Neutral Citation Number: [2025] EWCA Civ 188

Case Nos: CA-2024-001328 and CA-2024-000516

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Judge Rimington and Upper Tribunal Judge Frances
JR-2023-LON-001397 and JR-2023-LON-001944

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2025

Before:

LORD JUSTICE PETER JACKSON
LADY JUSTICE ANDREWS
and
LADY JUSTICE ELISABETH LAING

- -

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
S	**Respondent**
-and-	
ADVICE ON INDIVIDUAL RIGHTS IN EUROPE (AIRE) CENTRE	**Intervener**

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
-and-	
VLT	**Respondent**
and-	
ADVICE ON INDIVIDUAL RIGHTS IN EUROPE (AIRE) CENTRE	**Intervener**

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- -

Robin Tam KC and Michael Biggs (instructed by **the Treasury Solicitor**) for the **Appellant**
Chris Buttler KC and Catherine Meredith (instructed by **Greater Manchester Immigration Aid Unit (GMIAU)**) for the **Respondent in S**
Gráinne Mellon and Eva Doerr (instructed by **Turpin Miller**) for the **Respondent in VLT**

Stephanie Harrison KC, Bojana Asanovic and David Sellwood (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Intervener**, by written submissions only

Hearing dates: 4 - 5 December 2024
Further written submissions on various dates including 3 February 2025
- -

Approved Judgment

This judgment was handed down remotely at 11.00am on 28 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. Anonymity orders have been made in relation to both respondents. I will refer to them as 'VLT' and 'S'. The main issue in these two appeals from the Upper Tribunal (Immigration and Asylum Chamber) ('the UT') is the correct construction of part of a policy of the Secretary of State. That policy is the Secretary of State's guidance on DL, version 10, published on 16 March 2023 ('the DLP'). It governs the grant of discretionary leave ('DL') in a range of different cases. The provisions which are at issue in these appeals are transitional provisions in the DLP which create a concession for some members of a particular group of victims of trafficking ('VOTs'). I will refer to that particular group of VOTs as 'the *KTT* cohort' (see further, paragraphs 51-57, below). One feature of the members of that group is that they had made asylum claims based, to some extent, on their fears of being re-trafficked. I will refer to such claims as 'relevant claims'.

2. VLT and S both applied to the UT for judicial review of decisions by the Secretary of State refusing leave to remain as VOTs under the Immigration Rules (HC 395 as amended) ('the Rules'), and to refuse DL. The UT quashed the decision in VLT's case. It also made a declaration that the relevant part of the DLP was unlawful. It ordered the Secretary of State, 'absent special circumstances' to grant DL to VLT within 28 days. The UT also allowed S's claim. S's second argument was that the policy was also unlawful because its application to his case resulted in a breach of article 14 of the European Convention on Human Rights ('the ECHR').

3. Both appeals were said to concern the relationship between three documents and the extent to which they should, and do, or do not, reflect the provisions of the Council of Europe Convention against Trafficking in Human Beings ('ECAT'). That way of putting the case is based on the decision of this court in *R (EOG) v Secretary of State for the Home Department and KTT v Secretary of State for the Home Department* [2022] EWCA Civ 307; [2023] QB 351 ('*KTT*'). The first document is the transitional provisions in the DLP. The second is an appendix to the Rules, that is, the Appendix 'Temporary Permission to Stay for Victims of Human Trafficking or Slavery', which I will refer to as 'the VTS'. The third is the policy which is relevant to the VTS: 'Temporary Permission to Stay Considerations for Victims of Human Trafficking and Slavery', version 3.0, published on 8 June 2023 ('the VTSP').

4. The UT dismissed S's second argument (see paragraph 2, above). S cross-appeals against that part of the UT's decision (by a Respondent's Notice.) There is therefore a second issue in S's appeal, which is whether the documents, on their true construction, and in their application to his case, result in a breach of article 14 of the ECHR. VLT also cross-appeals against the UT's decision in his case.

5. For the reasons given in this judgment, I would hold that, in both cases, the UT misinterpreted the transitional provisions. The question whether the DLP was intended to comply with ECAT is an irrelevant distraction, given the legislative and associated policy changes which came into force on 30 January 2023. This argument was succinctly put to the UT by Mr Biggs, who represented the Secretary of State in VLT's case. In my judgment, the transitional provisions lawfully provide, first, for some

members of the *KTT* cohort to have their cases decided, as a concession, under the former policy (as it was interpreted by this court in *KTT*) but for those members of the *KTT* cohort who are subject to deportation orders or to deportation proceedings to be subject to the new scheme, under which they are free to make applications for leave to remain. I would also hold that that treatment is not contrary to article 14 of the ECHR, and I would therefore dismiss S's cross-appeal.

6. On this appeal, the Secretary of State was represented by Mr Tam KC and by Mr Biggs. VLT was represented by Ms Mellon and Ms Doerr. S was represented by Mr Buttler KC and by Ms Meredith. I thank all counsel for their written and oral submissions. In S's case the AIRE Centre intervened by written submissions only, to support his argument based on article 14 of the ECHR. I have read those submissions. The parties (other than the AIRE Centre) also helpfully provided the court with further written submissions after the hearing, including further submissions on three issues of statutory construction for which the court asked on 24 January 2025. Counsel provided those on 3 February 2025. I particularly thank them for those further submissions, which were very useful.

The facts

VLT (UTJ Frances)

7. VLT is a Vietnamese national. He is about 57. He was trafficked to the United Kingdom three times, in 2009, 2015 and 2018 and forced to grow cannabis to repay a debt. In 2012, he was convicted of conspiracy to cultivate cannabis, and sentenced to 8 months' imprisonment. The Secretary of State made a deportation order in January 2013. Neither the order, nor the underlying decision was in the documents for this appeal (see further paragraph 121, below).

8. The fact that he has been trafficked three times suggests that he must have returned twice to Vietnam; between 2009 and 2015 and between 2015 and 2018, and that he returned twice to the United Kingdom. The UT made no findings of fact about his returns to Vietnam and to the United Kingdom. It is not clear from its judgment whether he was deported to Vietnam, for example, or if so, how many times.

9. VLT was referred to the National Referral Mechanism ('the NRM') on 29 May 2018, presumably after he had returned to the United Kingdom for the third time. The NRM was the name which was then given to the officials in the Home Office who decided whether there were 'reasonable grounds' for considering that a person was a potential VOT, and who would later decide whether or not there were 'conclusive grounds' for such a decision. These functions of the NRM are now discharged by the Single Competent Authority ('the SCA') and the Immigration Enforcement Competent Authority.

10. VLT claimed asylum on 1 June 2018 on the grounds that he had a well-founded fear of being re-trafficked on return to Vietnam. On 27 June 2018 the NRM made a positive reasonable grounds decision. In October 2022, he made further submissions against his deportation. The Secretary of State refused his protection and human rights claims on 15 August 2023. The first page of that decision refers to VLT's sentence of imprisonment and says, among other things 'Although the sentence was below the

automatic deportation criteria of 12 months' imprisonment, you met the requirement for deportation on conducive grounds, under section 3(5) of the Immigration Act 1971'. At the time of the UT hearing, VLT's appeal against the Secretary of State's refusal to revoke the deportation order was pending. He could not be removed while that appeal was pending.

11. On 23 September 2022, the SCA made a positive conclusive grounds decision in VLT's case. His solicitors applied for DL on 10 November 2022. The Secretary of State refused the application for DL in a decision dated 12 June 2023 ('Decision 1'), refusing temporary permission to stay ('TPS') under the VTSP.

12. The Secretary of State considered a psychological report, background information about Vietnam, and a current circumstances questionnaire ('CCQ'). The Secretary of State first listed the three circumstances in which leave to remain should be granted. Reasonable inquiries had been made, but there was no evidence that VLT was helping with any police investigation. Leave was not necessary for that purpose, nor, as he was not seeking compensation, for that purpose either. The Secretary of State considered the medical evidence, and decided that VLT was not taking medication, or receiving counselling, and could be treated in Vietnam. The Secretary of State concluded that TPS was not necessary for a medical reason. The Secretary of State had also considered Part 9 of the Immigration Rules (HC 395 as amended) ('the Rules'), and had concluded that TPS must be refused because 'previous behaviour is deemed not conducive to the public good'.

13. VLT contended that the Secretary of State should have considered his case under other policy guidance, that is, the DLP. The DLP makes provision, among other things, about VOTs who received a positive conclusive grounds decision and whose claims for asylum were outstanding before 30 January 2023. The Secretary of State explained, in her response to VLT's pre-action protocol letter, why she had not considered VLT's case under the DLP.

14. After the UT's decision in this case VLT appealed to the First-tier Tribunal (Immigration and Asylum Chamber) ('the F-tT') against the refusal of his relevant claim. The F-tT allowed his appeal in a determination promulgated on 6 August 2024. We were told by Mr Tam that this had led VLT to withdraw ground 5 in his Respondent's Notice ('RN'), as the issue that it sought to raise had become academic. That ground corresponded to his ground 4 in the UT. It was not suggested by Mr Tam or by Ms Mellon that VLT's successful asylum appeal meant that we should not go on to consider the wider issues raised in the Secretary of State's appeal in his case. Our decision may also affect others in a similar position.

The grounds of challenge

15. VLT challenged Decision 1 on three grounds.

    1. The refusal to grant DL or to consider VLT's case under the DLP was a breach of article 14(1)(a) of ECAT, which was implemented by the DLP.

2. The DLP breaches article 14(1)(a) of ECAT and article 4 of the ECHR.
3. The refusal of TPS was unlawful because the Secretary of State did not take into account material expert evidence and/or approached the evidence wrongly.

S (UTJ Rimington)

16. S is believed to have been born in Nigeria in December 1978. He was brought to the United Kingdom by his mother when he was nine or ten years old. It was considered that he had been brought to the United Kingdom for the purposes of domestic servitude and sexual exploitation. He escaped but continued to be traumatised. He was convicted of burglary in 1996, when he was under 18, for which he received a conditional discharge. He was convicted of robbery and burglary in 1997 and sentenced to three years and nine months' imprisonment. His representatives applied for indefinite leave to remain in 2006. The UT did not say so, but that application was refused in 2012 in the deportation decision because of S's criminal convictions.

17. In April 2009, he was convicted of conspiracy to supply heroin and possession of a drug of Class C. He was sentenced to 6 years' imprisonment. A deportation order was signed on 8 March 2012. The Secretary of State tried to remove him to Nigeria but the authorities there would not accept that he was Nigerian. The F-tT dismissed his appeal against the decision to deport him. The UT dismissed his further appeal.

18. He was nevertheless referred to the NRM as a potential VOT. After an initially negative reasonable grounds decision, S received a positive reasonable grounds decision in November 2019 (having applied for judicial review, which led to a reconsideration by the SCA). He then received a positive conclusive grounds decision on 28 November 2022. He had filled in two CCQs and relied on a report from Dr Griffiths which recommended psychological therapy.

19. The Secretary of State refused leave to remain on 20 March 2023 under 'the post 30th January 2023 regime' under the VTS ('Decision 2'). The Secretary of State considered that S had received treatment in the United Kingdom and could continue to have it in his home country. The Secretary of State also refused DL by reference to Part 9 of the Rules. The Secretary of State maintained Decision 2 on 18 April 2023.

20. S applied for judicial review of Decision 2. There were initially several grounds for judicial review. The UT only considered grounds 1 and 4, however, as the Secretary of State conceded the issues challenged in the other grounds. Ground 1 was that the Secretary of State should have considered version 10 of the DLP, not the post-30 January 2023 TPS policy. The Secretary of State had also, it was said, unlawfully failed to apply version 5 of the DLP. Leave should have been backdated to 28 November 2022. The blanket exclusion of deportation cases and the disapplication of *KTT* was unlawful. The Secretary of State had breached section 6 of the Human Rights Act 1998 ('the HRA'). The policy induced unlawful conduct. The caseworkers were directed to refuse applications even though the VOT's stay in the United Kingdom was necessary owing to personal circumstances. S fell under the pre-30 January 2023 policy. The CCQ was a delaying tactic.

21. Ground 4 was that the failure to grant DL from 28 November 2022 was a breach of the positive obligation imposed by article 4 of the ECHR. This undermined S's recovery. He was deprived of his entitlement to work and to claim benefits. There was a breach of article 8. There was unjustified discrimination, under article 14 of the ECHR, on the basis of his 'other status' that is, his criminal offending.

22. By the date of the UT hearing the Secretary of State had offered to withdraw Decision 2 and to reconsider S's application. We were not told how that offer affected this appeal, but it was not suggested that this offer made the appeal academic.

The legal framework
The relevant statutory provisions
The Immigration Act 1971

23. Section 1(2) of the Immigration Act 1971 ('the 1971 Act') is headed 'General principles'. Section 1(2) provides that those who do not have a right of abode in the United Kingdom may live, work and settle there by permission and subject to such regulation and control of their entry and stay as is imposed by the 1971 Act. Section 1(4) provides that 'The rules laid down by the Secretary of State as to the practice to be followed in the administration of [the 1971 Act] for regulating the entry into and stay in the United Kingdom of persons not having the right of abode shall include provision for admitting (… and subject or not to such conditions as to length of stay or otherwise)' various categories of people.

24. Section 3 is headed 'General provisions for regulation and control'. Section 3(1)(b) provides that a person who is not a British citizen may be given leave to remain in the United Kingdom for a limited or indefinite period, which may be subject to the conditions listed in section 3(1)(c). Section 3(2) requires the Secretary of State to lay before Parliament 'statements of the rules or of any changes in the rules laid down by him as to the practice to be followed in the administration of [the 1971 Act] for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter… including any rules… as to the conditions to be attached in different circumstances…' Section 3(3) gives the Secretary of State a wide power to vary limited leave to remain. Section 3B contains further provisions about leave to remain. The power to give leave to remain is to be exercised by the Secretary of State (section 3(11)).

25. A person who is not a British citizen is liable to deportation if the Secretary of State 'deems his deportation to be conducive to the public good' (section 3(5)). A person is also liable to deportation if, after he attains the age of 17, he is convicted of an offence for which he is punishable with imprisonment and, on his conviction, a court orders his deportation (section 3(6)). Section 3(5) must now be read with section 32(4) of the UK Borders Act 2007 ('the 2007 Act') (see paragraph 33, below). Section 65 of the Nationality and Borders Act 2022 ('the 2022 Act') is to be treated for the purposes of section 3 of the 1971 Act as if it were a provision made by that Act (see paragraph 42, below).

26. Section 5 makes further provision about deportation. Where a person is liable to deportation, the Secretary of State may make a deportation order, that is, an order requiring him to leave, and prohibiting him for entering, the United Kingdom 'and a

deportation order shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force' (section 5(1)). The Secretary of State may at any time revoke a deportation order (section 5(2)). Section 6 provides for recommendations for deportation by a court.

The Nationality, Immigration and Asylum Act 2002

27. Part IV of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') deals with detention and removal. Section 72 is headed 'Serious criminal'. It applies for the purposes of article 33(2) of the Refugee Convention (section 72(1)). Section 72 creates various presumptions which apply when a court considers whether a person has been 'convicted by a final judgment of a particularly serious crime' and constitutes 'a danger to the community of the United Kingdom'. That presumption applies, among other things, when a person is convicted 'of an offence specified by order of the Secretary of State'. The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 ('the 2004 Order') was made under section 72(4)(a) of the 2002 Act. Article 1 provides that an offence of a description in any of Schedules 1-6 to the Order is specified for the purposes of section 72(4)(a). Offences under the Criminal Law Act 1977 ('the 1977 Act') are listed in Schedule 2. Offences of conspiracy are offences under the 1977 Act.

28. Section 77(1) prohibits the removal of a person whose asylum claim is pending. A claim is pending for this purpose until the person is given notice of the Secretary of State's decision on the claim (section 77(2)(b)). A pending asylum claim does not prevent the making of a deportation order (section 77(4)(b)).

29. A person may not be removed, either, while his appeal under section 82 of the 2002 Act is pending (section 78(1)). 'Pending' is defined in section 104 (section 78(2)). Nothing in section 78 prevents the making of a deportation order against an appellant (subject to section 79), or the 'taking of any other interim or preparatory action' (section 78(3)(b) and (c)).

30. Section 79(1) prevents the making of a deportation order against a person while an appeal which may be brought or continued while the person is in the United Kingdom relating to the decision to make the order could be brought (ignoring the possibility of an appeal out of time with permission) or such an appeal is pending (as defined in section 104). Section 79 does not apply to a deportation order which states that it is made under section 32(5) of the 2007 Act (see paragraph 33, below) (section 79(3)). A deportation order 'made in reliance on subsection (3) does not invalidate leave to enter or remain in accordance with section 5(1) [of the 1971 Act], if and for as long as section 78 …applies' (section 78(4)).

31. Section 82(1) gives a person a right to appeal to the tribunal where the Secretary of State has decided to refuse his protection claim or his human rights claim. 'Protection claim' is defined by section 82(2)(a) of the 2002 Act as a claim that the person's removal would breach the United Kingdom's obligations, either under the Refugee Convention, or in relation to persons eligible for a grant of humanitarian protection. Section 82(2)(b) explains what is meant by the refusal of a protection claim. Section 92 applies to determine where an appeal can be brought or continued (section 92(1)). A protection

claim must be brought from inside the United Kingdom unless it has been certified (under section 94) by the Secretary of State (section 92(2)).

The UK Borders Act 2007

32. Section 32 of the 2007 Act is in a group of sections headed 'Deportation of criminals' and is headed 'Automatic deportation'. Section 32(1) defines 'foreign criminal' as a person who is not a British citizen, is convicted in the United Kingdom of an offence, and to whom Condition 1 or 2 applies. Condition 1 is that he has been sentenced to a period of imprisonment of at least 12 months (section 32(2)). Condition 2 is that the offence is specified by the Secretary of State in an order made by the Secretary of State under section 72(4)(a) of the 2002 Act (see paragraph 27, above) and he is sentenced to 'a period of imprisonment' (section 32(3)(a) and (b)). No period is specified, so any period of imprisonment is enough.

33. Section 32(4) provides that the deportation of a foreign criminal is conducive to the public good for the purposes of section 3(5)(a) of the 1971 Act. Subject to the exceptions listed in section 33, the Secretary of State must make a deportation order in respect of a foreign criminal (section 32(5)). The Secretary of State may not revoke a deportation order made under section 32(5) unless he thinks that one of exceptions in section 33 applies, the applicant is outside the United Kingdom, or section 34(4) applies (section 33(6)).

34. Subject to section 33(7), section 33(1) provides that sections 32(4) and (5) do not apply where one of the exceptions in section 33 applies. There are two potentially relevant exceptions in section 33. Exception 1 is where deportation would breach a person's Convention rights or the United Kingdom's obligations under the Refugee Convention (section 33(2)). Exception 6 is where the Secretary of State thinks that the application of section 32(4) or (5) would contravene the United Kingdom's obligations under ECAT (section 33(6A)). Section 33(7) provides that the application of an exception does not prevent the making of a deportation order, but its effect is that it is neither assumed that the person's deportation is, or is not, conducive to the public good, and section 32(4) applies despite the application of Exception 1 (or of Exception 4, which concerns extradition and is not potentially relevant).

35. Section 34 is headed 'Timing'. Section 34(1) states that section 32(5) requires a deportation order to be made 'at a time chosen by the Secretary of State'. The Secretary of State may not make deportation order while an appeal against sentence or conviction is pending (section 34(2) and (3)). The Secretary of State may withdraw a decision that section 32(5) applies, or revoke a deportation order made under section 32(5) for the two purposes specified in section 34(4). Those are for taking action under the Immigration Acts or under the Rules, and later taking a new decision that section 32(5) applies.

The Modern Slavery Act 2015

36. The Modern Slavery Act 2015 ('the 2015 Act') is in five main parts. Part 1 creates criminal offences, Part 2 provides for slavery and trafficking prevention orders, Part 3 for maritime enforcement, Part 4 for an anti-slavery commissioner, and Part 5 for a range of measures to protect VOTs. Section 49 makes provision for the Secretary of

State to issue relevant statutory guidance, and section 50 for regulations about identifying and supporting VOTs. Section 49 was amended by the 2022 Act.

37. Section 50A is inserted by section 64 of the 2022 Act. Section 50A(1) imposes a duty on the Secretary of State to secure that any necessary support and assistance is available to an identified potential victim (within the meaning of section 61 of the 2022 Act: see paragraph 39, below) during the recovery period. A thing is 'necessary' if the Secretary of State thinks that it is necessary to help the person receiving it to recover from various types of harm arising from the conduct which resulted in the positive reasonable grounds decision (section 50A(2)). The Secretary of State has a discretion whether to provide such support in relation to a second such decision (section 50A(3) and (4)): and see section 62 of the 2022 Act (see paragraph 40, below). Section 50A(5) provides that any duty imposed by section 50A ceases if a decision is made under section 63(2) of the 2022 Act (see paragraph 41, below).

The Nationality and Borders Act 2022

38. Part 5 of the 2022 Act is headed 'Modern Slavery'. The provisions which are in force came into force on 30 January 2023, after the reasonable grounds and conclusive grounds decisions in these two cases. Section 58 gives the Secretary of State power to serve a notice requiring a person who has made a protection claim or human rights claim to give any information which might be relevant to a reasonable or conclusive grounds decision. If that information is provided late, a competent authority may take that into account when making either type of decision, as damaging that person's credibility (section 59). Those two sections are not yet in force.

39. Section 60 amends section 49 of the 2015 Act (see paragraph 36, above). Section 61 applies to 'an identified potential victim' if a decision is made by a competent authority that there are reasonable grounds to believe that he is a VOT ('a positive reasonable grounds decision'), and that decision is not a 'further RG decision' (see the next paragraph in which I summarise section 62). Subject to section 63(2), the identified potential victim may not be removed from or required to leave the United Kingdom during the recovery period. The 'recovery period' is defined in section 61(3). It ends, at the latest, on the day on which the conclusive grounds decision is made.

40. Section 62 applies where a competent authority has made a positive reasonable grounds decision ('RG 1') and makes a second such decision ('RG 2') based on things wholly done before RG 1 was made. The competent authority may, if it thinks it appropriate, decide that there should be a further period during which the person should not be removed from, or required to leave the United Kingdom. Section 62 is also subject to section 63(2).

41. Section 63 of the 2022 Act is headed 'Identified potential victims etc: disqualification from protection'. Section 63(1) provides that a competent authority may decide that section 63(2) is to apply to a person in respect of whom a reasonable grounds decision has been made if it is satisfied that the person is a threat to public order or has made a claim to be a VOT in bad faith. Where section 63(2) applies, any prohibition on the removal or departure from the United Kingdom under section 61 or 62 ceases to apply as does any requirement under section 65 to grant the person limited leave to remain in the United Kingdom (section 63(2)). Section 63(3) lists the types of person who are a

threat to public order. A person who is a 'foreign criminal' within the meaning of section 32(1) of the 2007 Act (see paragraph 32, above) is a threat to public order (section 63(3)(f)). Section 63(4)-(7) contains various definitions.

42. Section 65 is headed 'Leave to remain to victims of slavery or human trafficking'. It applies if a positive conclusive grounds decision had been made in respect of a person who is not a British citizen and who does not have leave to remain in the United Kingdom. The Secretary of State must grant leave to remain to such a person if the Secretary of State considers that it is necessary for the purpose of assisting them to recover from harm caused by their exploitation, enabling them to seek compensation for that exploitation, or enabling them to co-operate with a public authority in connection with an investigation or criminal proceedings in respect of their exploitation (section 65(2)). Section 65(2) is subject to section 63(2). Leave is not necessary for the relevant purposes if, as the case may be, the Secretary of State considers that the need for help can be met in a country referred to in section 65(5)(a) or (b), or both, or the person can seek compensation from outside the United Kingdom and it would be reasonable for him to do so (section 65(4)). If the Secretary of State is satisfied that the person is a threat to public order, the Secretary of State is not required to give him leave under section 65(2), and if any such leave has already been granted, it may be revoked (section 65(6) and (7)). Sub-sections 63(3)-(7) (see the previous paragraph) apply for the purposes of section 65 as they do for the purposes of section 63 (section 65(9)). A 'positive conclusive grounds decision' is a decision made by a competent authority that a person is a VOT (section 65(10)). Section 65 is to be treated for the purposes of section 3 of the 1971 Act as if it were a provision made by that Act (section 65(11)).

The European Convention against Trafficking in *Human Beings*

43. The United Kingdom signed ECAT in March 2007, and ratified it in December 2008. It came into force on 1 April 2009. In the light of the issues on this appeal, I need only quote part of article 14 of ECAT.

> '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 cooperation with the competent authorities in investigation or criminal proceedings…'

R (EOG) v Secretary of State for the Home Department and R (KTT) v Secretary of State for the Home Department

44. In *KTT* this court considered appeals by the Secretary of State from decisions of Mostyn J and Linden J. The appeals concerned the Secretary of State's policy for granting DL to VOTs. The policy at issue was referred to by this court as 'the MSL Guidance'. By the date of the appeal, a fifth version of that Guidance was in force (see paragraph 24

of the judgment of Underhill LJ, with which the other members of this court agreed). In paragraph 40 Underhill LJ explained, by reference to the judgment of Mostyn J in *EOG*, why a grant of leave is important for VOTs.

45. Underhill LJ summarised the relevant authorities. The Secretary of State had conceded in an earlier case that 'in so far as the Guidance purported to give effect to the terms of [ECAT] and failed to do so, that would be a justiciable error of law' (paragraph 26). That concession had been repeated in later cases, but withdrawn by the Secretary of State on the appeal in *EOG* and before the hearing by Linden J in *KTT*. Linden J heard argument and held that the concessions were correct. Just before the hearing in this court in that case, the Secretary of State decided not to argue that the concessions were wrong (paragraphs 33 and 34). This court agreed with the analysis of Linden J, with two qualifications (paragraphs 34-36).

46. Underhill LJ then considered the terms of the MSL Guidance. There were two issues. The first was whether the Secretary of State's policy had 'from the start purported and been intended to give effect to the corresponding provisions of Chapter III of ECAT' and, if so, whether that was still the case (paragraph 75). He decided that issue against the Secretary of State (paragraphs 68-77). The second issue was whether the MSL Guidance gave effect to article 14(1)(a) in circumstances where it failed to make clear that the question was whether a VOT's 'stay' in the United Kingdom was 'necessary owing to their personal situation' and that a VOT's stay could be 'necessary' in order to enable him to make a relevant claim. Underhill LJ also decided that issue against the Secretary of State (paragraphs 78-89).

R (XY) v Secretary of State for the Home Department

47. Lane J's judgment in *R (XY) v Secretary of State for the Home Department* [2024] EWHC 81 (Admin); [2024] 1 WLR 2272 explains part of the background to the transitional provisions. The policy at issue in that case was version 4 of an earlier policy, 'Discretionary leave considerations for victims of modern slavery' ('version 4'). The claimant had been trafficked in Albania. He escaped to the United Kingdom and made a relevant asylum claim in 2018. He received a favourable conclusive grounds decision in July 2021. On 29 November 2021, the Secretary of State told XY's solicitors that a provisional decision on leave to remain had been made but was being checked internally.

48. In July 2022, XY applied for judicial review, challenging the delay of the Secretary of State in making a decision on his asylum claim. He made a further application for judicial review in December 2022 challenging the Secretary of State's 'refusal' to make a decision whether or not to give him leave to remain as a VOT. In his application for judicial review, XY claimed that about 600 people had made relevant asylum claims and would be entitled to DL under the decision in *KTT* (see paragraphs 44-46, above). The Secretary of State filed an acknowledgement of service, which stated that the Secretary of State had decided to grant 12 months' leave to remain to XY and inviting him to withdraw his application for judicial review. XY did not do so. The Secretary of State gave him '12 months' ECAT leave' in January 2013, accepting that XY needed counselling.

49. Lane J explained that, at first instance in *KTT*, Linden J had considered an earlier iteration of version 4 (version 2). Linden J had held (paragraph 79) that version 2 showed 'overwhelmingly… a commitment to take decisions on [DL] in accordance with ECAT'. The relevant question under article 14(1)(a) of ECAT was whether a person's stay was necessary owing to his personal situation, not whether a grant of a residence permit was necessary. The fact that a person is pursuing a relevant asylum claim may be part of his personal situation, even though there was a statutory bar on his removal until his asylum claim had been decided (section 77 of the 2002 Act). On 25 October 2021, Linden J made a declaration that versions 2, 3 and 4 of the Secretary of State's policy '[DL] for Victims of Modern Slavery' (that is, the MSL Guidance) required the Secretary of State to make decisions on leave to remain in accordance with article 14(1)(a) of ECAT, which required the grant of a residence permit to a confirmed VOT when their stay is necessary owing to their personal situation. A stay could be 'necessary' pending a decision on a relevant asylum claim. This court dismissed the appeal of the Secretary of State in *KTT* on 17 March 2022 (see paragraphs 44-46, above).

50. Lane J further explained that the issue in *XY* was the lawfulness of the Secretary of State's response to the decisions in *KTT*. The claimant's case was that the Secretary of State's public position was to comply with *KTT*, while having a secret policy of making decisions in trafficking cases but not serving them. The Secretary of State's response was that there was a pause in making decisions pending the outcome of the litigation in *KTT*, and pending the outcome of the Secretary of State's application for permission to appeal to the Supreme Court. Lane J described in paragraphs 21-49 the internal discussions after the decisions of Linden J and of this court in *KTT*, after the refusal of permission to appeal by the Supreme Court, and in the immediate aftermath of that refusal.

51. Officials were concerned with 'the *KTT* cohort': that is, those who had received a positive conclusive grounds decision and had made a relevant asylum claim which was outstanding. Officials noted that the effect of *KTT* was that their previous practice of not making decisions about DL until the asylum claim had been decided must change, and that decisions on DL should be made even though the asylum claim was outstanding. On 19 January 2022 there was a ministerial submission asking for agreement to the course of action proposed by officials until the appeal in *KTT* had been finally determined. In mid-January 2022 there were about 800 relevant cases. If leave was granted, the VOT concerned would have access to benefits. The Minister was given four options. In the meantime, no decisions were made in cases like that of XY.

52. The 2022 Act received Royal Assent on 18 April 2022. Lane J said that the effect of section 65(2)(a) is that leave to remain will be given in accordance with the construction of ECAT which the Secretary of State unsuccessfully advanced in *KTT*. On 8 July 2022, caseworkers at the SCA were told that all decisions about DL which were affected by *KTT* were still on hold. On 28 October 2022 the Supreme Court refused permission to appeal in *KTT*.

53. On 11 January 2023, there was a further submission to ministers. The proposal was that, from 30 January 2023, the policy should change so that only VOTs who were within article 14(1)(b) of ECAT should be given DL. The proposal was motivated by the

litigation risks of not complying with *KTT*. At that stage some 1500 people were thought to be eligible for leave to remain as a result of *KTT*. The Secretary of State agreed with that approach on 17 January 2023. A further submission recommended that DL be given to some 80% of those whose who had made relevant asylum claims and whose decisions had been paused. The alternative, which was to decide those cases under the new policy, was not recommended, because of its likely 'reputational impact'. Decisions had been delayed in those cases, to the disadvantage of those affected, who could, because they were confirmed VOTs, be seen as vulnerable.

54. On 30 January 2023 section 65 of the 2022 Act was brought into force. On the same day, the Secretary of State rescinded the published MSL Guidance and brought into force the VTSP. By 14 February 2023, some 63 relevant applications for judicial review had been brought, and there had been 96 pre-action protocol letters in *KTT* cases. On 16 March 2023, the Secretary of State updated the DL Guidance (version 10).

55. In paragraphs 53-57, Lane J explained, first, that the obvious starting point for the claimant's case was that, as a result of the decision in *KTT*, the relevant passage in version 4 was to be understood as meaning that if a VOT's stay in the United Kingdom could be 'necessary owing to personal circumstances' if they had made a relevant asylum claim which was outstanding. That was the meaning of version 4 unless and until there was a successful appeal or until the Secretary of State amended the policy. Version 5, however, published after the decision of Linden J, simply repeated the relevant passage from version 4. Moreover, the Secretary of State was telling the world that decisions were being made under the policy when, in fact, they had been paused (paragraph 57).

56. The Secretary of State could have published that fact, but chose not to. The fact that officials had been told to pause decisions, and were pausing them, was, in itself, a policy, and it was a departure from the published policy. When claimants brought applications for judicial review, the Secretary of State settled them by offering to grant leave to remain. That seems to have been done to keep the policy secret (paragraph 70).

57. Lane J rejected an argument that the statutory bar on removal while an asylum claim is pending made this all immaterial. Section 77 did not prevent a VOT from being entitled to DL. A grant of leave gave a right to work, study and to claim benefits (paragraphs 73 and 74).

58. In paragraphs 105-141 Lane J described several breaches in the proceedings by the Secretary of State of her duty of candour, and several inappropriate redactions from the relevant documents. One of his conclusions (paragraph 132) was that information which the claimant had had 'laboriously to drag out of' the Secretary of State in the course of the proceedings should have been disclosed, at the earliest, by the date when the Secretary of State filed her detailed grounds of defence. The approach of the Secretary of State had been 'about as far from the requirement of "laying one's cards face up on the table" as could be imagined'. A graphic example was an inappropriate reliance on legal professional privilege to redact vast amounts from the ministerial submission of 19 January 2022 (paragraph 133). A further example was a

misunderstanding of what material might qualify for redaction on the ground of irrelevance (paragraph 134).

The Rules

59. Appendix VTS to the Rules came into force on 30 January 2023. The suitability requirement is stated in paragraph VTS 2.1. It is that the applicant 'must not fall for refusal as a threat to public order' (as per section 63 of [the 2022 Act])': see paragraph 41, above). The eligibility criteria for temporary permission to stay are stated in paragraphs VTS 3.1-3.4. One is that the permission to stay must be necessary for the purpose of helping the person to recover from physical or psychological harm arising from their exploitation, to apply for compensation, or to co-operate with an investigation or criminal proceedings (paragraph 3.1). The terms used in paragraph 3.1 are defined in paragraph 3.2. Paragraphs 3.3 and 3.4 explain that permission to stay is not necessary for the purpose of paragraph 3(1)(a) in two cases: if the applicant can be assisted in the country or territory of which he is a citizen and if he can seek compensation outside the United Kingdom.

The DLP

60. Page 4 of the DLP lists changes from the previous version of the DLP. The section on VOTs has been updated to 'implement caselaw'. The stated purpose of the DLP (see page 5) is to explain 'the limited circumstances in which it may be appropriate to grant [DL] and applies in both asylum and non-asylum cases applying from within the UK'. DL is 'intended to cover exceptional and compassionate circumstances, and, as such, should only be used sparingly'. DL is granted outside the Rules in accordance with the policy set out in the DLP. The DLP should be read with the other guidance listed on page 5, including the VTSP.

61. Page 6 says:

> 'Individuals with a positive conclusive grounds decision whose outstanding asylum claim or further submissions [to the extent that it is a relevant claim] has not been finally determined before 30 January 2023 should be considered for DL. Cases on or after 30 January 2023 – this includes individuals who received a positive conclusive grounds decision before 30 January 2023 but did not claim asylum or lodge further submissions until after 30 January 2023 (or vice versa) – will be considered under the [VTSP]'.

62. The section headed 'Reasons for granting [DL]' explains that it is not possible to cover all possible circumstances in which DL may be appropriate, but that 'the following broad categories may apply'. 'Modern Slavery cases (including human trafficking)' is a further heading. This section of the DLP records that, from 30 January 2023, VOTs with a positive conclusive grounds decision 'may be eligible for temporary permission to stay based on the criteria in' section 65 of the 2022 Act. The criteria in section 65 (see paragraph 42, above) are summarised. A person will not normally qualify for temporary permission to stay 'solely because they have been identified' as a VOT. The VTSP must be followed.

63. There is a further heading, 'Pre-30 January 2023 modern slavery (including human trafficking) cases'. The text explains that people who had had a positive conclusive grounds decision and had made a relevant claim before 30 January 2023 which had not been finally determined, 'were potentially entitled to DL had their applications been determined under Home Office policies' before 30 January 2023. The text then explains the tests for asylum and protection claims.

64. The text continues 'Individuals who meet the requirements above may be entitled to DL because the Home Office policies in force at the time implemented Article 14 [of ECAT]. The text then explains the effect of *KTT* (see paragraphs 44-46, above). This court is said to have decided that the Secretary of State's approach to applications for DL in such cases was not in accordance with article 14(1)(a) of ECAT '(which the policy was found to commit to implementing)'. This court found the stay of a VOT who has an outstanding relevant claim may be 'necessary owing to their personal situation'. The threshold for deciding whether an asylum claim is a relevant claim is low.

65. The next heading is 'When to consider DL'. The DLP then says:

> 'Under this policy, those individuals who were eligible for consideration of leave to remain under the KTT judgment prior to 30 January 2023 will not have their applications for DL determined under [the VTSP]. Instead, where a competent authority made a conclusive grounds decision prior to 30 January 2023; and the individual articulated [a relevant claim or further submissions]… and the individual's asylum claim or further submissions have not yet been finally determined… you must consider granting DL. DL will normally be granted in these circumstances.'

66. The very next heading is 'When not to consider DL'. The text then lists, in six bullet points, the circumstances when 'DL does not need to be considered on these grounds'. The final two bullet points are 'falls to be refused DL under Part 9 of [the Rules] (general grounds of refusal'), and 'is subject to deportation proceedings (see Deportation cases section)'. Under the heading 'Deportation cases' the DLP refers to cases in which a person is either subject to 'an extant deportation order' or where a decision to deport has been made and 'deportation continues to be pursued'. It continues, 'they must not be considered under the DL policy for modern slavery (including human trafficking) pre-30 January 2023. Instead they will be considered under [the VTSP]'.

67. Decision-makers are also told to consider 'the impact of an individual's criminal history before granting any leave, in asylum and in non-asylum cases'.

Article 14 of the ECHR
The Human Rights Act 1998

68. Section 1 of the HRA defines the 'Convention rights' as 'the rights and fundamental freedoms set out' among other things, in articles 1 to 3 of the First Protocol'. They are also set out in Schedule 1 to the HRA (section 1(3)). Section 2(1) of the HRA requires

a court 'determining a question which has arisen in connection with a Convention right to take into account any… judgment of the European Court of Human Rights'. Section 3(1) provides that 'In so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. If a court decides that a provision of primary legislation is incompatible with a Convention right, it may make a declaration of incompatibility (section 4(1) and (2)). Section 6(1) makes it unlawful for a public authority to act incompatibly with a Convention right, but it does not apply to an act if 'as a result of one or more provisions of primary legislation, the authority could not have acted differently' (section 6(2)). An act does not include a failure to introduce or propose primary legislation or to make any primary legislation (section 6(6)).

69. Articles 4, 8 and 14 are in Schedule 1 to the HRA. Article 4.1 and 4.2 provide that no-one shall be 'held in slavery or servitude' or 'be required to perform forced or compulsory labour'. The second prohibition is subject to the four exceptions listed in article 4.3. As is well known, article 8.1 provides that everyone has the right to respect for his private and family life among other things. Any interference by a public authority with the exercise of that right must be in accordance with the law, and necessary in a democratic society, in the interests, among other things, of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others.

70. Article 14 provides:

> 'Prohibition of discrimination
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

71. The question whether or not there is a breach of article 14 involves four stages, as Lord Reed explained in paragraphs 36 and 37 of *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223. He referred to the language of article 14 and to paragraph 61 of the decision of the Grand Chamber in *Carson v United Kingdom* (2010) 51 EHRR 13.

1. Does the claim fall within the ambit of a Convention right?
2. Is there a difference in treatment based on an identifiable characteristic (or 'status')?
3. Are people who are in analogous, or relevantly similar, situations treated differently?
4. Does the difference in treatment have an objective and reasonable justification? That involves two subsidiary questions.
    a. Does it pursue a legitimate aim?
    b. Is there a reasonable relationship of proportionality between the means employed and the aim sought to be realised?

72. In paragraph 15 of *In re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250 ('*McLaughlin*'), Baroness Hale said that 'these [ie stages] are not rigidly compartmentalised'. Lord Reed added, in *SC*, that the contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background.

A summary of the UT's reasoning in VLT

ECAT

73. The UT said that article 14(1) of ECAT requires state parties to issue a renewable residence permit to VOTs if one or other or both of two conditions applies (articles 14(1)(a) and 14(1)(b)). The UT referred to article 13 of ECAT, which provides that state parties give a potential VOT a 'recovery and reflection' period of at least 30 days when there are 'reasonable grounds' to believe that he is a VOT. There is an exception to this duty where 'grounds of public order prevent it' (article 13(3)). There is no public order exception in article 14(1).

74. The UT referred to the two questions which were considered by this court in *KTT* (see paragraph 46, above). The UT said that section 65 of the 2022 Act partly gives statutory force in domestic law to ECAT in three cases. It therefore goes further than article 14. The UT described the effect of sections 65(2) and 63(2). Where section 63(2) applies to a person, any prohibition on removing the person from or requiring them to leave the United Kingdom arising under section 61 or 62 and any requirement under section 65 to give the person limited leave to remain cease to apply. For the purposes of section 63, 'the circumstances in which a person is a threat to public order include, in particular, where the person is a foreign criminal within section 32(1) of the [the 2007 Act] (automatic deportation of foreign criminals)…'

The Rules and the DLP

75. The UT referred to the Rules. It said that the policy guidance on discretionary leave has been updated several times since 2013. Version 10 was published on 16 March 2023, after the 2022 Act came into force. The UT summarised the DLP, noting that it provides that it must be read with other guidance, including the VTSP. The UT also noted the provision in the DLP that, where the applicant is subject to deportation proceedings, 'they must not be considered under the DL policy for modern slavery (including human trafficking) cases pre-January 2023. Instead they will be considered under the [VTSP] upon application'. The UT referred to this as 'the deportation carve-out'.

The VTSP

76. The UT then referred to the VTSP. The relevant version was published on 8 June 2023. It was also published after the 2022 Act came into force. There is a section of the VTSP headed 'policy intention'. The VTSP is said to be a shift in the way in which the Secretary of State complies with ECAT in relation to the grant of 'renewable residence permits to victims of modern slavery under ECAT'. That shift is then described. A section deals with international obligations and ECAT. It explains that the Secretary of State's historic intention was to grant leave in both the situations described in article 14(1)(a) and (b). The Secretary of State's policy intention had now changed. That change is then described.

The UT's interpretation

77. In paragraphs 34-37, the UT described its conclusions on the interpretation of the two policies. It summarised the decision of this court in *KTT*. This Court had upheld the decision of Linden J that three versions of the MSL Guidance required decisions on a grant of leave to be in accordance with article 14(1)(a) of ECAT. The position had changed since section 65 of the 2022 Act came into force on 30 January 2023. The criteria are now the VTS and the VTSP. The VTSP 'expresses a clear intention not to implement' article 14(1)(a) of ECAT from 30 January 2023.

78. The applicant challenged Decision 1 on the ground that the VTSP does not apply, and he should have been considered under the DLP and given DL. The UT was not persuaded that 'the VTSP, in the light of section 65 of [the 2022 Act], is the starting point because both policies remain in force and the DLP states that it must be read' with other guidance including the VTSP. The principles in paragraph 77 of *KTT* applied (see paragraph 46, above). The first question was whether the DLP evinced an intention to give effect to ECAT. The second was whether it did so.

Did the DLP intend to give effect to article 14(1)(a)?

79. The UT found that the VTSP demonstrated a distinct shift in policy intention. The DLP did not. Further, the DLP identified two types of case, depending on whether they were before or after 30 January 2023. The former were to be considered under the DLP (DLMS cases) and the latter under the VTSP (VTS) cases. The DLP specifically provided for people who had received a positive conclusive grounds decision and made relevant claims before 30 January 2023 which had not yet been finally decided (that is, DLMS cases). The DLP says that DL will normally be granted on the grounds that their stay in the United Kingdom is necessary to pursue their asylum claim.

80. The Secretary of State accepted that these were transitional provisions, but submitted that there was no 'clear commitment to ECAT' in the DLP and no basis for such an inference. Such an inference would be inconsistent with the VTSP which is clear that the Secretary of State does not intend to implement article 14(1)(a) of ECAT.

81. According to the DLP, cases under the DLMS were potentially entitled to DL if their applications for leave to remain had been decided under Home Office policies before 30 January 2023 and they might be entitled to DL because those policies implement article 14(1)(a) of ECAT. The DLP then referred to *KTT* 'confirming that DLMS cases required consideration for grant of leave because their stay was necessary owing to their personal situation, to enable them to pursue a relevant claim'.

82. The UT did not accept that the words 'potentially entitled' or 'may be entitled' were just an acknowledgement that DLMS cases could have qualified for DL but did not because their cases were not decided before 30 January 2023. These were not 'benevolent transitional provisions that might have resulted in a grant of leave under [*KTT*] had they been decided sooner. The DLP was updated on 16 March 2023… There is no reason for these transitional provisions if they do not apply to decisions made on DLMS Cases after 30 January 2023'.

83. Nor did the UT accept that those words showed that the Secretary of State did not intend to apply ECAT or *KTT*. Page 6 of the DLP makes clear that DL would be granted in line

with the judgment in *KTT*. The DLP says that those who, before 30 January 2023, were eligible to be considered under the judgment in *KTT* will not have their applications decided under the VTSP. The DLP specifically says that DL must be considered and will normally be given to people in DLMS cases. 'Therefore section 65 [of the 2022 Act] does not prevent DLMS cases from benefitting from the judgment' in *KTT*.

84. The UT considered that, properly interpreted, the DLP provided that 'DLMS cases should be decided in accordance with article 14(1)(a) given the lack of an express intention to the contrary and the clear and explicit reference to ECAT and' to *KTT*. The DLP was intended to give effect to article 14(1)(a) of ECAT 'in respect of pre-30 January 2023 modern slavery and human trafficking cases'.

Did the DLP give effect to article 14(1)(a)?

85. Having 'committed' to giving effect to article 14(1)(a) in respect of pre-30 January 2023 cases, the DLP made an exception for those DLMS cases in which the applicant was subject to deportation proceedings. The Secretary of State submitted that, correctly interpreted, the DLP did not evince an intention to apply ECAT and *KTT* on the facts of this case because the Secretary of State's current approach is explicitly contrary to *KTT*. The Secretary of State had followed Parliament's decision to adopt a particular interpretation of ECAT and 'the point is only justiciable if the policies, properly interpreted', require article 14(1)(a) to be applied. Even if the exception for deportation is 'unlawful under ECAT, ECAT is not part of domestic law and the DLP did not evince an intention to apply article 14(1)(a)'. The applicant could not benefit from the transitional provisions because of the deportation exception.

86. The applicant submitted that the transitional provisions showed a commitment to comply with article 14(1)(a) of ECAT for those who had had a positive conclusive grounds decision and had an outstanding asylum claim before 30 January 2023. Following *KTT*, the Secretary of State could not exclude the applicant because he was subject to deportation proceedings. The policy which was in force before the DLP had no such exception. Section 65 did not stop the Secretary of State from granting leave to remain on a wider basis than that which was specified in section 65 of the 2022 Act. The policy before 30 January 2023 did show a commitment to comply with article 14(1)(a) of ECAT. It was clear that the intention of the DLP, objectively, was to apply article 14(1)(a). It was for the UT to review whether the Secretary of State had 'correctly implemented' article 14(1)(a). The deportation exception was unlawful because it was not based in ECAT. The Secretary of State had not argued, either, that she had made a policy decision to comply with ECAT except for deportation cases or that ECAT permitted a public order exemption.

87. In paragraphs 50 and 51 the UT described the Secretary of State's position in the reply to the pre-action protocol letter. Foreign national prisoners would be considered under section 65 of the 2022 Act and the provisions of the Rules introduced on 30 January 2023 'which allows [sic] for leave to remain not to be granted where the public order disqualification applies'. There is no public order exception in article 14, unlike article 13. That is recognised in the explanatory note to section 63 of the 2022 Act. The UT referred to section 63(3)(f) of the 2022 Act. The public order disqualification in the VTSP said that the Secretary of State is not required to grant permission to stay where

the person is a threat to public order and refers to the criteria in section 63(3)-(7) of the 2022 Act. The deportation exception in the DLP did not refer to the definition of a 'foreign criminal' or whether a person is a threat to public order. It did not refer to the public order disqualification from NRM support and was inconsistent with the Statutory Guidance on the Public Order Disqualification (which is referred to on page 13 of the VTSP). The DLP provided for a grant of DL to DLMS cases where their stay is 'necessary because of personal circumstances'. A blanket exception for deportation cases failed to give effect to the obligation in article 14(1)(a), and was contrary to the transitional provisions 'in respect of DLMS Cases implementing' *KTT*. The deportation exception excluded those who would have benefitted from the transitional provisions even though they were not foreign criminals or a threat to public order 'as defined under the policy in force' before 30 January 2023, the VTSP (post-30 January 2023), the 2007 Act or the 2022 Act. The deportation exception 'excludes DLMS cases on suitability grounds which have no foundation' in appendix VTS or the VTSP.

88. The UT's conclusion was that the deportation exception in the DLP went beyond the scope of the public order disqualification and was unlawful because it was incompatible with article 14(1)(a) and the requirements of sections 63 and 65 of the 2022 Act (paragraph 57).

89. In paragraphs 58-75 the UT gave its conclusions on the grounds of challenge. The transitional provisions were intended to implement the judgment in *KTT*. The fact that the applicant was subject to deportation proceedings was not a lawful ground for excluding him from the benefit of the DLP. The applicant had a positive conclusive grounds decision and had made a relevant claim before 30 January 2023. He applied for leave to remain in November 2022. He was in the group of DLMS Cases and would qualify for consideration for DL under the DLP and for a grant of leave following *KTT*. The Secretary of State refused to consider the application under the DLP because of the deportation order. However the conclusive grounds decision was that he was subject to forced criminality which resulted in a single conviction and a sentence of eight months' imprisonment. He was not a threat to public order.

90. The Secretary of State submitted that the applicant's was not a DLMS case because VLT was subject to deportation and therefore the VTSP and appendix VTS applied. He would be excluded from a grant of leave under the VTSP or appendix VTS because of the deportation order made in January 2013. The UT rejected that argument. VLT was not a 'foreign national offender' under section 63 of the 2022 Act and section 32 of the 2007 Act did not apply. He would not be excluded from a grant of leave under the VTSP or under appendix VTS on suitability grounds, in spite of the deportation order. There was therefore no lawful basis for his exclusion from the benefit of the transitional provisions in the DLP. The deportation order did not meet the current threshold for public order disqualification. His 'personal situation' brought him within the transitional provisions of the DLP. Ground 1 succeeded.

91. Ground 3 also succeeded 'in so far as the transitional provisions in the DLP evince an intention to comply' with article 14(1)(a), and the deportation exception failed to do so. This did not involve the direct enforcement of an unincorporated treaty (paragraph 32 of *KTT*). Neither of the declarations for which the applicant asked was necessary. In

paragraphs 66-72 the UT explained why it had rejected the applicant's submissions that the decision to refuse a residence permit was a breach of article 4 of the ECHR.

92. Ground 4 succeeded because the Secretary of State applied the wrong policy so that the refusal of VTS was unlawful. That was supported by a letter dated 7 March 2023 from the SCA. This reported that a decision would be made on the applicant's application 'once the policies had been reviewed in the light of' *KTT*. If the VTSP first published on 30 January 2023 had applied, 'there was no need to await further review of the DLP' (paragraph 74). That made it unnecessary for the UT to consider the merits of VLT's challenge to Decision 1, if, contrary to the UT's view, the Secretary of State applied the right policy in making that decision.

93. In paragraphs 76 and 77 the UT summarised its decision. The transitional provisions in the DLP which applied to DLMS Cases were intended to commit the Secretary of State to making decisions on DL in accordance with article 14(1)(a) of ECAT and *EOG*. The Secretary of State had not done so. Decision 1 was not in accordance with the DLP and was therefore unlawful.

A summary of the UT's reasoning in S

94. The UT summarised the legal framework in paragraphs 19-24, and the submissions in paragraphs 25-48. The Secretary of State had now withdrawn Decision 2. The Secretary of State was to re-make the decisions on leave to remain and on the application to revoke the deportation order. The Secretary of State should re-make the decision on DL within 28 days, and should decide whether or not to revoke the deportation order within 56 days. The extent of any leave was for the Secretary of State. The challenge to Decision 2 was 'essentially academic'. Save for some observations 'as to which policy should apply and its interpretation I find that there are no exceptional circumstances in which to assess this ground further' (paragraph 49).

95. The policy which should be applied was version 10 of the DLP, not version 5. The relevant part of the DLP was framed to catch outstanding claims. The UT was not persuaded that the earlier version could have been applied because S's representatives were submitting reports during the relevant period (paragraph 53). In paragraph 57 the UT said that the 'secret policy' deprecated in *XY* was not relevant in this case.

96. S submitted that the interpretation of the DLP was not an academic issue. *KTT* showed that the Secretary of State can depart from an international provision if there is a 'clear policy intention'. The UT accepted that the VTSP represented a 'clear shift in policy'. It noted that the DLP is to be read with other relevant documents. The UT nevertheless said that the DLP provided expressly that the *KTT* cohort 'should be considered' for DL and that it would 'normally be granted'. It quoted the explanation of the background on pages 10 and 11, and other relevant passages of the DLP (paragraphs 64-68).

97. Unlike the VTSP, the relevant part of the DLP was 'silent' about the effect of deportation. The sections about when to consider DL and when not to consider DL were separate (paragraph 69). If the caseworker was enjoined to consider DL first, then there was no scope of the caseworker not to consider DL in deportation cases (paragraph 70). The section headed 'Deportation' cannot apply to the *KTT* cohort, because it

'specifically states that the [VTSP] should apply, which, as seen above, it does not to the cohort'. The transitional provisions specifically bypassed the requirement to consider the VTSP 'which unambiguously introduces the exclusion of foreign criminals and embodies the shift in policy' (paragraph 74). There had been a shift in policy for those outside the cohort. There was no 'carve-out', but a shift in policy for those who are not in the cohort.

98. In *VLT* the UT had decided that for those applicants who had a conclusive grounds decision and had made a relevant claim before 30 January 2023, 'as this applicant', the intention was to apply article 14(1)(a) of ECAT. 'Silence in relation to the [*KTT*] cohort cannot exclude the application of ECAT article 14(1)(a) and ambiguity may point to compliance with ECAT rather than not (*KTT* [32]-[34])'. KTT was a foreign criminal with a 2-year sentence and article 14 has no public order equivalent to that in article 13(3)' (paragraph '14'). The transitional provisions 'specifically bypass the requirement to consider the [VTSP] which unambiguously introduces the exclusion for foreign criminals and embodies the shift in policy' (paragraph 74). 'Rather than a carve-out there is a shift in policy for all those who do not fall within the [*KTT*] cohort' (paragraph 75).

99. The claim based on article 14 of the ECHR 'related to unjustified difference in treatment and thus discrimination between those with and without offending. The applicant had no status for article 14 purposes because past offending did not fall into the bracket of 'other status' and further there was ample justification for treating criminals differently. There was no breach and no relief sought' (paragraph 79).

100. The UT decided, bearing in mind the withdrawal of Decision 2, and the Secretary of State's agreement to reconsider the application for the revocation of the deportation order within 56 days that the application for judicial review should only be granted to a limited extent. The UT required the Secretary of State 'lawfully and in accordance with [the DLP] (thus applying ECAT article 14(1)(a) and *KTT*) to remake the decision [on DL] within 26 days' (paragraph 81).

Discussion

101. There are four grounds of appeal in VLT's case. They identify four errors by the UT: (1) its interpretation of the transitional provisions, (2) its conclusion that the deportation 'carve-out' goes further than the public order disqualification in the 2022 Act, and is therefore unlawful, (3) its view that the reference in Decision 1 to Part 9 of the Rules was a material error of law, and (4) its decision to make a mandatory order. There is one ground of appeal in S's case: that the UT's interpretation of the transitional provisions was incorrect. The grounds of appeal in each case and S's RN raise two general questions, which could apply in other cases.

    1. Is the UT's interpretation of the transitional provisions of the DLP correct?
    2. If not, are S's article 4 rights, read with article 14, breached by the application to his case of the DLP (properly construed)?

There are some further questions which are specific to VLT's case. I consider those in paragraphs 119-122, below.

The interpretation of the DLP

102. There are three broad questions.

1. Does the reasoning in *KTT* apply to the interpretation of the DLP?
2. What are the purposes of the relevant provisions of the DLP?
3. Are those purposes lawful?

1. Does the reasoning in KTT apply to the interpretation of the DLP?

103. The premise of the method of construing the relevant policy in *KTT* is the existence of an international treaty which has been brought into domestic law, to an extent which is not wholly clear, in that policy (but not in primary legislation). In *S* the UT rightly noted that there had been a 'policy shift' since *KTT*. The source and nature of that shift must be understood, however. The shift is not merely a change in drafting of a policy, contrary to the impression which might be given by the UT's reasoning. It is the decision by Parliament about the extent to which statutory effect should be given to article 14(1)(a) of ECAT, and the associated changes to the Rules and to the relevant policies, most or all of which came into force as a package on 30 January 2023. *KTT* was decided before Parliament made that significant decision. The new statutory background is much more significant for the interpretation of the transitional provisions than the doctrine described in *KTT*. In my judgment there is now little or no room for the interpretative exercise described in *KTT*.

104. The main relevant feature of the new scheme in the 2022 Act is that the circumstances in which the Secretary of State will grant leave to VOTs do not reflect article 14(1)(a) of ECAT, as it was interpreted in *KTT*. Section 65 (see paragraph 42, above) does not use the wide phrase 'their stay is necessary owing to their personal situation'. It imposes an express obligation on the Secretary of State to grant leave in three concrete situations, subject to two express exceptions. A subsidiary feature, which was relied on by the UT in VLT, is that there is a new relationship between the detailed statutory regime for granting leave to remain and the public order regime, a point which is clearly expressed in paragraph VTS 2.1 (see paragraph 59, above). The question now is not whether the DLP evinces an intention to be bound by ECAT, but what, against the current legal background which I have described, the words in the DLP mean, and the extent to which they give effect to the first policy shift.

2.What are the purposes of the transitional provisions of the DLP?

105. A principle in the public law governing immigration cases is that when the Secretary of State makes a current decision, for example, on an applicant's article 8 case, a material consideration may well be any relevant 'historic injustice' or 'historical injustice' to which the claimant has been subject (see, for example, the obiter reasoning of Underhill LJ in paragraph 120 of *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009); [2018] HRLR, and the discussion in *Ahmed v Secretary of State for the Home Department* [2023] UKUT 00165 (IAC)).

106. I accept Mr Buttler's submission that the facts described in *XY* explain why the Secretary of State decided, in the transitional provisions, to give special treatment to most of the *KTT* cohort. The members of the *KTT* cohort would have been entitled to DL if decisions on their cases had not been delayed pursuant to the unlawful secret policy, because, under the law as explained in *KTT*, the MSL Guidance was intended to

comply with article 14(1)(a) of ECAT, but failed to do so, as it did not provide that the making of a relevant claim might make the stay of a VOT in the United Kingdom necessary because of his personal situation. The effect of the unlawful delay was to deprive the *KTT* cohort of a grant of leave to remain to which they would have been entitled, had decisions on their applications been made before 30 January 2023, as they should have been.

107. A clear purpose of the transitional provisions in the DLP is to recognise that injustice and to provide, as a remedy for it, that most of the *KTT* cohort should be granted the DL which they would have been granted had it not been for the unlawful delay in making decisions on their applications for leave. I will refer to that treatment as 'the *XY* concession'. That purpose is promoted by a linked feature of the transitional provisions. The normal rule in public law is that when a new policy framework is introduced, it applies to all decisions made after the date of its introduction (see, for example, *Odelola v Secretary of State for the Home Department* [2009] UKHL 25; [2009] 1 WLR 1230, as regards a change in the Rules). The *XY* concession disapplies the normal rule to those VOTs who benefit from it, because its effect is that an otherwise superseded policy is applied to their cases (that is, the MSL policy, as interpreted by this court in *KTT*). It is clear from the express terms of the transitional provisions that that is what is intended.

108. In *S* the UT suggested that a caseworker must stop reading the DL at the words 'You must consider granting DL. DL will normally be granted in these circumstances', so that there could be no question of applying the 'deportation carve-out' to the *KTT* cohort. That suggestion is wrong in law. It fails to give effect to the principle that a document such as the DLP must be read as whole. The UT was also wrong to suggest that the policy was 'silent' about those subject to deportation. It was not silent, as their position is expressly considered in the very next part of the DLP. A second clear purpose of the transitional provisions, therefore, contrary to that reasoning, is that those members of the *KTT* cohort who were the subject of a deportation order, or to deportation proceedings, should not benefit from the *XY* concession.

109. The consequence is that the *XY* concession does not apply to VLT and to S. The effect of that is that their applications for leave to remain as VOTs were to be considered, not under the DLP, which applied the superseded policy, as interpreted in *KTT*, but under the new legal framework which came into force from 30 January 2023. In Decisions 1 and 2 their applications were assessed individually under that new framework, and were refused. It is important to understand that the consequence of the application of the exception to their cases was not to exclude them from making an application for leave to remain under the Rules, or from a consideration of their application under the Rules. Its effect, rather, was that they did not benefit from the *XY* concession given to the other members of the *KTT* cohort. At times, both in the reasoning of the UT, and in the arguments of the respondents, this important point seems to have been overlooked, as Mr Tam pointed out. Paragraphs 14(3), 19, 22(2) and 23(4) of S's post-hearing submissions may be examples of this tendency.

3.Are those two purposes lawful?

110. After its commencement, section 65 of the 2022 Act makes provision for grants of leave to remain to VOTs (see paragraph 42, above). In short, the Secretary of State is not required to give leave to remain to a VOT who is a 'threat to public order' as defined.

That definition includes a person who is a 'foreign criminal' within the meaning of section 32(1) of the 2007 Act (see paragraph 32, above). These provisions are reflected in paragraph VTS 2.1 (see paragraph 59, above). Whether or not the Secretary of State could have refused under the new framework to give leave to remain as a VOT to S because he was a 'foreign criminal' (and therefore a threat to public order) does not matter. In the event, the Secretary of State considered S's application on its merits, despite the fact that S was a foreign criminal. The Secretary of State also considered VLT's application for leave under the VTS on its merits. In Decision 1 and Decision 2, the Secretary of State referred, erroneously, to Part 9 of the Rules. I say more about those errors in paragraph 122, below.

111. The DLP requires decision-makers to apply the VTS to all VOTs who receive a positive conclusive grounds decision after 30 January (that is, in a way which reflects the relevant provisions of the 2022 Act). The members of the *KTT* cohort are treated as an exception to that general rule, reflecting, as it seems to me, the Secretary of State's choice to give them a form of special treatment (reflecting the first purpose I described in paragraphs 105-107, above). The 'deportation carve-out' is an exception from that exception. As I have said, its effect is to disapply the *XY* concession to a sub-set of the *KTT* cohort, and to treat them in the same way as all the other VOTs who received a positive conclusive grounds decision after 30 January 2023. That sub-set consists of those who are subject to deportation orders or to deportation proceedings.

112. There is a close relationship between being a 'foreign criminal' and being subject to a deportation order, because, subject to exceptions, section 32(5) of the 2007 Act (see paragraph 33, above) requires the Secretary of State to make a deportation order in relation to a person who is a foreign criminal. But, first, there are many reasons why a foreign criminal may not currently be subject to a deportation order or to deportation proceedings (for example, in those cases where deportation proceedings are no longer current, and the foreign criminal has appealed successfully against a decision to make a deportation order, or has applied successfully to revoke a deportation order). Second, there are also cases, such as those of VLT (on the Secretary of State's concession) who are subject to a deportation order but are not foreign criminals.

113. The overall effect of this is that the DLP reflects two policy choices by the Secretary of State. The first is not to rely on the full breadth of section 65 (see paragraph 42, above) because of the special treatment of those members of the *KTT* cohort who are not subject to deportation orders or to deportation proceedings. They benefit from the *XY* concession. I reject the submission that the transitional provisions show an intention to comply with article 14(1)(a) of ECAT as interpreted by this court in *KTT*. The second choice is that the members of *KTT* cohort who are subject to deportation orders or deportation proceedings do not get the benefit of that concession. Nothing in the reasoning of the UT persuades me that those broad policy choices are unlawful. I repeat that the second policy choice does not deprive those affected by it of an individual consideration of their applications for leave under the new scheme. The Secretary of State considered both VLT's and S's applications for leave on their merits under the current scheme. Parliament, in the relevant legislation (see further, paragraphs 117 and 118, below), and the Secretary of State, in the relevant policies, each gives considerable weight to need to remove those who are subject to deportation orders. It is not irrational, or otherwise unlawful, for the Secretary of State to decide that the members of the *KTT* cohort who are subject to deportation orders or to deportation proceedings should not

benefit from the *XY* concession. I accept that there is not an exact match between the deportation carve-out and the public order exception in the new framework. I also accept Mr Tam's submission that this does not affect the lawfulness of the deportation 'carve-out'. Whether or not an applicant benefits from the *XY* concession depends, not on whether the public order exception applies to him, but on the existence of a deportation order or of deportation proceedings. The public order exception is only potentially relevant at the next stage of the decision-making process, once a decision has been made that the applicant's case is to be considered under the new scheme.

Are S's article 4 rights, read with article 14, breached by the application to his case of the DLP?

114. For reasons which will become clear, I consider that this is a case in which it makes sense to follow the advice of Baroness Hale in *McLaughlin*, and not to put the four stages of the analysis (see paragraph 72, above) into rigid boxes. Mr Tam was not inclined to dispute that the claim was within the ambit of article 8 or of article 4, and I would hold that it is. He did not accept that being the subject of a deportation order or to current deportation proceedings is an 'other status' for the purposes of article 14, but was not inclined to press the argument. I am prepared to assume, without deciding, that that is an 'other status'. If that is an 'other status', I accept that the transitional provisions do lead to a difference in treatment based on that status and that their application to S's case did so.

115. Those who are subject to the transitional provisions of the DLP are all VOTs and to that extent, they are all in an analogous position. I do not, however, consider that the VOTs who are the subject of the 'deportation carve-out' are in an analogous position to the VOTs who benefit from the *XY* concession. The former have all committed criminal offences in the United Kingdom, have been convicted of those offences, and been sentenced to the appropriate period of imprisonment. They are, moreover, either subject to a deportation order, or to current deportation proceedings. In my judgment there is a material difference between their situations.

116. I will, nevertheless, consider the question of justification. I bear in mind Mr Buttler's submission that what has to be justified is the Secretary of State's refusal to confer the *XY* concession on those members of the *KTT* cohort who were subject to a deportation order or to deportation proceedings, while conferring it on the other members of the *KTT* cohort. I also bear in mind his submission that the Secretary of State has adduced no evidence about the reasons for that difference in treatment and that, without such evidence, it is difficult for the Secretary of State to show what legitimate aim is promoted by the different treatment of these two groups, and therefore why that aim outweighs the impact on those, like S, who are treated differently, particularly where their cases have not been considered individually. On that last point, I note here that S's case was individually considered in Decision 2; and on my analysis, was individually considered under the correct provisions.

117. Deportation is governed by a detailed and interlocking regime in primary legislation, which has become increasingly sophisticated in the years since the commencement of the 1971 Act: see my summary (paragraphs 25-30, 32-35 and 41-42, above). Since its commencement, section 32(5) of the 2007 Act (see paragraph 33, above) has imposed a duty on the Secretary of State to make a deportation order in respect of a foreign

criminal. On the other hand, Parliament has also ensured that there are carefully crafted protections for those who might otherwise be subject to removal pursuant to a deportation order (see sections 77, 78, and 79, of the 2002 Act, and the exceptions in section 33 of the 2007 Act: paragraphs 28, 29, 30 and 34, above). Exception 6 (section 33(6A)) is a specific exception relating to ECAT. Its effect is that if the Secretary of State thinks that the application of section 32(4) and (5) would contravene the United Kingdom's obligations under ECAT, she is not obliged by section 32(5) to make a deportation order (but may make one). Sections 63 and 65 of the 2002 Act (paragraphs 41 and 42, above) supplement this scheme. This scheme shows both that Parliament considers that the deportation of foreign criminals is an important aim and that Parliament has tempered that by conferring express protections on foreign criminals, including an express protection in relation to ECAT.

118. None of these provisions is a complete answer to the article 14 argument. But the scheme as a whole shows that Parliament has given great weight, subject to such safeguards as it considers appropriate, to the deportation of foreign criminals. It is obvious why: they are convicted criminals, a potential risk to the public, and the default position, subject to express statutory exceptions and protections is that, rather than being given leave to remain, their removal from the United Kingdom is conducive to the public good, and should be pursued. A related point is that Parliament has also now struck a balance concerning the rights to leave to remain of VOTs who are foreign criminals, which is reflected in paragraph VTS 2.1 of the Rules. Subject to the express ECAT exception, the Secretary of State is not obliged to give leave to remain to a VOT who is a foreign criminal and thus a threat to public order. No evidence is necessary to support that analysis of the policy of the legislation (see *Wilson v First County Trust Limited* [2003] UKHL 40; [2004] 1 AC 816 at paragraphs 61-67, 116-118, 140-145, 173 and 178). Like the UT, I consider that those policy aims relating to deportation are an ample justification for the difference in treatment of S and the members of the *KTT* cohort who are not foreign criminals, but who are subject to deportation orders or to deportation proceedings.

The questions which are specific to VLT's case

119. There were three further specific questions in VLT's case. On the withdrawal of his RN, there are now, at most, two.

1. Is VLT a foreign criminal?
2. Was the Secretary of State's reliance on Part 9 of the Rules a material error of law which would independently justify a grant of relief?

1.Is VLT a 'foreign criminal?

120. S is a 'foreign criminal'. S's sentence was longer than 12 months, and Exception 1 in section 32 of the 2007 Act clearly applies to him. VLT received a sentence of 8 months' imprisonment for an offence of conspiracy. It might be thought that the combination of section 32(3)(a) of the 2007 Act and the 2004 Order is that Exception 2 applies to VLT (see paragraphs 32 and 27, above). Both VLT's counsel and those representing the Secretary of State, however, drew the court's attention, in their post-hearing submissions, to the decision of this court in *EN (Serbia) v Secretary of State for the Home Department* [2009] EWCA Civ 630; [2020] QB 633. This court held, in a

Refugee Convention case, that the 2004 Order was ultra vires. The 2004 Order was not quashed, probably because *EN (Serbia)* was a statutory appeal. Whether or not the reasoning in *EN (Serbia)* applies to the 2004 Order in this different statutory context, the Secretary of State, in those submissions, expressly disavowed reliance on the 2004 Order. She wishes it to be made clear that she considers that *EN (Serbia)* definitively establishes the status of the 2004 Order. It is difficult, therefore, to understand why it has not been revoked, or why, as the Secretary of State's further submissions also show, it was amended in 2015 and in 2023. For the purposes of this appeal, I nevertheless accept that VLT is not a foreign criminal.

121. A correct premise, therefore, of the UT's reasoning in paragraphs 58-75 (see paragraphs 89-90, above) is that VLT is not a 'foreign criminal'. The deportation order in his case was not in the bundle. Mr Tam suggested that it might have been made on the ground that his deportation was conducive to the public good. I accept, for the purposes of this appeal, that the public order exception cannot apply to him, and that the UT was right so to hold. I do not consider, however (differing in this respect from the UT), that this conclusion affects my reasoning about the lawfulness of the deportation 'carve-out'. The UT's conclusion that the fact that VLT is not a 'foreign criminal' made the application of the deportation 'carve-out' to his case unlawful was based, in my judgment, on the wrong assumption that the effect of the deportation exception is to prevent a VOT from applying for leave to remain at all (see paragraph 109, above).

3.Part 9 of the Rules

122. The Secretary of State referred to Part 9 of the Rules in Decision 1 (and in Decision 2). That was wrong. The Secretary of State had, however, already considered the merits of VLT's application (and of S's) in accordance with the provisions of the VTS, and decided that VLT did not meet the requirements of the VTS (nor did S). In those circumstances, if, as I have held in the previous paragraph, that consideration was lawful, the mistaken reliance on Part 9 of the Rules was not a material error of law. The Secretary of State was entitled to refuse, and would have refused, VLT's application for leave for independent reasons. If necessary, I would hold that the same reasoning applies to that error in Decision 2.

Conclusions

123. For these reasons, I would allow the appeals of the Secretary of State. Neither decision was flawed by a material error of law, and the transitional provisions in the DLP are lawful. I would dismiss the RN in S's case. In that situation, the Secretary of State's fourth ground of appeal in VLT's case does not arise, and it is not necessary for me to decide it. We did not hear detailed argument about ground 4. I say no more than that I see the force of the argument that a mandatory order was inappropriate in that case.

Lady Justice Andrews

124. I am grateful to Lady Justice Elisabeth Laing for her painstaking analysis of the various provisions of the relevant statutes, rules and policies, and for her detailed account of the background history, which was necessary to put into context the questions which we had to decide in these related appeals. Ultimately, however, the Secretary of State's appeals turned on two key issues, namely:

1. Whether, on the correct interpretation of the transitional provisions in the DLP, it was intended that *all* individuals within

the *KTT* cohort who had applied for DL (pending determination of their asylum claims) before 30 January 2023 should have their claims decided in accordance with Article 14(1)(a) of ECAT as interpreted in *KTT*, or only those who were not subject to deportation proceedings;

2. If those members of the *KTT* cohort who were subject to deportation proceedings were excluded from the concession, whether their exclusion was unlawful.

125. ECAT has no direct effect in UK law. One must therefore look to statute and policy to determine the extent to which its provisions have been implemented domestically. The role of the court is to interpret the relevant legislation and policies, and to determine challenges to their lawfulness. On the interpretation issue, it seems to me to be clear from sections 53 to 65 of the 2022 Act, as confirmed in the VTSP, that there was a deliberate policy shift in terms of how it was decided (by those with responsibility for making such decisions) that the UK would comply with its obligations under Article 14 of ECAT. Henceforth, temporary permission to stay would only be granted to VOTs in circumstances covered by Article 14(1)(b) of ECAT, and not in circumstances covered by Article 14(1)(a). Although we heard some interesting arguments on the question whether it is open to a contracting State to comply with Article 14 of ECAT by implementing only Article 14(1)(b), it was unnecessary to determine them. There is no doubt that this is what Parliament has decided to do, and the transitional provisions of the DL have to be interpreted against that background.

126. As my Lady has explained at [107-109], the starting point is that anyone whose applications for DL had not yet been decided in accordance with the historic policy could not complain if they were decided in accordance with the new policy, because that would be the correct approach under general public law principles. Nevertheless, a deliberate decision was made to allow certain individuals to continue to have their cases decided under the old policy despite the fact that it had been superseded. That concession was reflected in the DLP which, on its proper interpretation, did not extend to the entire *KTT* cohort.

127. Version 10 of the DLP spelled out that that concession did not extend to individuals "currently subject to deportation proceedings, either by way of an extant deportation order or where a deportation decision has been made and deportation continues to be pursued". Those persons, like anyone else whose applications for DL were in the pipeline but had not yet been decided, would have them decided in accordance with the current policy. This meant that for the VOTs in that group, their claims would be dealt with on a case by case basis by reference to the VTS and VTSP. The UT in both cases was wrong to interpret the DLP in a manner which was inconsistent with the policy shift, and contrary to its own express provisions.

128. The only remaining question is whether what the UT referred to as the "deportation carve-out" is lawful and, for the reasons adumbrated by my Lady, I consider that it is. It does not follow from the fact that an advantage has been conferred on those members of the *KTT* cohort who are not subject to deportation proceedings that those who do not qualify for the concession have been the subject of unlawful discrimination. My Lady has explained why the difference in treatment can be objectively justified, and I agree with her reasoning.

Lord Justice Peter Jackson

129. I also agree. *In Robinson v Secretary of State for the Home Department* [2019] INLR 452, [2019] 3 All ER 741, [2020] AC 942, [2019] Imm AR 877, [2019] 2 WLR 897, the Supreme Court, through Lord Lloyd-Jones, expressed the view that the structure of both primary and secondary legislation in this field has reached such a degree of complexity that there is an urgent need to make the law and procedure clear and comprehensible. These appeals offer further striking evidence of that urgent need.