JR-2021-LON-001894

In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

In the matter of an application for Judicial Review

The King on the application of
SSA (Ethiopia)

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Blundell

UPON hearing Priya Solanki of counsel, instructed by BHD Solicitors, for the applicant and William Irwin of counsel, instructed by GLD, for the respondent at a hearing on 14 November 2022

IT IS ORDERED THAT:

1. The Applicant's claim for judicial review is granted on Grounds 1, 2 and 3 for the reasons set out in the judgment.

2. It is declared that the applicant was unlawfully discriminated against within the meaning of Article 14 ECHR to the extent identified in the judgment.

3. The Respondent's decision dated 1 October 2021 is quashed.

4. The Respondent is to grant the Applicant Discretionary Leave within 28 days of this order, absent special circumstances.

5. The Applicant's damages claim is to be transferred to County Court and to be stayed for three months on transfer to allow the parties to attempt to negotiate settlement.

6. The Respondent is to pay the Applicant's reasonable costs, to be assessed if not agreed.

7. There is to be a detailed assessment of the Applicant's legally aided costs.

8. The Respondent is refused permission to appeal to the Court of Appeal.

Signed: M.J.Blundell

Upper Tribunal Judge Blundell

Dated: **31 January 2023**

The date on which this order was sent is given <u>below</u>

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): *2 February 2023*

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Case No: JR-2021-LON-001894

Field House,
Breams Buildings
London, EC4A 1WR

31 January 2023

Before:

UPPER TRIBUNAL JUDGE BLUNDELL

- -

Between:

THE KING
on the application of
SSA (ETHIOPIA)

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Priya Solanki
(instructed by BHD Solicitors), for the applicant

William Irwin
(instructed by the Government Legal Department) for the respondent

Hearing date: 14 November 2022
Additional written submissions on 22 November 2022

- -

J U D G M E N T

- -

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the applicant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the applicant, likely to lead members of the public to identify the applicant. Failure to comply with this order could amount to a contempt of court.

Judge Blundell:

1. The applicant is an asylum-seeker and a confirmed victim of trafficking. She seeks an anonymity order. Having considered the Presidential Guidance on Anonymity Orders, I make an order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, in the terms above.

Background

2. The applicant is an Ethiopian national who was born on 12 September 1975. She seeks judicial review of the respondent's decision to refuse to grant her a period of discretionary leave to remain as a recognised victim of trafficking. In order to frame that challenge and the areas of contention between the applicant and the respondent, it is necessary to set out something of the chronology.

3. The applicant entered the United Kingdom on 17 January 2018. She had flown directly from Saudi Arabia, using her own passport. She had previously been granted entry clearance as a Domestic Worker, sponsored by her Saudi employers.

4. On 18 February 2018, the police removed the applicant from the home of her employers. She subsequently intimated that she wished to claim asylum and, on 20 March 2018, she underwent an asylum screening interview. She stated, amongst other things, that she was married to a man who remained in Ethiopia; that she had been exploited in Saudi Arabia; and that she had been involved in politics in Ethiopia, as a result of which she feared that she would be killed by the authorities were she to return.

5. The applicant made the first of two statements in support of her protection claim on 26 March 2018. She stated that she was one of six children from a middle-class family which owned a grocery shop. She had been educated to the age of 20. She had married in 2008. Her husband was a chauffeur and worked in Saudi Arabia. Her father had supported the Oromo Liberation Front ("OLF"), as had she. He had been arrested in 2012 and had been killed by the authorities. She had been sought by the police after her father's death and she left Ethiopia for Saudi Arabia. An agency had found employment for her there.

6. All of the employees in the Saudi household were treated very badly and the applicant stated that she had no time off in the six years she worked there. Physical abuse was commonplace, from any member of the household, and could occur at any time of the day or night. She had come to the UK with her employer and had not intended to claim asylum. She had not contacted the police; that had been done by friends of her cousin, after she told her niece that she was being treated particularly badly. After the police had removed her from her employer's house, she had decided not to press charges as she feared that her employer could take revenge against her or her family. Her husband had been forced to return to Ethiopia after suffering similar difficulties at the hands of his employer in Saudi Arabia.

7. The applicant stated that she had returned to Ethiopia in 2015 because her brother was unwell. She was arrested on the day of her arrival. She had been detained and interrogated, during which she had been significantly ill-treated. She was asked about the OLF. She had managed to escape and had returned to Saudi Arabia, where she started working

for her old employer again. She feared returning to Ethiopia because of what had happened in 2015. She felt that she had no choice but to live 'in slavery' in Saudi Arabia because she would be killed in her own country.

8. The applicant was issued with a notice under section 120 of the Nationality, Immigration and Asylum Act 2002. Her solicitors returned that notice on 27 March 2018. She continued to rely on the Refugee Convention and Articles 2 and 3 ECHR. At [2] and [5] of that document, the applicant also relied on the following arguments:

> [2] The applicant is also a victim of trafficking for the purpose of labour exploitation.
>
> […]
>
> [5] The applicant seeks to rely on Article 4 grounds. She has already been exploited in Saudi Arabia and in the UK for a number of years and she fears that she would be reduced to a situation of exploitation again if returned to Ethiopia as she could not remain there and would be forced again into exploitation.

9. The applicant was duly referred to the National Referral Mechanism ("NRM") and, on 4 July 2018, it was accepted that there were reasonable grounds to believe that she was a victim of trafficking.

10. The applicant's second statement was made on 14 February 2019. She clarified and expanded on some points she had made in the original statement. She struggled with memories of what had happened to her in Ethiopia and in Saudi Arabia. She had various health problems and had undergone a hysterectomy in the UK. She added that she had not been paid for the work she had done in the UK and that she had only been permitted between two and four hours sleep per night.

11. On 18 February 2019, the applicant underwent a substantive asylum interview. The interview lasted from 10am to just before 6pm and more than two hundred questions were asked and answered. It is not necessary for the purpose of this judgment to attempt a comprehensive summary of what was said. It suffices to note the following.

12. The applicant stated that she and her family had been supporting the OLF for many years. Her father had been killed by the regime due to his support for the OLF in 2012. Fearing a similar fate, she had left Ethiopia later that year and had gone to work in Saudi Arabia. Her niece had arranged a job for her with a member of the Saudi royal family. When the applicant returned to Ethiopia in 2015 she was arrested by the authorities and significantly ill-treated. She had managed to escape from detention, after which she went to the airport and returned to Saudi Arabia.

13. The applicant stated that she had 'faced slavery conditions' whilst in Saudi Arabia. She had been treated very poorly in every respect: overworked, underpaid, given little or no time off, and physically ill-treated. She had continued because she was scared of returning to Ethiopia. She had come to the UK with her employer in January 2018 and

her treatment was as bad in this country as it had been in Saudi Arabia. She had met twice with the police after being removed from the house in February 2018 but she did not wish to take any action because her niece worked for the same family and she feared for her niece's safety.

14. The pandemic intervened. The applicant's protection claim and her claim to be a victim of trafficking remained undecided for two years. On 17 June 2021, the respondent answered pre-action correspondence (in which complaint was made about the ongoing delay) by undertaking to resolve the trafficking claim within four months and the protection claim within two months thereafter. On 12 August 2021, the respondent accepted on conclusive grounds that the applicant was a victim of trafficking.

15. The applicant was then invited to submit any evidence and representations she wished to have considered when the respondent came to decide whether she should be granted leave to remain as a victim of trafficking. She did so on 17 September 2021, providing to the respondent a completed Personal Circumstances Questionnaire and supporting documents.

16. The applicant's solicitors also submitted a letter of the same date explaining why the applicant should be granted leave to remain. The letter set out the applicant's personal circumstances and reminded the respondent of Article 14 of the European Convention on Action Against Trafficking in Human Beings ("ECAT"). The respondent was invited to consider whether the applicant's stay was necessary owing to her personal situation, pursuant to Article 14(1)(a) thereof. It was submitted that the applicant was not in a position of safety whilst her asylum claim was 'in limbo'. The letter drew attention to the applicant's particular needs, including her mental and physical health conditions; the risk of 're-exploitation' in Ethiopia; and the need for continued and consistent support from professionals of various types.

Decision Under Challenge

17. Consideration was then given to whether the applicant should be granted leave to remain as a victim of trafficking. On 1 October 2021, the respondent decided that no such leave would be granted. This is the decision under challenge. Since it is comparatively short, and because the reasoning is under challenge before me, it is necessary to reproduce the operative parts of the decision in full:

> **The decision not to issue Discretionary Leave has been made for the reasons outlined below.**
>
> In making this decision the following information has been considered:
>
> Surgery letter dated 06/09/2018
> Letter from Waterloo Multi-Ethnic Counselling dated 21/08/2019
> Letter from NHS dated 24/02/2020, 02/08/2021
> Letter from Hestia dated 08/09/2020
> Medical records received 17/09/2021
> Letter from Barnes Harrild & Dyer Solicitors dated 25/2019, 17/09/2021

> Personal Circumstances Questionnaire received 17/09/2021
> Home Office records accessed 30/01/2021
>
> It is noted that [the applicant] currently has an outstanding protection claim under which full consideration will be given to her risk on return to her home country, taking account of the finding that [the applicant] is a victim of modern slavery.
>
> An assessment has been carried out to consider whether it is appropriate to consider your client's eligibility for Discretionary Leave now or until the protection claim has been decided. It has been decided that your client's protection claim should be considered first. The reasoning for this is:
>
> (i) You are not assisting the police with enquiries
>
> (ii) You are not pursuing a claim for compensation
>
> (iii) Your personal circumstances do not require it. It is noted in your PCQ received on 17/09/2021 that although you have been diagnosed with mental health conditions, pain in your knees, back and hands, and diabetes, you are not currently receiving any counselling, however you previously received counselling from Waterloo Multi-Ethnic Counselling. It is noted that you are on a waiting list to receive counselling however no information has been provided to show that you have been assessed and have a treatment plan agreed.
>
> If [the applicant's] protection claim is refused further consideration will be given as to whether [the applicant] should be granted discretionary leave.
>
> [The applicant] will not be required to leave the UK whilst her protection claim, other application or eligibility for discretionary leave is under consideration. [emphasis in original]

18. Pre-action correspondence did not persuade the respondent to alter her decision and, on 31 December 2021, this claim was issued.

Grounds of Claim and Defence

19. The three grounds which were pleaded may be summarised as follows:

> *Ground One* – the respondent had acted in a manner which was discriminatory and contrary to Article 14 ECHR when she decided to defer consideration of DL because the applicant was an asylum-seeker.
>
> *Ground Two* – the respondent had acted incompatibly with ECAT and had failed to consider material matters when refusing to grant DL.
>
> *Ground Three* - in deciding not to grant DL, the respondent had acted otherwise than in accordance with her own policy, which was itself unlawful in any event.

20. In her Summary Grounds of Defence, the respondent resisted each of these grounds of challenge. She also noted that the decisions in R (KTT) v SSHD [2021] EWHC 2722 (Admin); [2022] 1 WLR 1312 and R (EOG) v SSHD [2020] EWHC 3310 (Admin); [2021] 1 WLR 1875 were on appeal to the Court of Appeal, and she sought a stay of this claim to await the judgment.

Grant of Permission and Subsequent Events

21. On 24 March 2022, UTJ Sheridan granted permission and refused the application for a stay. He was satisfied that each of the grounds was arguable and that insufficient reason had been given to stay the proceedings.

22. Unbeknownst to UTJ Sheridan, the Court of Appeal had actually handed down judgment in SSHD v EOG & KTT (Aire Centre Intervening) [2022] EWCA Civ 307; [2022] 3 WLR 353 on 17 March 2022. The Secretary of State sought permission to appeal to the Supreme Court and she made a second application to stay these proceedings to await the decision on the application for permission. That application was refused by an Upper Tribunal Lawyer, however, and was not renewed for consideration by a judge.

23. The respondent duly filed Detailed Grounds of Defence on 19 May 2022. Skeleton arguments followed in preparation for the hearing.

Refusal of Protection Claim

24. On 20 October 2022, and therefore significantly after the decision under challenge and the issuance of these proceedings, the respondent refused the applicant's protection claim. A copy of that decision was filed with the respondent's skeleton argument.

25. The format of the decision letter is unfamiliar and oddly tabular but the thrust of it was as follows. The respondent accepted (in this order) that the applicant was an Ethiopian national; that her claim engaged the Refugee Convention; that she was of Oromo ethnicity; and that she was a victim of trafficking. The respondent also accepted that the applicant was an OLF supporter in Ethiopia.

26. The respondent did not accept that the applicant had faced adverse attention from the Ethiopian authorities. She considered there to be internal inconsistences, implausibility, and a lack of sufficient detail in the applicant's claims.

27. At section 8 of the refusal letter, the respondent dealt with the question of whether the applicant had a well-founded fear of persecution on return to Ethiopia. The way in which that question was resolved is material to the issues in this claim and must be reproduced in full (the emphasis in the final paragraph is mine):

> I am not satisfied to a reasonable degree of likelihood that your fear of persecution is well-founded fear because:

I am satisfied that you are a female victim of trafficking because you have hit the credibility indicators outlined above.

Although it is accepted you are a member of that PSG it is not accepted that you would be at risk on return to Ethiopia as you have a partner living in Ethiopia (AIR 109), you have siblings in Ethiopia who you claim have been willing to provide help in the past (AIR 151, 156), your family has land and businesses which could aid them in supporting you (AIR 11). It is considered that because you have access to this support you will not be at risk of re-trafficking upon return to Ethiopia.

I am satisfied that you are a supporter of the OLF because you have hit the key credibility indicators as outlined above.

The country guidance case of AAR (OLF - MB confirmed) Ethiopia CG [2022] UKUT 00001 (IAC), heard 24 February 2021, promulgated 29 December 2021 applies. In AAR the Upper Tribunal held that: 'In broad terms, MB (OLF and MTA – risk) Ethiopia CG [2007] UKAIT 00030 still accurately reflects the situation facing members and supporters of the OLF if returned to Ethiopia. However, in material respects, it is appropriate to clarify and supplement the existing guidance.

1) 'OLF members and supporters and those specifically perceived by the authorities to be such members or supporters will in general be at real risk if they have been previously arrested or detained on suspicion of OLF involvement.

2) 'Those who have a significant history, known to the authorities, of OLF membership or support, or are perceived by the authorities to have such significant history will in general be at real risk of persecution by the authorities.

3) '"Significant" should not be read as denoting a very high level of involvement or support. Rather, it relates to suspicion being established that a person is perceived by the authorities as possessing an anti-government agenda. This is a fact sensitive assessment.' (para 103).

I am not satisfied that you fear persecution in Ethiopia as a result of that characteristic because it has not been accepted that you have previously received adverse attention from the Ethiopian authorities. Additionally, you state you were a low-level supporter rather than a member of the OLF (AIR 82).

ETH CPIN Oromos, OLF and OLA March 2022 [2.4.19] states that:

'In general the treatment of Oromos (by virtue of ethnicity alone) is not sufficiently serious by its nature and/or repetition, or by an accumulation of various measures, to amount to persecution or serious harm'.

> It therefore not considered that you would be at risk upon return to Ethiopia due to your Oromo ethnicity and your membership of the PSG, female victim of trafficking.

28. On 28 October 2022, the Supreme Court refused the respondent's application for permission to appeal against the Court of Appeal's order in R (KTT) v SSHD. Briggs, Sales and Burrows JJSC refused permission because the application did not raise an arguable point of law and because s65 of the Nationality and Borders Act 2022 made the point academic.

29. Prior to the hearing, I noted that the skeleton arguments pre-dated the refusal of asylum and I asked for notes from the advocates concerning the significance of that decision to the present proceedings. In short, it was agreed between the parties that the present proceedings had not been rendered academic. I agree. Had the applicant been granted asylum, this claim might have become academic, at least in part. Since the applicant was refused asylum, however, the applicant is still entitled to maintain that the decision to refuse her leave to remain as a victim of trafficking was unlawful.

Submissions

30. Ms Solanki took her second ground first and submitted that the respondent had misdirected herself in the manner identified by Linden J, and upheld by the Court of Appeal, in R (KTT) v SSHD. She had been obliged to grant the applicant a period of DL whilst her asylum claim was pending because her stay was necessary for that period. The respondent was fully aware of the proceedings in KTT; the Administrative Court's decision was handed down in October 2021 and the decision under challenge had been taken in the same month. There was no consideration in the decision of whether the applicant's stay was necessary whilst her asylum claim was under consideration, which was a necessary part of the holistic consideration of her personal circumstances. That argument had been advanced in the representations which were made following the Conclusive Grounds decision but had been ignored by the respondent.

31. Ms Solanki submitted that the respondent's position on this point had been inconsistent. She had asked for stays to await the ultimate decision in KTT, thereby accepting that it was highly relevant, whereas she subsequently maintained that it was not relevant. Faced with the Supreme Court's refusal of permission, the respondent's final position was that she was not obliged to grant the applicant leave because her asylum claim was not substantially based on a fear of re-trafficking. There were two difficulties with that argument. Firstly, it was not a point taken in the decision under challenge and, secondly, it was based on a misreading of the protection claim, which had always been based in part on that fear. It was clear from the refusal of the protection claim that the respondent had treated the risk of re-trafficking as a material part of the application for international protection.

32. Fundamentally, the respondent's submission did not accord with what was said by Linden J or the Court of Appeal, in any event. It sufficed, in Ms Solanki's submission, if the protection claim was based in any part on the risk of re-trafficking. The difficulty with adopting a 'substantial part'

test was clear from R v Monopolies and Mergers Commission & Anor *ex parte* South Yorkshire Transport Ltd [1993] 1 WLR 23.

33. Ms Solanki submitted that the respondent's decision was also vitiated by her failure to give any adequate consideration to the applicant's health. It was well-established that support from the NRM came to an end after a Conclusive Grounds decision had been made. Mr Irwin objected to this submission, noting that the procedure had changed after Murray J's decision in R (JP & BS) v SSHD [2019] EWHC 3346; [2020] 1 WLR 918; there was now a needs assessment undertaken by the Secretary of State, as was clear from the published guidance. (Counsel agreed to provide a joint note on this subject after the hearing, and that note was duly filed on 22 November 2022).

34. The real problem, Ms Solanki submitted, was that the respondent had failed to give any real consideration to the applicant's actual medical needs. Professor Katona had explained the impact of delay on victims of trafficking in JP & BS and that impact had not been considered by the respondent. Nor had the respondent considered the situation of the applicant's family, members of which were in exploitative situations.

35. As for ground three, Ms Solanki submitted that the respondent had continued to have an unlawful policy in place following the decisions of the Administrative Court and the Court of Appeal in KTT. The respondent should have issued interim guidance whilst she pursued her appeals against Linden J's order. The respondent had in any event failed to follow the operative part of the current policy, which required her to consider all relevant factors when deciding whether to grant leave to remain to a victim of trafficking.

36. In relation to ground one, it was agreed between the advocates (as it was in JP & BS) that the applicant's claims fell within the ambit of Articles 4 and 8 and Article 1 Protocol 1 of the ECHR. The only reason that the applicant had not received full consideration of her application for leave to remain was that she was awaiting a decision on her application for asylum. The objective justification for that difference in treatment was said by the respondent to be administrative convenience but that was not accepted by Murray J in JP & BS to provide sufficient objective justification for the discriminatory impact of the scheduling rule. Despite what was said by the respondent about the changes since Murray J had decided JP & BS, his conclusion was as apt now as it was then.

37. Mr Irwin helpfully indicated that he would mirror Ms Solanki's submissions and he started, therefore, with the second ground. He prefaced his submissions by accepting that the applicant was entitled to succeed if I concluded that her protection claim was based on a fear of re-trafficking. On that basis, he suggested, the breadth of KTT might not fall to be considered by the tribunal.

38. The respondent's fundamental submission on this ground, Mr Irwin stated, was that KTT established a precise element of a trafficking case which might amount to personal circumstances which required a competent authority to conclude that the individual's stay in the host state was necessary. The meaning of 'necessary' in this context was supplied by the judgment in R (PK (Ghana)) v SSHD [2018] EWCA Civ 98; [2018] 1 WLR 3955.

39. Mr Irwin submitted that it was imperative to recall that what had been said in KTT was said in the context of a protection claim which was made *entirely* on the basis of a fear of re-trafficking and leading counsel for the claimant had accepted throughout that litigation that his submission only applied in cases in which the asylum claim was trafficking-related. Leading counsel for KTT had the salient parts of PK (Ghana) firmly in mind when he had applied that limitation to his own submission. He was cognisant of the requirement in Article 14 that an individual's stay had to be rendered *necessary* for the respondent to be required to grant limited leave to a victim of trafficking. Underhill LJ had summarised the position at [86] of his judgment: the limitation derived from leading counsel's acceptance that the personal situation referred to in article 14.1(a) must "refer to the victim's situation qua victim". That limitation was also aligned with the ECAT itself, and the Explanatory Report, all of which showed that the critical question was whether a stay was necessary because the only relevant fear expressed in the protection claim was one which fell within the aims of the ECAT itself.

40. Mr Irwin submitted that a passing reference – or several passing references - to trafficking in the context of the asylum claim would not suffice to engage that requirement. In this case, the applicant's case was based on her fear of return to Ethiopia as a person with a personal and familial connection to the OLF, and not on the fear of re-trafficking. Anything said by the applicant or her solicitors about re-trafficking was not the thrust of her claim and did not suffice to establish a public law error on the part of the respondent. The proper conclusion, based on all of the material before the respondent at the time, was that anything said by the applicant illustrated that her fear was of politically motivated persecution, whereas anything said by her solicitors attempted to introduce a fear of re-trafficking. Whilst there might be cases in which it was appropriate to look beyond what was said by an applicant, the thrust of the fear she had expressed was clear, and it was not trafficking related.

41. Mr Irwin frankly acknowledged that the refusal letter in the protection claim represented 'the high point for the applicant and the low point for the respondent'. It was, he acknowledged, possibly a difficult case for the respondent, given her engagement with the trafficking claim as a part of the asylum claim. The acceptance of the applicant's status as a victim of trafficking and the positioning in the letter did not indicate that this was the thrust of the applicant's protection claim, however, and it was clear that more ink had been spilled in considering the OLF limb of the claim. Considering the claim as a whole, and bearing in mind the limitations imposed by KTT and PK (Ghana), the respondent was not obliged to conclude that the applicant's stay was necessary by reference to her protection claim; the 'advocacy documents' from the applicant's solicitors did not show that the thrust of her protection claim was a fear of re-trafficking.

42. Mr Irwin turned after the short adjournment to the applicant's health. He submitted that the respondent's policy provided an accurate summary of the law. The evidence provided to the respondent was limited and dated and did not begin to show that the applicant's stay was necessary for medical reasons.

43. Turning to ground three, Mr Irwin stated on instructions that the respondent had considered whether to alter her policy in light of what had been said at first instance and on appeal in KTT. She had decided to await the Supreme Court's decision on her application for permission to appeal. It was her current intention to reconsider the policy in light of the refusal of permission. In the meantime, the respondent had given 'bespoke consideration' to whether to grant leave in an individual case.

44. The applicant had submitted that the policy did not properly reflect the jurisprudence but the relevant part of the policy underlined that consideration was to be given to whether leave was necessary and set out a non-exhaustive list of circumstances in which that might be so. Adjustments would be made in due course to reflect KTT but the policy was lawful, as was the deferral of considering whether the applicant should be granted DL until after her protection claim had been considered.

45. As for the applicant's submission that the respondent's approach was discriminatory, the respondent submitted that she was entitled to proceed as she did and that there was no discrimination. There was no blanket policy, as there had been prior to JP & BS, to defer consideration of DL until after the protection claim was decided. In any event, it was wrong to characterise the respondent's decision as merely a deferral; there was a positive decision not to grant leave on medical grounds and it was only the protection grounds which had been deferred for later consideration. What had been objectionable in JP & BS was that the scheduling rule was a blanket rule, which permitted of no exceptions, and even those with medical reasons to stay (for example) were denied DL if they had a pending protection claim. It was also relevant to recall that the support available to victims of trafficking was materially different from that which was available at the time of JP & BS. There was a '45 day rule' at that time, pursuant to which a victim of trafficking was not entitled to support (other than NASS support) 45 days after the conclusive grounds decision was reached.

46. In JP & BS, the comparator for Article 14 ECHR purposes was between a confirmed victim of trafficking who had no outstanding protection claim, on the one hand, and a confirmed victim of trafficking who did have an outstanding protection claim, on the other. That consideration did not now arise because the only part of the DL assessment which was deferred was that which related to the applicant's protection claim. The respondent would consider any medical claim, or one which was based on assistance to the police, for example. The policy had been properly amended to remedy the unlawfulness identified in JP & BS.

47. Mr Irwin submitted that there was no evidence in this case to show that any delay would have a detrimental impact on the applicant. What was said by Professor Katona in JP & BS was dealing with a wholly different situation. There was, in sum, no discriminatory impact on those in the applicant's position.

48. In reply, Ms Solanki submitted that it was necessary to remember that an asylum claim might have several different limbs. That might particularly be said of trafficking cases. It was difficult in practice to identify the real 'thrust' of an asylum case, and the respondent's suggested approach risked putting a less articulate asylum-seeker at a disadvantage. The

reality was that the applicant's solicitors had clearly articulated a risk of re-trafficking and it had been dealt with by the respondent in the letter of refusal. It had been necessary for the respondent to consider in the decision under challenge whether to grant leave by reference to the protection claim, and she had simply failed to do so. Equally, there had been a detailed analysis of the applicant's medical situation by Mr Irwin but that only served to illustrate the absence of consideration in the decision. It was troubling that the policy had not been amended to reflect the conclusions in KTT.

49. The position under Article 14 ECHR was clear, Ms Solanki submitted. The applicant fell within the ambit of protection rights. She had been treated differently to a comparator who had not claimed asylum. There was no objective justification for that difference in treatment and administrative convenience was insufficient. The respondent's approach was contrary to her own policy and to ECAT. She would have been in a better position as regards limited leave if she had not claimed asylum. There had been no consideration by the respondent of the impact of delay, whether in light of what had been said by Professor Katona in JP & BS or otherwise.

50. In their joint note following the hearing, counsel set out the support which is available to potential and accepted victims of trafficking now, as compared to the provision which was made at the time that Murray J decided JP & BS.

51. I reserved judgment at the end of the hearing.

52. Before proceeding any further, I wish to reiterate the thanks I expressed to counsel at the end of the hearing. This was a conspicuously well-argued case.

Legal Framework

53. As Underhill LJ stated at [5] of KTT & EOG, ECAT was adopted by the Council of Europe on 16 May 2005. It has ten chapters. I am concerned with chapter III, which is headed "Measures to protect and promote the rights of victims, guaranteeing gender equality". That chapter comprises articles 10-17. Although I was referred to other parts of the ECAT, the most relevant part is agreed on all sides to be Article 14, which I should reproduce in full:

> *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.

> 2. The residence permit for child victims, when legally necessary, shall be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions.
>
> 3. The non-renewal or withdrawal of a residence permit is subject to the conditions provided for by the internal law of the Party.
>
> 4. If a victim submits an application for another kind of residence permit, the Party concerned shall take into account that he or she holds, or has held, a residence permit in conformity with paragraph 1.
>
> 5. Having regard to the obligations of Parties to which Article 40 of this Convention refers, each Party shall ensure that granting of a permit according to this provision shall be without prejudice to the right to seek and enjoy asylum.

54. The status of ECAT in the UK is not in issue before me. It was ratified by the UK in December 2008, but the provisions of Chapter III have not been embodied in UK legislation. The government chose, instead, to implement its obligations by adopting guidance, the issuance of which now has a statutory underpinning in the form of s49 of the Modern Slavery Act 2015. A reader of that guidance who wishes to understand the circumstances in which a confirmed victim of trafficking such as the applicant might be granted a residence permit (which, in the UK, means Discretionary Leave to Remain or 'Modern Slavery Leave' or 'ECAT Leave', as it is described in some of the authorities) is referred to a separate guidance document titled *Discretionary leave considerations for victims of modern slavery*.

55. Two versions of that guidance are before me. Version 4.0 was published on 8 December 2020 and was in force at the date of the decision under challenge. Version 5.0 was published on 10 December 2021 and remains in force to date.

56. In both versions, the guidance reminds decision makers that an individual will not qualify for DL solely because they have been accepted to be a victim of modern slavery, and that there must be reasons based on their individual circumstances to justify a grant of leave. Replicating the terms of Article 14.1(a), the guidance then states that DL may be considered under the policy where there is a positive conclusive grounds decision, *and* the individual satisfies one of three criteria: leave is necessary owing to personal circumstances; leave is necessary to pursue compensation; and victims are helping police with their enquiries.

57. Guidance then follows on each of those three categories. The material part of the guidance for present purposes is entitled 'Leave is necessary owing to personal circumstances'. That part has remained the same across versions 4 and 5 of the guidance. It is in the following terms:

> **Leave is necessary owing to personal circumstances**
>
> When deciding whether a grant of leave is necessary under this criterion an individualised human rights and children

safeguarding legislation - based approach should be adopted. The aim should be to protect and assist the victim and to safeguard their human rights. In seeking to do so decision makers should primarily:

• assess whether a grant of leave to a recognised victim is necessary for the UK to meet its objective under the Trafficking Convention - to provide protection and assistance to that victim, owing to their personal situation

It is not possible to cover all the circumstances in which DL may be appropriate because this depends on the totality of evidence available in individual cases. However, considerations when deciding if DL is appropriate might include the following non- exhaustive list:

• whether the person may be eligible for a more advantageous form of leave, for instance, asylum or humanitarian protection

• whether leave is necessary because there is a significant and real risk in light of objective evidence that the person may be re-trafficked or become a victim of modern slavery again - in such cases consideration should also be given as to whether the risk is greater in the UK or in the person's home country

• whether, if returned home, the person would face harm or ill-treatment from those who first brought them to the UK, or exploited them in their home country

• whether on the objective information and evidence in a particular case the receiving state have the willingness and ability to provide through its legal system a reasonable level of protection to the person if returned to their care (it would be rare for an individual to be able to rely on there being an absence of sufficient protection for victims of modern slavery in an EU member state)

• whether DL is necessary for the person to seek compensation through the Courts or is assisting the police with a criminal investigation or prosecution

Additionally, a person may provide evidence from a healthcare professional that they need medical treatment. In these cases, consideration should be given to whether it is necessary for the treatment to be provided in the UK. In terms of needing to stay in the UK to have such treatment, caseworkers should note that the UK's international obligations do not extend to a requirement that treatment must be provided by specialists in trafficking, or that it be targeted towards one aspect of an individual's needs (the consequences of trafficking) as opposed to his or her overall psychological needs as set out in the case of EM v SSHD[1]. In brief, the UK's international obligations call for the provision of support, not that the person is supported

[1] No citation is provided in the text. There is instead a hyperlink to the judgment on BAILII: R (EM) v SSHD [2018] EWCA Civ 1070; [2018] 1 WLR 4386.

> until they achieve full physical, psychological or social recovery.

58. I have stated above that the status of ECAT is not in issue before me. By that, I mean, firstly, that there is no suggestion on Ms Solanki's part that she is entitled to rely on the provisions of Chapter III as such since ECAT has not been incorporated into domestic legislation and, secondly, that there is no suggestion on Mr Irwin's part that that is the end of the matter as far as this claim is concerned. That is because, as Linden J held in KTT, the Secretary of State has declared that in promulgating the Guidance it was her intention to give effect to the UK's relevant obligations under ECAT; and that if, on the court's construction of the relevant provisions, she had failed to do so, she had misdirected herself as to a material consideration and was liable to judicial review on ordinary public law principles. That conclusion – which replicated earlier concessions made by the Secretary of State and accepted by the courts – was challenged before the Court of Appeal in KTT & EOG. For reasons he gave at [25]-[37], Underhill LJ (with whom the Master of the Rolls and Dingemans LJ agreed) rejected that ground of appeal. Mr Irwin therefore recognised before me that the respondent's decision – and the guidance upon which it was based – are justiciable on this basis.

The Authorities

59. There are thirteen European and domestic decisions before me. For the present, however, I intend to make reference to only three.

PK (Ghana) v SSHD

60. The applicant in PK (Ghana) was a confirmed victim of trafficking who had been refused DL because the Secretary of State had concluded that her personal circumstances were not 'compelling', as was required by the guidance in force at that time. At first instance, Picken J had dismissed the claim, holding that the policy guidance gave effect to the respondent's obligation under Article 14 of ECAT. The claimant appealed.

61. The only substantive judgment was given by Hickinbottom LJ, with whom Patten and Singh LJJ agreed. At [11], Hickinbottom LJ noted that the key provision was Article 14 of ECAT. At [14], he set out what was said about the purpose of the Article at [182]-[184] the Explanatory Note. At [18]-[19], under the sub-heading 'Domestic provisions', he set out the guidance which was in force at the relevant time, which required a decision-maker to consider whether a confirmed victim's circumstances were compelling or 'so compelling that it is considered appropriate to grant some form of leave'. At [21], Hickinbottom LJ noted the Secretary of State's submission that this formulation was consistent with and properly reflected the requirement in Article 14(1)(a) that a residence permit should be granted to a person if their stay is necessary owing to their personal situation.

62. Having set out the appalling background to PK's case, and having referred to Picken J's conclusions, Hickinbottom LJ stated at [39] that he was satisfied that Picken J had fallen into error. He rejected the Secretary of State's submission that the Convention gave the respondent a discretion which was both broad and untrammelled or open-ended. Hickinbottom LJ held that the word 'necessary' in Article 14(1)(a),

considered in context, meant ‘required to achieve a desired purpose, effect of result’ and was to be seen ‘through the prism of the objectives of the Convention’. The competent authority therefore had to ‘consider whether the person staying in the country is necessary in the light of, and with a view to achieving those objectives’: [44]. The policy guidance documents were flawed because they failed to engage with the relevant Convention criteria at all: [49]. At [51], Hickinbottom LJ said this:

> [51] However, the Secretary of State's guidance is entirely silent as to the purpose for which it must be necessary for the victim to remain. That is understandable if the Secretary of State shares the view set out in Miss Bretherton's submissions that Article 14(1)(a) gives the competent authority an open-ended discretion. However, in my view it is fatal if, as I consider, the provision does not give an open-ended discretion, but rather requires an assessment of whether it is necessary for the purposes of protection and assistance of the victim of trafficking (or one of the other objectives of the Convention) to allow him to remain in the country. In this case, the Secretary of State's guidance neither requires nor prompts any such engagement. As a result, in my view, it does not reflect the requirements of Article 14(1)(a), and is unlawful.

63. Then, at [56], in considering the threshold connoted by the use of the word ‘compelling’, Hickinbottom LJ said that ‘the Convention is intended to give victims of trafficking particular protection and assistance; and Article 14(1)(a) merely requires consideration of whether it is necessary for the victim to remain in a country because of his or her personal circumstances, without the higher threshold implicit in the word "compelling". The use of that word gave rise to a very substantial risk that a decision maker who applied the policy guidance would apply a threshold different from and higher than that required by the Convention: [57].

64. So it was that the appeal was allowed and the 2013 version of the policy guidance was declared to be unlawful.

R (JP & BS) v SSHD

65. The second case I will turn to is R (JP & BS) v SSHD which, as I have already mentioned, is a judgment at first instance, given by Murray J. The two claimants had been accepted by the Secretary of State to be victims of trafficking, on conclusive grounds. In each case, however, the claimant had also claimed asylum and the defendant had deferred the decision on whether to grant DL. She had done so in accordance with the policy in force from August 2018, which was not to make a decision on whether to grant DL to a victim of trafficking unless and until it had been determined that the victim did not qualify for any other form of leave, including leave to remain as an asylum seeker.

66. The claimants sought judicial review on two grounds. Firstly, that the deferral of their applications and the policy upon which it was based (described as the “scheduling rule”) was incompatible with the UK’s obligations under the ECAT. Secondly, that the policy was incompatible with the prohibition on discrimination in Article 14 ECHR, read with Articles 4 and 8 and Article 1 Protocol 1.

67. Murray J described the scheduling rule and its origin at [33]-[38]. He noted that it was from version 2 of the respondent's guidance entitled *Discretionary leave considerations for victims of modern slavery guidance*, as in force from 10 September 2018 onwards. The rule was to be found on page 12 of the policy and was that "[a] ll outstanding asylum decisions should be taken before any consideration is given to whether the victim is eligible for discretionary leave".

68. At [36], Murray J described the effect of the policy as follows:

> [36] The effect of the scheduling rule is that a victim of trafficking who is also an asylum seeker will not have their application for ECAT leave determined until their application for asylum has been granted and then a decision on refugee leave has been made. A victim of trafficking who is not an asylum seeker (and has not applied for any other form of status that could result in a grant of leave) will have their application for ECAT leave determined at the same time as they receive a positive conclusive grounds decision.

69. Given the delays in the asylum system, the consequence of the scheduling rule was that an asylum-seeking victim of trafficking would have to wait for several months before a decision was taken on their eligibility for DL, whereas a non-asylum seeking victim may have a decision on trafficking at the same time as their conclusive grounds decision: [37].

70. The claimants were only entitled to basic trafficking support for 14 days after the conclusive grounds decisions were made, after which they were reduced to support from the National Asylum Support Service ("NASS"), which was considerably less generous. That period was subsequently increased to 45 days. Murray J referred to the provision of support for these periods as the '14 day rule' and the '45 day rule' respectively. By the time that Murray J heard the applications for judicial review, the respondent had conceded in different proceedings that the provision of support could not be delimited by time alone, and that a 'needs based assessment' was instead required in deciding whether to continue to provide trafficking support: [42-[44]. For the purpose of the claims before Murray J, however, it was to be assumed that the 45 day rule was lawful: [45]. A key issue in the case was accordingly the interaction between the 45 day rule and the scheduling rule.

71. Having considered the justification advanced by the defendant for the existence of the scheduling rule, Murray J did not accept that the scheduling rule was irrational [132]. He did find, however, that the delay, coupled with the cessation of basic trafficking support, meant that the policy was not consistent with the UK's obligations under Article 14(1): [133]-[139]. In reaching that conclusion, Murray J took account of an expert report from Professor Katona regarding the impact of delay on victims of trafficking, a summary of which he set out at [79]-[81].

72. Murray J then considered the submission that the scheduling rule was incompatible with Article 14 ECHR. It was common ground, as it was before me, that the circumstances fell within the ambit of one of more Convention rights: [146]-[147]. Murray J was satisfied that there was a

difference of treatment between people who were in an analogous situation, ie those who were accepted victims of trafficking who had made an asylum claim, on the one hand, and those victims who had not, on the other: [148]-[149]. He was also satisfied that the status of being an asylum seeker fell within the scope of being an 'other status' for the purpose of Article 14 ECHR. The critical question for his resolution was therefore the fourth posed by Baroness Hale in re McLaughlin [2018] 1 WLR 4250, of whether there was an objective justification for the difference in treatment between the two groups: [155].

73. Before he evaluated the competing submissions on objective justification, Murray J made four preliminary observations, the first of which I specifically note. It was that the claimants were not seeking a declaration that ECAT leave should always be determined before an asylum decision, 'but merely that there be no requirement, on a blanket basis, that ECAT leave not be determined until the asylum decision is made': [161](i).

74. At [162]-[167], Murray J concluded as follows. In the absence of evidence, he found it difficult to assess whether the aim of administrative convenience was sufficiently important to justify the limitation of a protected right: [162]. He accepted that the scheduling rule was rationally connected to that aim, that point having been properly conceded by the claimants: [163]. At [164], Murray J noted that there was no evidence to show that a less intrusive measure than a blanket scheduling rule had been considered by the defendant. A less intrusive measure might, he noted, 'be one that allowed for the decision on the relative timing of the decision on ECAT leave and on asylum to be made on a case-by-case basis by reference to the position of the relevant asylum seeking victim'.

75. At [165], having made reference to the effect on the claimants themselves and the evidence of Professor Katona, Murray J accepted that the severity of the effects if the scheduling rule on the rights of asylum-seeking victims outweighed the importance of the objective of administrative convenience to which the scheduling rule is intended to contribute. So it was that he accepted that there was no sufficient objective justification for the discriminatory impact of the scheduling rule in its form at that time.

KTT & EOG v SSHD

76. In R (EOG) v SSHD [2020] EWHC 3310 (Admin); [2021] 1 WLR 1875, Mostyn J found that ECAT imposed a positive obligation on state parties to grant formal residence rights to a recipient of a positive reasonable grounds decision. The Court of Appeal reversed that decision for reasons that I need not set out, since the applicant before me is in receipt of a favourable decision on conclusive grounds.

77. In R (KTT) v SSHD [2021] EWHC 2722 (Admin); [2022] 1 WLR 1312, Linden J held that Article 14(1)(a) of ECAT required victims of trafficking who had made claims for asylum, and who feared being re-trafficked if returned to their country of origin, to be granted modern slavery discretionary leave to remain (MSL) on the basis that it was "necessary owing to their personal situation" for them to remain in the UK to pursue their claims. He held accordingly that versions 2, 3 and 4 of the

respondent's policy did not accurately reflect those requirements. The Secretary of State appealed to the Court of Appeal, which affirmed Linden J's decision.

78. Underhill LJ's judgment, with which Sir Geoffrey Vos MR and Dingemans LJ agreed, runs to 92 paragraphs but I need not analyse certain sections of it. The legal framework and the relevant domestic law occupy most of the first 24 paragraphs. There is then a lengthy section resolving the question of justiciability in the way I have summarised above: [25]-[37]. Paragraphs [38]-[57] concern the case of EOG and the reasons why Underhill LJ concluded that Mostyn J had erred as described above. The facts of KTT are set out at [58]-[65].

79. At [66], Underhill LJ recorded that the applicant's case was that

> … article 14.1 (a) of ECAT required that a victim of trafficking be given a residence permit if the competent authority considered that "their stay is necessary owing to their personal situation"; that it was the Secretary of State's declared policy to comply with that obligation; and that her [sc. KTT's] stay in the UK was "necessary owing to [her] personal situation" because she needed to remain here in order to pursue her asylum claim, and the Secretary of State could not reasonably have considered otherwise.

80. At [68]-[77], Underhill LJ considered and resolved in the applicant's favour the question of whether it had been the Secretary of State's policy to make decisions in accordance with Article 14.1(a) of ECAT. Then, at [78]-[89], he considered the question which is particularly relevant to the determination of this claim: whether the respondent's guidance gave effect to Article 14.1(a). He stated, at [78], that KTT's case could be 'straightforwardly stated'. The question which confronted the Secretary of State was whether the victim's stay was necessary owing to their personal situation.

81. It was accepted by Mr Buttler KC, for the applicant, that that language had to be construed having regard to the purpose of Chapter III of ECAT, which had been characterised in PK (Ghana) as 'the protection and assistance of victims of trafficking', and that 'accordingly the reference must be to the victim's situation as a victim of trafficking'. Critically, however, the submission made on behalf of the applicant was that 'it is the *stay,* not the issue of a residence permit, which must be necessary'. KTT's asylum claim was based (and, I note, was only based) on a fear of being re-trafficked from Vietnam, and it was said to be necessary for her to stay in the UK in order to pursue that claim. That approach was said to be in accordance with ECAT because

> it means that a victim of trafficking awaiting the outcome of a (trafficking-related) asylum claim will not be in … limbo … with no immigration status and unable to work. [emphasis added]

82. Mr Tam KC, for the Secretary of State, argued that this argument was overly technical and, amongst other things, that an asylum-seeker could not be removed from the United Kingdom whilst their claim (and any appeal) was pending, as a result of ss77-78 of the Nationality, Immigration and Asylum Act 2002. At [80], Underhill LJ recorded the way

in which Linden J had rejected that argument. Given that Underhill LJ said at [81] that he could not improve on Linden J's reasoning, I will also reproduce the reasoning in question:

> [89] … I prefer Mr Buttler's interpretation of Article 14 ECAT, which is based on an ordinary reading of the text of the provision and, in my view, consistent with its purpose. The reality of Mr Tam's argument on interpretation is that Article 14(1) should be read as if it says that the issuing of the residence permit must be necessary, whereas the language of the provision clearly requires consideration of whether the stay is necessary in which case the permit must be issued. Indeed, the requirement to consider whether ' their stay is necessary ' leaves room for it to be the case that the victim is staying in any event. The provision then asks whether the stay is necessary for a particular reason or purpose, in which case a residence permit, with attendant benefits and advantages, is required to be issued. The language does not appear to regard the residence permit as solely for the purpose of facilitating a stay which would not otherwise be possible, although this may be an important function of such a permit. Rather, the point of the residence permit is at least in part to trigger additional advantages, as will be discussed below.
>
> [90] I do not consider that applying the language of Article 14 is an overly technical approach, or inconsistent with the approach required by the Vienna Convention. Moreover, the approach suggested by the language is consistent with the aims of ECAT including the aim of protecting and assisting the victims of trafficking. Mr Tam's suggested interpretation of Article 14 is significantly less likely to further those aims given that it has the consequence of reducing the likelihood that a residence permit will be issued, with the beneficial consequences to which Mr Buttler refers.

83. At [82], Underhill LJ acknowledged that the adoption of this natural meaning of Article 14(1)(a) placed confirmed victims of trafficking in a better position than other asylum seekers. He considered that to be the straightforward consequence of the decision to ratify the Convention. At [83]-[84], he rejected an additional argument advanced by Mr Tam KC about the meaning of the word 'stay' in Article 14(1)(a). Then, at [86], Underhill LJ rejected the defendant's argument that the claimant's argument was illogical. Since this paragraph featured prominently in Mr Irwin's argument before me, it is necessary to reproduce it in full:

> [86] Mr Tam submitted that Mr Buttler's "self-imposed limitation" to cases where the asylum claim was trafficking-related was illogical because "the outcome sought in both trafficking-based and non-trafficking-based asylum claims is the same: asylum, and the concomitant leave to remain". I cannot see that that gives rise to any illogicality. The limitation derives from an acceptance that the "personal situation" referred to in article 14.1 (a) must, on a purposive construction, refer to the victim's situation *qua* victim: Mr Buttler accepted that article 14.1 (a) would not assist a confirmed victim of trafficking who sought leave to remain

> pending a decision on, say, a claim for asylum based on the risk of political persecution. We do not in this case need to decide whether the concession was necessary, but it is in principle entirely coherent. There may possibly, as Mr Tam also submitted, be some cases where the true basis of an asylum claim is not clear; but that does not render the distinction illogical. [emphasis added]

84. Underhill LJ then rejected two further arguments advanced by the Secretary of State before he added some closing observations about the phenomenon of delays in the immigration and asylum system. It was for all of these reasons, therefore, that the Court of Appeal upheld the order made by Linden J.

Discussion

85. Ms Solanki began her submissions by addressing her second ground. Mr Irwin mirrored that approach. I consider that ground to represent the logical starting point for my analysis, and I shall also turn to it first.

Ground Two

86. By ground two, Ms Solanki contends that the respondent was obliged to grant the applicant Discretionary Leave whilst her asylum claim was pending. That, she submitted, was the straightforward consequence of the Court of Appeal's decision in KTT; the applicant's stay is necessary owing to her personal circumstances because she has a pending asylum claim.

87. Whilst Ms Solanki is probably correct in her submission that the Secretary of State's response to that submission has been something of a moving target, nothing really turns on that. This claim was issued after Linden J's judgment but before the decision of the Court of Appeal and the Secretary of State had obviously been obliged to consider her defence to this claim in parallel with the KTT litigation.

88. In the final analysis, following the refusal of permission to appeal to the Supreme Court, Mr Irwin's response was characteristically clear. He submitted, in reliance on the 'self-imposed limitation' accepted by Mr Buttler KC in KTT that the applicant's case was simply not caught by the *ratio* of that decision. She is not, he submitted, a person with a pending asylum claim (or appeal) which is trafficking-related and Article 14(1)(a) does not bite, so as to require her to be granted leave to remain whilst that claim is in progress. As he submitted at [22] of his skeleton argument, KTT is not authority for the proposition that *any* claim for protection made by a victim of trafficking engages Article 14(1)(a) of ECAT; the applicant must establish that her asylum claim was – in fact – based on a fear of being re-trafficked. It is only where that is so that KTT applies so as to render the applicant's stay necessary by virtue of her personal circumstances.

89. The difficulty with Mr Irwin's argument, as I think he was constrained to accept, is that this is clearly not a case of the type imagined by Underhill LJ in the antepenultimate sentence of [86] of his judgment in KTT. The applicant is not, in other words, a victim of trafficking whose asylum claim is entirely unrelated to her status as a victim of trafficking. I have

set out what might at first blush be thought to be an overly detailed summary of the asylum claim at [4]-[13] above. I set out the claim in that degree of detail in order to inform the analysis which follows.

90. Mr Irwin is certainly entitled to submit, based on any reasonable analysis of the applicant's protection claim, that it is principally based on the applicant's fear of return to Ethiopia as a person with an actual or imputed political opinion as a supporter of the Oromo Liberation Front. She made no reference to a fear of re-trafficking in her screening interview or her first statement. Her solicitors made reference to such a fear in the statement made under s120 but there was scant mention in either the applicant's second statement or in her lengthy substantive asylum interview. Ms Solanki submitted that the claim based on the OLF and the fear of re-trafficking were really two sides of the same coin; the applicant had been vulnerable to exploitation because she desperately needed to escape from Ethiopia, and it was in those circumstances that she fell into the hands of her Saudi employer. That might be so but, as Mr Irwin noted in his forensic analysis of the protection claim, that was not what was said by the applicant herself.

91. I consider there to be a significant risk, however, in attempting to draw a bright line between what is said by an applicant for protection and what is said by their legal representatives. An individual might be at risk on return to their country of origin for a reason that has not occurred to them. It might be asserted, for example, that a risk of persecution in an individual's home area might reasonably be avoided by relocating to another. The applicant in question has never been to that part of the country and might know nothing about it but their solicitors might, with reference to background material, be able to establish (or at least to submit) that relocation to that part of the country would expose the individual to a risk. Precisely this situation is commonly encountered in Albanian protection claims, in which an applicant fears return to their home area for 'honour-based' reasons and is said to be unable to relocate to another part of the country because they would be exposed to a risk of exploitation there. It is very frequently the case in that paradigm situation that the applicant personally asserts the risk in their home area, and their solicitors perfectly properly make representations to the Secretary of State about the ineffectiveness of internal relocation as a possible answer to that claim. Insofar as Mr Irwin submitted that the applicant's claim was not trafficking-related because she had not herself asserted that risk, I do not accept that submission.

92. Mr Irwin also submitted that the applicant's stay was not necessary because of her pending asylum claim because that claim was not *substantially* based on a fear of re-trafficking. In his note of 14 November 2022, he deployed a slightly different formulation, in submitting that the 'real thrust' of the protection claim was not trafficking-related. No such qualification appears in the authorities, and in KTT in particular, and I see no proper basis for the adoption of that approach. What matters for the purpose of Article 14.1(a) is that the individual victim of trafficking has a pending protection claim which is trafficking-related. Where that is so, their personal circumstances are such that their stay is necessary – and leave must therefore be granted – whilst that claim is pending.

93. It is not possible, whether through the use of an adverb or otherwise, to be prescriptive about the extent to which the claim must be trafficking related. Ms Solanki observed – with reference to what was said by Lord Mustill in R v Monopolies & Mergers Commission *ex parte* South Yorkshire Transport Ltd [1993] 1 WLR 23 that 'substantial' is an inherently imprecise word. I agree, and I cannot immediately imagine the yardstick by which a decision-maker could gauge whether a protection claim was 'substantially' based on a fear of re-trafficking. The only appropriate qualification to what was said in KTT is, in my judgment, that the protection claim must be based in material part on a fear of re-trafficking. It suffices, in other words, for there to be a fear of re-trafficking articulated to the extent that the respondent is bound to consider it. Where a claim is based in material part on a risk of re-trafficking, the principle in KTT is engaged, since the accepted victim of trafficking's stay is necessary, for the purposes of Article 14(1)(a), whilst their protection claim is pending. In seeking to delimit the principle as he did in his submissions, I consider Mr Irwin to have placed an impermissible gloss upon it.

94. There can be no doubt in this case that the applicant's claim was based in material part on a fear of re-trafficking. That aspect of her case was advanced in terms by her solicitors in the s120 notice and it was underlined in the letter which accompanied the Personal Circumstances Questionnaire.

95. Further, as Mr Irwin recognised, it was very difficult for him to assert that the fear of re-trafficking was not a material part of the protection claim. That is because it was considered by the Secretary of State in the refusal letter, as a separate head of claim, distinct from the applicant's fear on the basis of her actual or imputed political opinion. I accept Mr Irwin's submission that nothing turns on the fact that the fear of re-trafficking was considered first. I suggested at one point in the hearing that the fear of re-trafficking might have been thought by the Secretary of State to be the primary basis of claim but that is, I accept, to read too much into the structure of the letter. Be that as it may, the reality is that the respondent recognised that the risk of re-trafficking was asserted and grappled with it in the refusal letter. She accepted, therefore, that the protection claim was based in material part on a fear of re-trafficking. For the reasons I have given, I consider that to suffice to engage the principle in KTT.

96. The respondent did not consider whether the applicant's pending asylum claim, based in material part on a fear of re-trafficking, meant that her stay was necessary whilst that claim was under consideration. Whether that is described as a misdirection in law or a failure to take account of a material consideration, I come to the clear conclusion that it was a public law error in the decision under challenge. Given the respondent's acceptance that the applicant has appealed the refusal of protection to the First-tier Tribunal and that she will assert in her appeal that she is at risk of re-trafficking (Mr Irwin's 14 November note refers, at [7]-[9]), the public law error is a material one because the principle in KTT continues to apply. The applicant is therefore entitled to succeed on this aspect of the second ground.

97. The remaining parts of ground two are less meritorious. Ms Solanki submitted that the respondent's consideration of the applicant's personal

situation was also vitiated by a failure to consider her health adequately or at all. In my judgment, the respondent's consideration of the remaining submissions made in the letter which accompanied the Personal Circumstances Questionnaire (and the evidence upon which those submissions were based) was lawful and adequately reasoned.

98. The medical evidence which was provided to the respondent in September 2021 was limited and, in many respects, quite dated. The letters from Hestia and Waterloo Multi-Ethic Counselling were dated 8 September 2020 and 21 August 2019 respectively. There was an appointment letter for an x-ray on the applicant's knee in February 2020 and a routine diabetes eye examination appointment letter from August 2021. There was a copy of the applicant's GP records. Given the limited and dated evidence which was submitted, it was rational for the respondent to conclude that the applicant's medical circumstances did not militate in favour of a grant of leave. As Mr Irwin submitted at [44]-[50] of his skeleton argument, the medical evidence did not establish that the applicant required ongoing medical care or that she would be unable to receive that care in the event that she was not granted ECAT leave.

99. Given the obvious limitations in the medical evidence supplied with the representations made in September 2021, Ms Solanki attempted to bolster this aspect of ground two with reference to what Professor Katona had said in JP & BS. This is already a lengthy judgment and I shall not lengthen it still further by setting out the expert evidence which was before Murray J in that case. Murray J set out a summary of that evidence at [79]-[81].

100. I do not consider the respondent to have been at fault for not considering Professor Katona's evidence in that case, however, for the following reasons. Firstly, it was not drawn to her attention by the applicant's solicitors and the respondent cannot be expected to recall and consider evidence which was given in an application for judicial review. At the risk of stating the obvious, Professor Katona's evidence did not form part of the ratio of the decision and the respondent was not somehow bound by it.

101. Secondly, and in any event, Professor Katona's evidence was expressed at a high level of generality and there was little or no evidence in this case, specific to the applicant, to show that the uncertainty of her predicament (protracted though it had been) was causing her distress or resulting in any difficulty in engaging fully in trauma-focused work. In fact, the evidence from the counselling services suggested quite the opposite; the letter from Hestia in particular showed that she had engaged with the counselling; that it had 'helped her with her confidence and her trauma' and that she had improved.

102. Ms Solanki criticised the respondent for not taking into account the ongoing delay in processing the applicant's claim. That, she submitted, was also material to the question of whether her stay was necessary owing to her personal circumstances. The delay was not said to be relevant to that consideration in the letter of 17 September 2021, however, and I cannot presently see how it bore on the question of whether to grant leave. This was not a case such as R (FT) v SSHD [2017] UKUT 331 (IAC) in which the respondent's delay went hand in

hand with the applicant's vulnerability as matters which rationally militated in favour of granting leave to remain.

103. Ms Solanki also submitted, with reference to [182]-[184] of the Explanatory Note, that the respondent had failed to take into account the applicant's family situation and her safety as factors which militated in favour of granting leave to remain. The former point added nothing, in my judgment, and the latter was only relevant for the reasons given in KTT.

104. I therefore hold that the applicant is entitled to succeed on ground two, but only on the basis of Ms Solanki's primary submission based on KTT.

Ground Three

105. This ground has two parts, the second of which is that the respondent failed to undertake the holistic assessment required by her policy in order to decide whether the applicant should have been granted Discretionary Leave as a victim of trafficking. That submission is based on the same factors as I have considered in relation to ground two, above, and requires no further consideration.

106. By the first part of ground three, the applicant contends that the respondent's policy is itself unlawful. I confess to a degree of bemusement over the respondent's response to this argument. As I have recorded at some length above, it was held by Linden J in KTT that versions 3 and 4 of the respondent's policy were misleading as the effect of Article 14(1)(a) of ECAT. Version 5, as currently in force, is materially identical and must also be misleading for the same reason. There has been no attempt to alter the policy to reflect what was said by Linden J or by the Court of Appeal and the policy must, it seems to me, be unlawful for its failure properly to reflect the requirements of ECAT.

107. At [52]-[56] of his skeleton argument, however, Mr Irwin refers to what was said by the Supreme Court in A v SSHD [2021] UKSC 37; [2021] 1 WLR 3931 and submits that 'policies are unlawful only if they sanction, positively approve or encourage unlawful conduct by those to whom it is directed'. That is, with respect, a textbook summary of what was held in A v SSHD and R (BF (Eritrea) v SSHD [2021] UKSC 38; [2021] 1 WLR 3967 but it overlooks the fact that those authorities were cited before the Administrative Court and the Court of Appeal in KTT. Mr Irwin accepts, as he must, that the respondent is obliged to publish revised policy in order to implement the judgment in KTT (skeleton argument at [56]) and I cannot see how I could possibly conclude in these circumstances that the existing policy is lawful.

108. In summary, the policy considered by Linden J and the Court of Appeal was held to be misleading as to the effect of Article 14(1)(a). Those conclusions were reached in full knowledge of what was said by the Supreme Court in A and BF (Eritrea). Version 5.0 of the policy is materially identical as to the significance of a pending, trafficking-related asylum claim and must be misleading for the same reason. I do not think I have any choice but to conclude that the policy is unlawful for misconstruing the effect of Article 14(1)(a) of ECAT.

Ground One

109. By ground one, Ms Solanki submitted that the decision was discriminatory and contrary to Article 14 ECHR. The Article provides as follows:

> 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.

110. Ms Solanki submits, in a nutshell, that the respondent's policy on the consideration of ECAT leave for those with pending asylum claims is discriminatory for the same reasons as were found by Murray J in JP & BS. I should note at the outset, before grappling with that submission, that I accept Mr Irwin's submission that the landscape is fundamentally different from that which was considered by Murray J in JP & BS. The two key differences on which Mr Irwin relies are as follows.

111. Firstly, there is now no 'blanket rule' which requires a decision maker to delay consideration of an applicant's entitlement to ECAT leave until after a decision on their entitlement to international protection has been reached. That was the effect of the scheduling rule, as set out in version 2.0 of the *Discretionary leave considerations for victims of modern slavery* policy, which stated in terms that "[a]ll outstanding asylum decisions should be taken before any consideration is given to whether the victim is eligible for discretionary leave."

112. I have made reference to the later versions of the policy already. The relevant section of it was amended after JP & BS. Under the sub-heading 'Actions to take following a positive conclusive grounds decision (Immigration Considerations), on page 10, it states as follows:

> A positive conclusive grounds decision does not result in an automatic grant of immigration leave. However, unless the confirmed victim has an outstanding asylum claim at the time the positive conclusive grounds decision is made, automatic consideration (for non-European Economic Area (EEA) victims) should normally be given at the same time, or as soon as possible afterwards, to whether a grant of
> discretionary leave is appropriate under this policy.
>
> If the confirmed victim has an outstanding asylum claim and the deferral of a decision on whether to grant discretionary leave would not itself result in the withdrawal of any National Referral Mechanism (NRM) support which the victim receives and still needs, then the asylum claim should normally be decided before any consideration is given to whether the victim is eligible for discretionary leave (DL) under this policy.
>
> However, in some cases it may nonetheless be appropriate to consider a grant of DL under this policy in advance of consideration of the asylum claim. Each case should be considered carefully on its own facts, but examples of where this would be appropriate include:

> • it is clear that the victim is assisting the police with enquiries and is therefore likely to qualify for discretionary leave to remain under this policy
>
> • it is clear that the victim is pursuing a claim for compensation and is therefore likely to qualify for discretionary leave to remain under this policy
>
> • it is clear that due to personal circumstances the victim is likely to qualify for discretionary leave to remain under this policy, regardless of the outcome of the asylum of humanitarian protection claim - for example, there is strong evidence that the victim has a medical need to help them recover from their experience of being a victim of modern slavery and it is also clear that the assistance they require is unlikely to be available outside the UK (regardless of any issue about whether they would be safe in that country, which would fall to be considered as part of their protection claim)
>
> Where a decision has previously been made to defer consideration of discretionary leave to remain, pending the outcome of the victim's asylum claim, but there has been a material change in circumstances such that it would now be appropriate to consider a grant of discretionary leave to remain in advance of consideration of the asylum claim, this should be considered.

113. As Mr Irwin puts it at [27] of the Detailed Grounds of Defence, therefore, the current policy is wholly different from the 'blanket' approach required by the scheduling rule. Where a victim of trafficking has also made an asylum claim, deferral of consideration of ECAT leave is the usual position but a decision on ECAT leave might be made depending on the facts of the case.

114. The way in which that policy operated in this case is clear from the text of the decision, as I think Ms Solanki was constrained to accept. The respondent did not merely delay consideration of whether ECAT leave was appropriate on any basis. She considered whether leave should be given on medical grounds, for example, and concluded that it should not be. She considered whether to assess the applicant's eligibility for ECAT leave on other grounds 'now or until the protection claim has been decided' and decided on the former course, pursuant to the presumption in the policy. As Mr Irwin submitted, therefore, some aspects of the claim for ECAT leave were considered, whilst others were 'parked' to await the decision on the asylum claim.

115. The second difference on which Mr Irwin relies is that the '45 day rule', by which a confirmed victim of trafficking was automatically reduced to NASS support 45 days after a conclusive grounds decision was made, has been abolished. In fact, as Murray J noted at [41]-[42] of JP & BS, the Secretary of State had already accepted in settling another case that assistance to victims could not be delimited by reference only to the lapse of time after the decision had been made.

116. The position as it currently stands is set out in a helpful joint note which was provided by counsel – at my direction – after the hearing. I do not l

need to set out the contents of that note in detail. It suffices to note that a person who is accepted on conclusive grounds to be a victim of trafficking is given a Recovery Needs Assessment, the purpose of which is to allow support workers to work with victims in developing recommendations for support where they have ongoing recovery needs arising from their modern slavery experiences. An individual will continue to receive financial support under the Modern Slavery Victim Care Contract (MSVCC) for a minimum of 45 days after the Conclusive Grounds decision for as long as they are assessed to have a recovery need for it, in accordance with the Recovery Needs Assessment guidance. The provision of support is contingent upon there being a recommendation from the victim's support worker and an acceptance of that recommendation from the Single Competent Authority. Recommendations must include an exit date for the support to end, up to a maximum of six months, though further requests can be made for support thereafter.

117. The other significant difference between the circumstances considered by Murray J and those which I must consider is that the KTT litigation has been finally resolved adversely to the respondent. Before Murray J, the scheduling rule automatically and without exception prevented a victim of trafficking who had claimed asylum from accessing ECAT leave consideration until after their protection claim had been resolved. Before me, however, the usual position is that a victim of trafficking such as the applicant – who is entitled to ECAT leave as a result of her pending, trafficking-related claim – will not receive that leave because consideration of it will be deferred to await the asylum decision.

118. Having noted those differences in the current landscape, as compared to that which was considered in JP & BS, I turn to address the discrimination claim in the manner required by the authorities. I adopt the four stage test from Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557 and R (on the application of Stott) v Secretary of State for Justice [2018] UKSC 59, as summarised by Baroness Hale at [15] of re McLaughlin [2018] 1 WLR 4250:

    (1) Do the circumstances "fall within the ambit" of one or more of the Convention rights?

    (2) Has there been a difference of treatment between two persons who are in an analogous situation?

    (3) Is that difference of treatment on the ground of one of the characteristics listed or "other status"?

    (4) Is there an objective justification for that difference in treatment?

119. It is common ground, as it was in JP & BS, that the applicant's circumstances fall within the ambit of the Convention rights, Articles 4 and 8 and Article 1 Protocol 1 in particular.

120. It was submitted by Mr Irwin at [30] of his Detailed Grounds of Defence and at [10] of his skeleton argument that the applicant was not treated less favourably than a proper comparator, and that 'the only people in a comparable position to the applicant are other confirmed victims of trafficking who have outstanding protection claims, decisions on the

merits of which will be relevant to the decision on personal circumstances for the purposes of DL.'

121. I do not accept that submission. Notwithstanding the amendments to the respondent's policy, the comparator group remains as identified by Murray J at [148]-[149] of JP & BS. The applicant belongs to the group of asylum-seeking victims of trafficking and is an analogous situation to a non-asylum seeking victim. I see no reason to depart from Murray J's conclusion in that regard.

122. Pursuant to the respondent's policy, there is a difference of treatment between the two groups. For those, such as the applicant, who belong to the first group, deferral of consideration of ECAT leave until after the asylum claim has been decided is the usual position but a decision regarding ECAT leave might be made depending on the particular facts of the case (the Detailed Grounds refer, at [27]). For those in the comparator group, there is no deferral of consideration to a later point in time. Although the policy has changed, the two groups are still in an analogous situation and there is still a difference in treatment.

123. Also in common with Murray J in JP & BS, at [150] of his judgment, I conclude that the status of being an asylum seeker falls within 'other status' for the purpose of Article 14 ECHR.

124. The real question is whether there is an objective justification for the difference in treatment or, to use Lord Nicholls' formulation in R (Carson) v Secretary of State for Work and Pensions [2005] UKHL 37; [2006] 1 AC 173, whether the difference in treatment can 'withstand scrutiny'. The burden of proving justification lies on the respondent: DH v Czech Republic (2008) 47 EHRR 3.

125. The analysis of that question in JP & BS comprised a significant proportion of Murray J's judgment and, ordinarily in any such case, it would be necessary to consider the four sub-questions posed by Baroness Hale at [23] of R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57; [2015] 1 WLR 3820.

126. In this case, however, with the benefit of the decision of the Court of Appeal in KTT, it seems to me that my conclusion can be stated very shortly indeed. The respondent decided to defer part of her consideration of whether the applicant's personal circumstances were such that her stay was necessary in the UK. She did so because, and only because, the applicant had an outstanding claim for international protection which was brought, in material part, in reliance on the risk of re-trafficking. What the respondent was required by Article 14(1)(a) of ECAT to do, however, was to grant the applicant leave to remain whilst that asylum claim was pending.

127. The respondent stated before Murray J that her aim in adopting the scheduling rule was the administrative convenience of the decision on the protection claim being taken first. Murray J proceeded on the basis that this was a legitimate aim and that the adoption of the scheduling rule was rationally connected to administrative convenience: [162]-[163]. In light of KTT, I do not feel able to reach the same conclusion in relation to the decision to defer consideration of the applicant's claim for ECAT

leave. In a case such as the applicant's, it cannot *legitimately* be said that administrative convenience favours delaying the decision on the claim for ECAT leave because the applicant is entitled to that leave without further ado. The very reason that the applicant was entitled to ECAT leave was deployed against her as the reason that she would not be considered for it until after her protection claim had been decided. The decision to defer (or partly to defer) the consideration of ECAT leave on the basis of the applicant's status as an asylum seeker was not one which could withstand scrutiny, therefore.

128. At [164] of JP & BS, Murray J stated that it might in some cases be appropriate to defer a decision on ECAT leave until after a decision is made on asylum. That remains so. It might, in particular, be legitimate to defer a decision on ECAT leave until after a decision is made on asylum when the asylum claim is wholly unrelated to the trafficking claim. In such a case, Article 14(1)(a) does not oblige the respondent to grant ECAT leave to the victim. Where the victim's asylum claim is trafficking related, however, the only permissible course is to grant ECAT leave whilst that claim (and any appeal) remains pending. The deferral of that consideration is unlawful and the administrative convenience upon which it is apparently based cannot amount to any justification for such an action.

129. Whilst I accept, therefore, that the respondent is entitled to submit that she has altered her policy in order to address the mischief identified in JP & BS, I consider her defence to the applicant's discrimination claim to fall at an earlier hurdle. She treated the applicant differently because she was an asylum seeker, by deferring the decision on her ECAT leave application until after the decision on her protection claim. But she was instead *required* to grant ECAT leave to the applicant whilst that protection claim was pending. The respondent cannot, in my judgment, be heard to submit that her unlawful decision to defer the ECAT leave decision was nevertheless a legitimate action, aimed at furthering administrative convenience. An action which is unlawful cannot, to my mind, be said to justify a difference in treatment. I therefore hold that the applicant is also entitled to succeed on her first ground.

Conclusion

130. The applicant succeeds on each of her three grounds for reasons which might be summarised as follows. She succeeds on the second ground because the respondent was not entitled to defer consideration of her claim for ECAT leave pending the outcome of her trafficking-related asylum claim; to do so was contrary to KTT v SSHD. She succeeds on her third ground because the respondent failed to consider her personal circumstances in the manner required by KTT v SSHD and because the material part of her policy was unlawful following the decisions of the High Court and the Court of Appeal in that case. And she succeeds on her first ground because the difference in treatment she experienced as an asylum seeker, when her claim for ECAT leave was deferred as result of that status, cannot be justified by reference to an unlawful policy.

131. I invite counsel to agree, if possible, an order that reflects this judgment. Otherwise, they should make written submissions on the form of the order and any other consequential matters.

Postscript

132. This judgment was circulated in draft in the usual way and counsel duly provided typographical and other such corrections. The parties were unable to agree on the precise terms of the order, however, and made submissions on two disputed matters, which I deal with in turn.

133. Firstly, the respondent submits that the order should state that 'the respondent is to grant the applicant discretionary leave within 28 days of this order, absent special circumstances.' The applicant agrees but submits that the order should also stipulate that leave is to be granted 'in accordance with the terms of this judgment'.

134. Having considered the competing submissions, I decline to state that leave is to be granted in accordance with the terms of my judgment. The judgment does not require the applicant to be granted any particular period of leave. Her appeal against the refusal of asylum remains pending and the respondent will have to consider what period of leave should be granted in order to accommodate that process. The insertion of 'in accordance with the terms of this judgment' does not alter the respondent's obligation in substance.

135. Secondly, the applicant seeks a declaration that version 5.0 of the respondent's policy *Discretionary leave considerations for victims of modern slavery*, and in particular that part of it which I have set out at [57] above, 'is unlawful as it is misleading as to the effect of Article 14(1)(a) ECAT in the terms and to the extent set out in the judgment'.

136. The respondent opposes the Upper Tribunal making such an order because: (i) the policy remains unlawful for the reasons given in KTT, so declaratory relief is unnecessary; and (ii) the respondent intends to publish new guidance on 31 January 2023, and any declaration would accordingly be otiose.

137. I decline in the exercise of my discretion to make the declaration sought by the applicant. As I have noted in my judgment, versions 4 and 5 of the policy are materially identical and it necessarily follows from the consideration of version 4 in KTT that version 5 is unlawful. In any event, as Mr Irwin observes in his written submissions, the policy is to be changed so as to reflect what was said in KTT on 31 January 2023. Given the changes which the respondent has already agreed to make, and that she intends to do so on the day on which this judgment is handed down, a declaration would serve no useful purpose: R (Dimmock) v Secretary of State for Education and Skills [2007] EWHC 2288 (Admin); [2008] 1 All ER 367.

138. The Secretary of State has sought permission to appeal. She submits that there are arguable errors in my resolution of each of the applicant's grounds of claim. I do not consider any of the three grounds of appeal to be arguable. The applicant's asylum claim was based in material part on a fear of re-trafficking and it is not arguable that that was insufficient to engage the KTT principle. There was no evidence before me to show that the respondent had adopted a practice which differed from that set out in her published policy, which was otherwise unlawful for the reasons given. It is not arguable that a non-asylum-seeking victim of trafficking was an improper comparator, or that the applicant was not treated differently;

the real question in this case was whether the difference in treatment was objectively justifiable, which it could not have been, given the unlawfulness of the policy.

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