel Thomas dated 24 March 2022 ("the Thomas report"). Secondly, it would provide him with the security he needed to defend himself during, and cope generally with, his criminal trial. The applicant also relied on a trafficking report dated 16 May 2022 by Mr Steve Harvey, and made other representations about his private and family life.

Decision under challenge: the 12 December decision

9. By the 12 December decision, the Secretary of State decided not to grant MS leave to the applicant. In doing so, the Secretary of State stated that she had applied the three criteria contained in DL policy, namely to consider whether leave was necessary:

    a. owing to the applicant's personal circumstances;

    b. in order for the applicant to pursue compensation;

    c. because the applicant was helping the police with their enquiries.

10. The decision explained that the police force investigating those responsible for the applicant's forced criminality had confirmed that the applicant was not required to remain in the UK to assist the investigation or prosecution. MS leave was not necessary to assist the applicant's recovery from a health perspective; the over-the-counter medication used by the applicant (Nytol) was available in Nigeria, and the applicant would be able to access it there. The applicant was not at risk of being re-trafficked or being returned to the situation of modern slavery.

11. The 12 December decision was maintained, with additional reasons responding to proposed grounds of challenge, by a pre-action protocol response dated 30 January 2023. That letter added that there was no requirement in the DL policy for victims of slavery to be granted MS leave in order for them to participate in a criminal trial as a defendant.

12. Meanwhile, the applicant had made representations to the CPS about the circumstances in which the offences with which he stood charged were committed, relying on the CG decision and other materials. By a decision notified to the applicant on 9 February 2023, the CPS stated that an evidential review of the applicant's case had concluded that the Crown would not be able to disprove the defence contained in section 45 of the Modern Slavery Act 2015 ("the 2015 Act"). Consequently, the prosecution offered no evidence.

13. On 7 August 2023, the applicant was granted 30 months' leave to remain pursuant to the human rights claim he made on 8 July 2018.

Procedural background

14. Permission to bring this claim was granted on the papers by Upper Tribunal Judge Lindsley by a decision dated 5 July 2023. The proceedings were stayed behind *R (oao XY) v Secretary of State for the Home Department* [2024] EWHC 81 (Admin), judgment in which was handed down on 23 January 2024.

15. On 13 March 2024, the applicant informed the Upper Tribunal that judgment in *XY* had been handed down. By a decision dated 1 July 2024, a lawyer of the Upper Tribunal acting under delegated powers granted the applicant permission to amend the grounds for review in light of *XY*, and directed that the substantive hearing would take place over the course of two days.

16. It was against that background that the substantive hearing took place before me on 4 February 2025. I directed that the matter would only take a day to hear, with the second day reserved for judgment writing. Mr Buttler KC and Mr Irwin confirmed at the hearing that they were content with that timing. Indeed, Mr Buttler

did not avail himself of the opportunity that I emphasised was available to him to continue his submissions into the next day.

Ground for review

17. There is a single ground for review. The applicant contends that the 12 December decision, and the decision to maintain it dated 30 January 2023 taken in the course of pre-action correspondence, featured errors of domestic public law, thereby rendering it "not in accordance with the law" for the purposes of Article 8(2) ECHR. The applicant seeks damages as just satisfaction for the breaches of his Convention rights.

18. The domestic public law errors that Mr Buttler KC contends infected the 12 December decision are said to be a failure properly to follow and apply Article 14(1)(a) and (b) of ECAT. Article 14 sits within Chapter III of the Convention ("Measures to protect and promote the rights of victims, guaranteeing gender equality"). Paragraph (1) provides:

> "**Article 14 – Residence permit**
>
> 1. Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:
>
> a. the competent authority considers that their stay is necessary owing to their personal situation;
>
> b. the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings."

ECAT and domestic law

19. The DL policy was amended on 30 January 2023 in light of section 65 of the Nationality and Borders Act 2022, which came into force on that day. Section 65 places Article 14 of ECAT on a statutory footing with effect from that date. Those developments do not affect my analysis in these proceedings. The discussion and analysis that follows relates to the legal framework applicable to the 12 December decision, before those provisions came into force.

20. While the above provisions of ECAT had not been incorporated into domestic law at the date of the 12 December decision, the Secretary of State accepts (and it is not in dispute in these proceedings) that her policy at the time of that decision was to adopt and reflect those requirements as a matter of domestic policy, and that the DL policy should be read as intending to give effect to the requirements of Article 14(1). That means that a decision that is inconsistent with Article 14(1) would, in principle, be flawed as a matter of domestic public law, since the Secretary of State is obliged to abide by her policy in the absence of good reasons to depart from it.

21. The evolution of the above approach of the courts and the Secretary of State to the role of ECAT, an unincorporated international treaty, may be traced across a number of authorities. I set out a relevant selection below.

22. In *R (Atamewan) v Secretary of State for the Home Department* [2013] EWHC 2727 (Admin), the Secretary of State accepted that, insofar as her policy sought to give

effect to the terms of ECAT and failed to do so, that would be a justiciable error of law (para. 55), subject to certain qualifications (see, e.g., paras 89 and 90).

23. In *R (Galdikas) v Secretary of State for the Home Department* [2016] EWHC 942 (Admin), Sir Stephen Silber rejected the proposition that ECAT, and in particular Article 12 (assistance to victims) was part of English law (para. 57). But Sir Stephen accepted that, to the extent a policy or guidance issued by the Secretary of State was intended to give effect to ECAT (or as was relevant in those proceedings, Article 12 of it), conventional public law principles would be engaged to require the Secretary of State to apply those aspects of the Convention, or provide good reasons for departing from that policy. Having applied those principles, Sir Stephen did not accept that the entirety of ECAT, or even the whole of Article 12 could be said to apply as a matter of domestic law in that way. He did accept that the policy of the Secretary of State was to approach applications for MS leave consistently with the Convention, and to that extent that issue was justiciable in those proceedings: para. 66.

24. In *R (PK (Ghana)) v Secretary of State for the Home Department* [2018] EWCA Civ 98 the Secretary of State again conceded that the relevant policy guidance sought to give effect to ECAT. To the extent it failed to give effect to that Convention, that would be a justiciable error of law: see para. 34. The court addressed what amounted to "necessary" for the purposes of Article 14(1)(a). See para. 44:

> "'Necessary', in this context, means required to achieve a desired purpose, effect or result. In Article 14(1)(b), the purpose for which it is necessary for a person to stay in the country is express: the competent authority has to consider that the person staying in the country 'is necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings'. In Article 14(1)(a), the purpose is not express: but the provision is deep within the Trafficking Convention which (as [counsel for the Secretary of State] rightly accepted) must be construed purposively. Thus, 'necessary' in Article 14(1)(a) has to be seen through the prism of the objectives of the Convention: and **the competent authority has to consider whether the person staying in the country is necessary in the light of, and with a view to achieving, those objectives**." (Emphasis added)

25. The preamble to ECAT states that the paramount objectives of the Convention are:

> "respect for victims' rights, protection of victims and action to combat trafficking in human beings…"

26. See also Article 1(b) which states that one of the Convention's purposes is:

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

27. Para. 50 of *PK (Ghana)* summarised those objectives as "the protection and assistance of victims of trafficking".

28. In *R (EOT) v Secretary of State for the Home Department, R (KTT) v Secretary of State for the Home Department* [2022] EWCA Civ 307, the Court of Appeal held that the DL policy then in force "has from the start purported and been intended to give effect to the corresponding provisions of Chapter III of ECAT…" (para. 75).

29. The court upheld the judgment of Linden J sitting in the Administrative Court in *KTT* which identified another basis upon which a victim's "stay" may be necessary for the purposes of Article 14(1)(a). KTT had been recognised as a victim of human trafficking and claimed asylum on the basis that she faced a risk of being re-trafficked. The issue was whether her "stay" was "necessary" as a facet of her "personal situation" pending the final determination of her asylum claim for the purposes of Article 14(1)(a) (during which period she was statutorily irremovable from the United Kingdom in any event). Linden J's conclusion that KTT's stay was necessary was upheld by the Court of Appeal, with the consequence that she was entitled to MS leave under the DL policy: see paras 80 to 81.

30. Mr Buttler appeared for the claimant in *KTT* at first instance and on appeal. He conceded in those proceedings that the reference to a victim's "personal situation" had to be construed having regard to the purpose of Chapter III of the Convention, as characterised by Hickinbottom LJ in *PK (Ghana)* (see para. 27, above). See para. 78 of *KTT* in the Court of Appeal:

> "Mr Buttler accepts that… the reference must be to the victim's situation *as a victim of trafficking*; but he submits that it is clear as a matter of language that it is the *stay*, not the issue of the residence permit, which must be 'necessary'." (Emphasis supplied)

31. Underhill LJ accepted the above concession at para. 86, holding that the concession meant that the "'personal situation' referred to in Article 14(1)(a) must, on a purposive construction, refer to the victim's situation *qua* victim." The court did not rule on whether the concession was necessary but accepted it. Mr Buttler maintained the concession before me. I accept the concession (which represents the approach I would have been minded to take but for the common ground that exists on this issue in any event).

The applicant's submissions

32. The Statement of Facts and Grounds and the applicant's skeleton argument extended to over 90 pages. The issues were considerably narrower in the manner in which they were presented by Mr Buttler. What follows is necessarily a summary of his main points.

33. Mr Buttler's primary submissions were that the 12 December decision was flawed in three ways. First, it failed to address the applicant's need to stay in the United Kingdom to advance a modern slavery defence to the criminal charges against him (issue (1)). Secondly, it failed to engage with the Competent Authority's failure to refer the domestic servitude in 2013 to the Metropolitan Police Service (issue (2)). Thirdly, it failed to apply anxious scrutiny to the medical evidence provided to the Secretary of State about the applicant's need for therapy in order to address the trauma of his trafficking experiences. The medical evidence demonstrated that the applicant would need to be granted leave to remain in order effectively to commence the necessary therapy. That was issue (3). In Mr Buttler's submission, it

was only necessary to establish one of those three possible heads of claim in order for the applicant's judicial review to succeed.

34. As to issue (1), Mr Buttler submitted that the 12 December decision failed to engage with the applicant's need to remain in the United Kingdom in order to mount a modern slavery defence to the two charges of possession with intent to supply a Class A drug. The applicant plainly had to remain in the United Kingdom in order to defend the criminal proceedings. He would not have been able to exonerate himself for the crimes he was forced to commit as a result of his modern slavery. Those details were before the Secretary of State including the defence statement relied on by the applicant and the criminal proceedings. It was plainly necessary for the applicant to "stay" in the United Kingdom, for the purposes of article 14 (1). He should have been granted MS leave on that basis, Mr Buttler submitted.

35. As to issue (2), Mr Buttler stressed that the Competent Authority was obliged expressly to refer both periods of modern slavery to which the applicant was subjected to the police. While the Competent Authority referred the second period of the applicant's modern slavery to the relevant police force, it did not refer the earlier period of domestic servitude. The applicant's stay in the United Kingdom was therefore necessary pending the investigation of the 2013 domestic servitude. Unless and until the Metropolitan Police Service informed the Secretary of State that the applicant's presence in the United Kingdom was no longer necessary in order for those offences to be investigated, it was incumbent upon the Secretary of State to grant the applicant MS leave. Mr Buttler relied upon scope and extent of the investigative duty to which contracting parties to the ECHR are subject pursuant to their duties under Article 4 of that convention (prohibition of slavery and forced labour).

36. As to issue (3), Mr Buttler relied upon the Thomas report. Dr Thomas had concluded that, although some of the applicant's medication would be available in Nigeria, it would not be accessible to him. The Thomas report demonstrated that the applicant experiences significant treatment needs. Those included moderate to severe symptoms of a major depressive disorder with additional psychotic features (page 205), and a range of other conditions. The applicant would not be able to engage with treatment for those conditions in the absence of the stability that would have been provided by a grant of MS leave. The 12 December decision failed to engage with that issue.

37. In Mr Buttler's submission those public law errors amounted to breaches of Article 8 ECHR. That was because Lane J's judgment in *XY* established two propositions. First, a denial of MS leave would, in principle, be capable of engaging Article 8 ECHR (and it was not open to the Secretary of State to contend otherwise, in light of *XY*). Secondly, where Article 8(1) is engaged, it will be breached if the decision in question was vitiated by a public law error. That is based on the requirement in Article 8(2) for any interference with Article 8(1) rights to be "in accordance with the law…"

38. As to the engagement of Article 8(1), Mr Buttler submitted that the 12 December decision had a significant adverse impact on the applicant's mental health, and delayed his ability to be treated for the trauma that had been caused by his experiences of modern slavery. Mr Buttler also submitted that the applicant's financial circumstances were such that Article 8(1) ECHR was engaged by the 12

December decision. In the absence of any leave to remain, the applicant was unable to work, and was unable to access the social assistance benefits he would otherwise be entitled to. That had a profound effect on the applicant, particularly in relation to his ability to see his British children.

39. Drawing those submissions together, Mr Buttler submitted that the Secretary of State had breached her DL policy to apply ECAT in the three ways specified, any one of which was sufficient to establish a breach of Article 8 ECHR. The applicant was thus entitled to damages, and an order providing for their assessment.

The Secretary of State's submissions

40. As to issue (1) (stay necessary to defend criminal proceedings on modern slavery grounds), Mr Irwin submitted that ECAT imposed no requirement on States Parties to the Convention to grant a residence permit to a defendant in criminal proceedings. Staying in the United Kingdom in order to defend criminal proceedings was not encompassed by the objectives of protection and assistance of victims of trafficking. The Convention should be construed as a whole; Chapter IV makes provision pertaining to the substantive criminal law. It is not possible to read the result for which Mr Buttler contends into Article 14(1)(a).

41. As to issue (2) (inadequate referral by the Competent Authority to the Metropolitan Police Service), Mr Irwin submitted that this facet of the applicant's case had not been pleaded in the manner the applicant sought to rely on it in the Statement of Facts and Grounds. The applicant had not pleaded a duty to refer both phases of the applicant's modern slavery to the relevant police forces by reference to Article 4 of the ECHR. There was no obligation for the Secretary of State to make multiple referrals to different police forces. Once a referral had been made, it was a matter for the police.

42. In relation to point (3) (failure to apply anxious scrutiny to the medical evidence and failure to take into account the Thomas report), the Secretary of State approached this issue in a manner that was open to her. Dr Thomas is not an expert in healthcare provision in Nigeria, as she acknowledged in her report. The DL policy requires the Secretary of State to ensure that adequate treatment for some of the harm caused by trafficking is available, but does not mandate the provision of a complete recovery.

43. Mr Irwin submitted that Article 8 was not engaged by the 12 December decision. At all material times the applicant had an outstanding Article 8 application that was pending before the Secretary of State. It has since been granted. The applicant's true complaint, properly understood, was that the Secretary of State had not taken a decision on *that* application. It was open to him to have challenged any perceived unlawful in action or delay on the Secretary of State's part in relation to his Article 8 human rights claim, which he had not. The mere fact that the Secretary of State had cause to take a decision under the DL policy concerning MS leave while that application was pending was, in Mr Irwin's submission, nothing to the point.

Issue (1): applicant's stay not necessary to defend criminal proceedings

44. Do the "necessary… personal circumstances" of a victim of modern slavery who is prosecuted for the very offences he was forced to commit in circumstances of modern slavery include the need to "stay" in the host state to exonerate themselves?

If, properly understood, Article 14(1)(a) of ECAT regards defending criminal proceedings on modern slavery grounds (or otherwise relying on domestic provision adopted pursuant to Article 26) as "necessary" owing to the "personal situation" of the trafficked person, the applicant will succeed on this issue. Whether that approach is right is the question that underpins this issue.

45. The Vienna Convention on the Law of Treaties requires the construction of international instruments to be approached on a purposive, and not necessarily literal basis. Article 31(1) of the Vienna Convention (quoted by Linden J at para. 39 of *KTT* in the High Court) provides that:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

46. Article 14(1)(a) must be the starting point for this analysis, viewed in the context of the treaty as a whole, including its objectives. *PK (Ghana)* stressed that "necessary" must be construed by reference to the object that is to be pursued: para. 44. It is common ground that the "personal situation" in Article 14(1)(a) means an individual's personal situation *as a victim of trafficking*. The competent authority must determine whether the individual's stay is "necessary" in light of, and with a view to achieving, the Convention's objectives concerning the protection and assistance of victims of trafficking (*PK (Ghana)* at para. 44).

47. I have concluded that Article 14(1)(a) of ECAT does not regard the applicant's stay as necessary owing to his personal situation in order to defend criminal proceedings arising out of modern slavery, for the following reasons.

48. First, defending criminal proceedings is a step far removed from the primary objectives of protecting and assisting the needs of victims of modern slavery as expressed by the substantive provisions of Chapter III. The provision made under Chapter III to further the protection and assistance of victims of trafficking includes the identification of victims illuminates these objectives. The structure of Chapter III is identification of victims (Article 10), the protection of their private life (Article 11), assistance for victims' physical, psychological and social recovery (Article 12), recovery and reflection (Article 13), the issue of residence permits (Article 14, the present issue), compensation and redress (Article 15), repatriation and return of victims (Article 16) and gender equality (Article 17). These factors contribute to meeting some of the therapeutic and recovery needs experienced by victims of modern slavery, and make provision for a victim's need to stay in the host state as an adjunct to those objectives. In my judgment, the objectives pursued by these provisions are not sufficiently related to the personal circumstances of a defendant to criminal proceedings to bring that a defendant to criminal proceedings within Article 14(1)(a).

49. The judgment of the Court of Appeal in *KTT* helps to calibrate the linkage required: KTT's stay was necessary because she was pursuing a claim for asylum based on her status as a victim of modern slavery. Pursuing a modern slavery-based claim for asylum is, on any view, a much stronger link between the need to stay for a trafficking related reason than needing to stay to rely on the non-punishment provision in Article 26 (see below).

50. Secondly, the inclusion of paragraph (1)(b) of Article 14 sheds a degree of light on the meaning and scope of paragraph (1)(a). Ordinarily, one would expect a victim's need to cooperate with the authorities in the investigation or prosecution of those responsible for subjecting that victim to modern slavery to amount to a significant facet of that person's "personal situation", for which their stay would be "necessary", if one gives those terms meanings that are commensurate with the breadth for which Mr Buttler contends. The provisions of ECAT tell in the opposite direction, however. On a purely textual level, the inclusion of paragraph (1)(b) suggests that paragraph (1)(a) would not otherwise have the meaning and scope for which Mr Buttler contends. If it did, paragraph (1)(b) would not have been necessary.

51. Accordingly, Article 14(1)(b) defines – and thereby limits – the reasons for which, in principle, a victim's stay may be regarded as "necessary" for reasons connected with the domestic criminal justice process in the host territory. Had the framers of ECAT sought to extend the protection of Article 14 to those *charged* with criminal offences, Article 14(1)(b) would have been the place to say so. It does not. I accept Mr Irwin's submission that it would be surprising that, in addition to the express provision made by Article 14(1)(b) for matters relating to criminal investigations and prosecutions, there existed a separate, implied, basis for a victim of trafficking to be granted a residence permit in the host country in order to be prosecuted, under the auspices of Article 14(1)(a). The fact that there is no such provision is entirely consistent with the broader approach of Chapter III to the protection and recovery of victims of trafficking.

52. Thirdly, this conclusion is reinforced when one looks to the overall structure of the Convention and the location of Article 14(1)(a) within it (namely Chapter III). The themes covered by each of the ten chapters of the Convention are as follows:

    a. Chapter I – Purposes, scope, non-discrimination principle and definitions;

    b. Chapter II – Prevention, co-operation and other measures;

    c. Chapter III – Measures to protect and promote the rights of victims, guaranteeing gender equality;

    d. Chapter IV – Substantive criminal law;

    e. Chapter V – Investigation, prosecution and procedural law;

    f. Chapter VI – International co-operation and co-operation with civil society;

    g. Chapter VII – Monitoring mechanism;

    h. Chapter VIII – Relationship with other international instruments;

    i. Chapter IX – Amendments to the Convention;

    j. Chapter X – Final clauses.

53. It is significant that elsewhere, namely chapters IV and V, ECAT makes express substantive and procedural provision concerning the criminal law, investigations and prosecutions. There is no mention in, or cross-reference between, those provisions and the need for a residence permit under Article 14 in relation to any

category of victim of modern slavery, still less for those charged with criminal offences.

54. Fourthly, Chapter IV makes provision concerning victims of modern slavery who are prosecuted in respect of offences they were forced to commit. The obligation is contained in Article 26, entitled "non-punishment provision":

> "Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so."

55. The high watermark of Article 26 obliges parties to the Convention to provide for the "possibility" of not imposing *penalties* on the victims of modern slavery for offences they were forced to commit. There is no suggestion that the Convention mandates the provision of a complete defence as a matter of criminal law (although that would be one way to meet that obligation: see section 45 of the 2015 Act, which Mr Irwin confirmed in his submissions is the means by which the United Kingdom has chosen to implement this obligation). Put another way, at its highest Article 26 addresses the punishment to be faced by victims of modern slavery, rather than their substantive criminal liability.

56. It follows that Mr Buttler's submission that the Convention views the stay of a defendant to criminal proceedings as being "necessary owing to their personal situation" (Article 14(1)(a)) in order to enable him or her to advance a "complete defence" to an alleged offence (as Mr Buttler's skeleton argument put it at para. 74 on page 30) is without merit. The submission exceeds the minimum standards imposed by the Convention. It is based on the footing that it is "necessary" for a victim of modern slavery to "stay" in order to enjoy a benefit that the Convention itself does not confer, namely a complete defence to charges. It is difficult to construe Article 14(1)(a) as requiring the host country to regard a victim's stay as necessary such that a residence permit must be issued in order to defend criminal proceedings on modern slavery grounds in circumstances where, pursuant to Article 26, all that the Convention requires is for States Parties to provide for the "possibility of not imposing penalties on victims for their involvement in unlawful activities…"

57. While it could be said that there is an equal need to remain in-country to take advantage of the non-punishment provision, I do not consider that that would be an answer to this point. The imposition or non-imposition (as the case may be) of a penalty is subsidiary to the substantive process of assigning criminal liability. If the Convention does not regard a stay as necessary in order to contest substantive criminal liability, it would be surprising if it regarded the stay of a victim of modern slavery to be necessary in order to participate in an ancillary process.

58. Fifthly, some support is found for my conclusion in the Explanatory Report to the Convention. The Explanatory Report has been used as an aid to ECAT's interpretation on many occasions (see, for example, *Rantsev v Cyprus and Russia* (2010) 51 EHRR, para. 161; *Chowdury and Others v Greece* (21884/15), paras 38 and 93; *R (TDT (Vietnam)) v Secretary of State for the Home Department* [2018] 1 WLR 4922, in which the Explanatory Report was described as "instructive" at para. 10; *PK*

(Ghana) at paras 36 and 60[1]; *R (JP) v Secretary of State for the Home Department* [2020] 1 WLR 918 at para. 27; *KTT* (CA) at para. 47). This point may be stated simply: nothing in the detailed narrative provided in the Explanatory Report supports the applicant's submission. The focus of Article 14, and paras 180 to 190 of the Explanatory Report, lies in the provision of residence permits as a means to secure the assistance of victims of modern slavery in the criminal process (para. 181, final sentence), or on account of the victim's needs (para. 184). There is no mention of a stay being necessary to defend criminal proceedings, or even to rely on the non-punishment provision in Article 26, in those paragraphs or elsewhere in the Explanatory Report.

59. Drawing these factors together, I conclude that Article 14(1)(a) of ECAT does not require the competent authority to consider that the stay of a victim of trafficking is necessary owing to their personal situation on account of the victim being prosecuted for offences arising out of their modern slavery. That is consistent with a textual analysis of the Convention, in light of its aims, purpose and context. It would be surprising if the framers of the Convention sought to confer a substantive right of residence, and the attendant benefits deriving from a residence permit, on defendants to criminal proceedings, in circumstances where there is no mention of that objective in the text of the Convention, and the Explanatory Report is silent on the point.

60. Applying that analysis to the facts of the applicant's case, the Secretary of State did not err in her application of the DL policy and her conclusion that the applicant's stay was not necessary owing to his personal situation as a victim of modern slavery.

61. This point may be tested by the fact that, without a "residence permit" granted in reliance on Article 14(1)(a), and while he was present without leave to remain, the applicant successfully persuaded the CPS to drop the charges against him. The applicant did not require MS leave – or any other form of leave – in order to achieve that objective. He successfully achieved a result which went beyond the minimum standards of the Convention (that is, the non-punishment principle) in circumstances in which his "stay" was not regarded as "necessary" by Article 14(1)(a).

62. I therefore dismiss this application for judicial review insofar as it relates to issue (1).

Issue (2): no error on account of the referral of the applicant's domestic servitude to the police

63. By this ground, the applicant seeks to mount a collateral challenge to the earlier actions of the Competent Authority in referring the applicant's modern slavery to the police. The Competent Authority referred the applicant's 2020 county lines forced criminality to Essex Police, but in doing so did not expressly refer to the 2013 period of domestic servitude to the Metropolitan Police Service, and the focus of the correspondence was on the 2020 phase of the applicant's modern slavery. Mr

[1] At para. 60 of *PK (Ghana)*, Hickinbottom LJ rejected the reliance of the judge below on the Explanatory Report on the basis that it did not support the proposition for which it was relied upon, rather than on the basis the report itself was incapable of being relevant to any issue of construction.

Buttler sought to make what he described as the "contextual submission" that that process breached the investigative duty mandated Article 4 of the ECHR, and that the Secretary of State was required to satisfy herself that the applicant's stay was not required for *that* investigation prior to taking the 12 December decision. Since the investigative duty was incomplete, in Mr Buttler's submission it was not possible for the Secretary of State lawfully to conclude that the applicant's stay was not "necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings" for the purposes of Article 14(1)(b).

64. I reject this submission for the following reasons.

65. First, the CG decision was provided to Essex police (see page 364). The CG decision detailed both phases of modern slavery. That was sufficient. All relevant information was before a police force. It is not for the Competent Authority to micromanage the onward distribution of police business across different police forces, or seek to bypass any intra-police force process for the allocation of responsibility for cross-boundary criminal investigations.

66. Secondly, this submission seeks to impute to the Secretary of State the responsibility for investigating and prosecuting criminal offences, the constitutional responsibility for which lies elsewhere. See *Secretary of State for the Home Department v Hoang Anh Minh* [2016] EWCA Civ 656 at para. 38, per Burnett LJ:

> "The Competent Authority may make its own investigations, including seeking to interview the person concerned, but it is not a body with any constitutional responsibility for investigating or prosecuting crime, or identifying wrongdoers."

67. *Hoang Anh Minh* also made clear that the United Kingdom's procedural obligations under Article 4 of the ECHR have not been assumed by a single public body (para. 39). I consider that this aspect of Mr Buttler's submission seeks to confer on the Secretary of State precisely the broad, overall evaluation that Burnett LJ said does not rest with any single body, and relies on the Secretary of State assuming a constitutional role which lies elsewhere.

68. Thirdly, a failure by the Competent Authority to refer a matter to the police is unlikely give rise to a breach of the procedural limb of Article 4. This point was addressed in *Hoang Anh Minh* at para. 39:

> "[The Competent Authority's] functions under the guidance are squarely focussed upon the alleged victim, and his welfare. Its role in a possible criminal investigation is limited to informing the police of a credible allegation of wrongdoing, having made a positive reasonable grounds decision. **If it fails to do so, the person concerned may inform the police (as happened here via his solicitors). It is difficult to envisage how a failing even at the second substantive decision stage by the Competent Authority could feed into an assessment whether the United Kingdom was in breach of the article 4 procedural obligation.** Perhaps, if it failed to notify the police of a positive reasonable grounds decision, and the person concerned was removed from the United Kingdom before the police could investigate a crime justiciable in this jurisdiction, its failure might found a successful complaint under article 4. But ordinarily in

these circumstances there will have been a referral to the police whose function it is to investigate crime." (Emphasis added)

69. Moreover, there has been nothing to prevent the applicant's legal team from raising this complaint directly with the relevant police force. Mr Buttler submitted that a victim of modern slavery cannot be expected to report the matter to the police him or herself, relying on Article 27(1) of the Convention. This submission cannot be sustained in light of the judgment of Burnett LJ, above, and an examination of the terms, aim and purpose of the Convention. The rationale behind Article 27(1) "is to avoid traffickers' subjecting victims to pressure and threats in attempts to deter them from complaining to the authorities" (Explanatory Report, para. 277). Nothing in Article 27(1) entitles the applicant's experienced and publicly-funded legal team to decline to refer a matter to the relevant police force in the event that they had concerns that a matter had not been investigated properly: see the extract from the judgment of Burnett LJ to which emphasis has been added above. It is not clear why the applicant's legal team has not raised this or pursued this matter with what it considers to be the relevant police force.

70. Judicial review is a discretionary remedy. Applicants are expected to exhaust other avenues of redress before a court or tribunal will grant relief. The fact that this applicant's legal team (1) had concerns about the scope of the police investigation, but (2) did not raise the matter with the relevant force itself is, in any event, fatal to this ground succeeding. There can be no actionable public law error in those circumstances such that it would be appropriate to grant permission for the claim to proceed.

71. I also note the police were plainly aware of the 2013 allegations at the time (see para. 9 of the decision of First-tier Tribunal Judge Wellesley-Cole at page 322). If the applicant considers that a 2013 police investigation was inadequate, or the response to the Competent Authority's referral to Essex Police in 2021, responsibility for any failings by those bodies cannot be laid at the feet of the Secretary of State in a decision taken on 12 December 2022. Essex Police were (and remain) seized of the resulting police investigation, and has confirmed to the police that the applicant's presence in the United Kingdom is not necessary to progress the investigation. Under the circumstances, it was not unlawful for the Secretary of State to conclude that the applicant's stay was not necessary on Article 14(1)(b) grounds.

72. This ground is without merit.

Issue 3: no failure to apply anxious scrutiny and applicant's stay not necessary on account of his mental health conditions

73. Mr Buttler founded his submissions concerning this issue on the premise that the requirement to apply anxious scrutiny applies equally to a decision concerning MS leave as it does to a decision concerning a claim for asylum. That submission is founded, at least in part, on *MN v Secretary of State for the Home Department* and *IXU v Secretary of State for the Home Department* [2020] EWCA Civ 1746, [2021] 1 WLR 1956 at paras 242 to 246. I accept Mr Irwin's submission that what matters is the substance of the Secretary of State's analysis, rather than its form. See, for example, para. 245 of *MN*:

> "as in any such review what matters is the substance of the analysis, reasoning and conclusions, rather than matters of wording or form"

74. *MN* and *IXU* involved challenges to the two-stage process adopted by the Competent Authority concerning the recognition of victims of modern slavery. It did not concern decisions concerning MS leave. But, as the Secretary of State accepts, such decisions are important decisions, and must be taken properly.

75. The underlying question pertaining to this issue is therefore whether the 12 December decision took proper account of the Thomas report. It is necessary to read that decision alongside the amplification of its reasoning provided by the pre-action response dated 30 January 2023.

76. The Thomas report summarised the mental health conditions with which the applicant lives. They include moderate-severe symptoms of a major depressive disorder with additional psychotic features. Those conditions, in the opinion of Dr Thomas, mean that the applicant has significant treatment needs. Dr Thomas' opinion was that he would not be able effectively to access appropriate treatment without the in-country stability that would be provided by a grant of leave to remain, and that insufficient provision would be available in Nigeria in any event.

77. The 12 December decision expressly engaged with whether a grant of MS leave was necessary to protect and assist the applicant's recovery. That approach was consistent with Article 14(1)(a) which only regards an individual's stay to be "necessary" if it is required on account of the individual's *trafficking-related* "personal situation", when viewed in the context of the aims of Chapter III of the Convention, as held in *PK (Ghana)* (see para. 27, above). The decision acknowledged that the applicant takes Nytol, and noted that it would be available in Nigeria. Finally, the decision quoted at length from the Secretary of State's *Country Information Note – Nigeria: Medical treatment and healthcare, December 2021*, demonstrating the extent of the psychiatric provision available in Nigeria. On any view, the treatment available in Nigeria is more complex than that which was accessed by the applicant on the material before the Secretary of State in the course of the 12 December decision.

78. I reject Mr Buttler's submission that the 12 December decision should have engaged in further depth with the conclusions of the Thomas report about the applicant's need to remain in the United Kingdom to access treatment without fear of return to Nigeria. Dr Thomas accepted at para. 182 that her expertise does not lie in the provision of psychological therapy or medical intervention in Nigeria. More significantly, the report details a range of underlying trauma experienced by the applicant over a considerable period of time. Those experiences included "that his time in Sudan as a child had been particularly traumatic" due to the ongoing conflict at the time, his exposure to dead bodies, and sustaining an injury caused by an army officer (paras 9 and 10). The applicant was instructed by the Nigerian Embassy to return to Nigeria to see his ailing father, only to find that he was already dead upon arrival. He also found out that the family home had been burned down by Boko Haram (para. 22), and was subsequently abandoned by his mother, who he now assumes to be dead (para. 78). Later trauma experienced by the applicant includes the two periods of modern slavery. The applicant reports that his psychiatric symptoms commenced upon the death of his father (para. 79). Dr Thomas considered that the applicant minimised the impact of his mother's neglect

of him (para. 82), and the impact upon him of not being able to work to provide for his family (para. 83).

79. In light of the mixed causes of the applicant's trauma, even taking Dr Thomas' report at its highest, it is difficult to see how the applicant's stay could be said to be necessary as a result of his trafficking-related "personal situation" for the purposes of Article 14(1)(a) such that his stay was "necessary". As the Secretary of State's pre-action protocol response put it, the applicant had not commenced any treatment in the UK. Since appropriate treatment would be available in Nigeria, the Secretary of State was entitled to conclude that his stay was not necessary in Article 14(1)(a) terms. Moreover, the obligation upon the Secretary of State contained in the DL policy is not to ensure the provision of support enabling a full recovery (see page 729 of the bundle).

80. I therefore agree with Mr Irwin that there is no basis to conclude that the Secretary of State addressed the question of whether the applicant's psychiatric needs could be met if returned to Nigeria on an incorrect or insufficient basis.

81. The claim is therefore dismissed on this ground.

Article 8 not engaged

82. I reject Mr Buttler's submission that Article 8 was engaged by the 12 December decision. Properly understood, *XY* does not require a different conclusion.

83. For Article 8(1) to be engaged by a decision of the Secretary of State, there must be a causal link between the decision and its consequences for the individual concerned of sufficient severity to engage the protection of the article. The classic formulation of this test may be found in *Razgar* [2004] UKHL 27 at para. 17. Lord Bingham's summary is expressed in the context of a removal decision, but the considerations apply with equal force to other decisions: for "proposed removal", question one should be read as referring to the 12 December decision. The five questions are:

> "(1) Will the proposed removal [the 12 December decision] be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

84. The 12 December decision did not have the effect of exposing the applicant to any of the consequences that he claims led to the engagement of Article 8. The applicant

was already exposed to the consequences of the so-called 'hostile environment' on account of his status as an overstayer. He enjoyed no ECAT-based entitlement to be granted MS leave. It was not, therefore, the 12 December decision which had the effect of continuing his exposure to the hostile environment, but a combination of his status as an overstayer and the Secretary of State's inaction on his (separate) Article 8-based human rights claim, which he made on 8 July 2018. The applicant's true complaint is that the Secretary of State had not taken a timely decision in response to his Article 8 family life human rights claim made on that date. Other than raising the issue of delay in pre-action correspondence on 23 February 2023, the applicant has not brought proceedings to challenge the alleged unlawful delay in the consideration of his Article 8 claim.

85. It is important to approach this analysis on the footing that the 12 December decision was not unlawful as a matter of public law. For the reasons set out above, it was consistent with Article 14(1) of ECAT, and to the extent it was the Secretary of State's policy to act consistently with those requirements, that policy objective was met. That is significant because it demonstrates that, in contrast to the position in *XY*, there was no underlying ECAT-based or public law unlawfulness in the decision of the Secretary of State. It was common ground that the applicant in *XY* was entitled to MS leave, since he had been granted MS leave shortly before proceedings were commenced. Lane J held that the Secretary of State had adopted a secret policy which materially departed from her published policy, whereby her officials were instructed not to issue MS decisions. Moreover, such decisions, when taken, were unlawfully served to the file, rather than on the applicant, thereby depriving him of the opportunity to challenge the decision. Accordingly, the Secretary of State's unlawful actions directly deprived the XY of the very leave which the Secretary of State later accepted that he was entitled to. In those circumstances, the effect of the continued exposure to the hostile environment was directly and causally linked to the unlawful MS leave decision. By contrast, in these proceedings, I have held that there has been no such unlawfulness, and therefore no causal link.

86. This analysis is therefore entirely consistent with that contained in *XY*.

87. I therefore find that the 12 December decision did not have the effect of continuing the applicant's exposure to the hostile environment, or otherwise adversely impacting his private or family life in the UK. It did not surpass the first *Razgar* hurdle because it did not expose the applicant to any adverse consequences to which he was not otherwise legitimately exposed to (subject to any claim for unlawful delay in the determination of his human rights claim, a matter on which I express no view). At its highest, the 12 December decision did not confer on the applicant a benefit to which he was not entitled, and simply enabled the *status quo* to continue.

88. In the alternative, if Article 8 *was* engaged, then any interference with the applicant's private and/or family life by the 12 December decision was plainly justified for the purposes of the "in accordance with the law" limb of Article 8(2), for the reasons set out under my analysis of issues (1), (2) and (3), above.

Conclusions

89. Drawing this analysis together, I resolve the issues identified at the outset of this judgment as follows:

    a. Issue (1): where a recognised victim of modern slavery is prosecuted for offences arising out of the forced criminality that formed a basis for the Competent Authority's recognition of his or her status as a victim of modern slavery, the Secretary of State is not required by Article 14(1)(a) of ECAT to consider that their "stay is necessary owing to their personal situation" in order for the individual to rely on the Article 26 non-punishment provision, or otherwise defend the criminal charges on the basis of being a victim of modern slavery.

    b. Issue (2): where the Secretary of State is satisfied that the Competent Authority referred a positive conclusive grounds decision to the police, and where the police have confirmed that the individual's presence in the United Kingdom is not required for the purposes of investigating or prosecuting any criminal offences, no further steps are required by the Secretary of State when determining whether a person's stay is necessary for the purposes of cooperating with the police and prosecuting authorities in investigation or criminal proceedings for the purposes of Article 14(1)(b) of ECAT.

    c. Issue (3): the Secretary of State addressed the Thomas report with sufficient care and there is no basis to conclude that the Secretary of State addressed the question of whether the applicant's psychiatric needs could be met if returned to Nigeria on an incorrect or insufficient basis.

    d. Article 8 ECHR was not engaged by the 12 December decision in the circumstances of these proceedings.

90. This application for permission to bring judicial review proceedings is dismissed. The 12 December decision did not unlawfully interfere with the applicant's rights under Article 8(1) ECHR, and the applicant is accordingly not entitled to a declaration for the assessment of damages.

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