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Our ref MAEH/0140696-0000001 UKO4: 2004028659.4

28 February 2023

Dear Sir or Madam

CA-2023-000189: *R (Asylum Aid) v Secretary of State for the Home Department*

1. We act for the United Nations Special Rapporteur on Trafficking in Persons, especially women and children, Professor Siobhán Mullally (the **Special Rapporteur**) on a *pro bono* basis. The Special Rapporteur has also instructed on a *pro bono* basis a counsel team of Adam Straw KC, Catherine Meredith, Zoe Harper and Michael Spencer of Doughty Street Chambers. The Special Rapporteur intends to seek permission to assist the Court on the fundamental issues arising in the appeal of *R (on the application of ASYLUM AID) v Secretary of State for the Home Department* (CO/2056/2022) ("**Asylum Aid**") through an in intervention by way of brief written submissions only. We write on an urgent basis to seek the parties' agreement to this proposed intervention by 4pm on Wednesday 1 March 2023.

2. The Special Rapporteur is concerned about the application of the UK-Rwanda arrangements to asylum seeking potential victims of trafficking. Given that the Special Rapporteur has been appointed by the United Nations as an independent expert on trafficking as a result of her specialist expertise, she is well suited to assist the Court on these issues.

The UN Special Rapporteur on Trafficking in Persons, especially women and children

3. Special Rapporteurs are independent experts on thematic human rights or country issues within the Special Procedures of the UN Human Rights system. The Special Rapporteurs are independent human rights experts, and in accordance with the Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council, all Special Rapporteurs carry out their functions independently and impartially.

4. Pursuant to Human Rights Council (**HRC**) Resolution 44/4, the mandate of the Special Rapporteur involves: (a) taking action on violations committed against trafficked persons and on situations in which there has been a failure to protect their human rights; (b) undertaking country visits in order to study the situation in situ and formulate recommendations to prevent and/or combat trafficking, and protect the human rights of victims of trafficking in specific countries and/or regions; and (c) submitting annual reports to the UN Human Rights Council and the General Assembly. HRC Resolution 44/4 specifically recognises the importance of the work of the Special Rapporteur on trafficking in persons, especially women and children, "*in the prevention of trafficking in persons and the promotion of the global fight against trafficking in persons and in promoting awareness of and upholding the human rights of victims of trafficking*".

5. Professor Siobhán Mullally assumed her mandate as the UN Special Rapporteur on 1 August 2020. Prior to her appointment as Special Rapporteur, Professor Mullally was the former President (2016-18) and First Vice-President (2014-16) of the Council of Europe Group of Experts on Action Against Trafficking in Human Beings (**GRETA**). GRETA is the monitoring body of the Council of Europe Convention on Action Against Trafficking in Human Beings (**ECAT**).

6. The Special Rapporteur has extensive experience of interventions in domestic and international courts and tribunals, in cases raising issues of importance in relation to trafficking. Any submission by the Special Rapporteur is provided on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorisation for the positions and views expressed by the Special Rapporteur, in full accordance with her independence, was neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, nor any of the officials associated with those bodies.

7. Relevantly, the Special Rapporteur has recently appeared as an intervener, with permission, in cases concerning the rights of trafficked persons before the domestic courts in *Wong v. Basfar* [2022] UKSC 20; *R v AAD & Ors* [2022] EWCA Crim 106; before the Grand Chamber of the European Court of Human Rights (**ECtHR**) in *HF and MF v France* (App. No. 24384/19) and *JD and AD v France* (App. No. 44234/20); and *Prosecutor v Dominic Ongwen* No. ICC-02/04-01/15 A A2 (Appeals Chamber, the International Criminal Court). The Special Rapporteur's experience in relation to GRETA's third party interventions in the ECtHR included cases such as *VCL and AN v the United Kingdom* (App. Nos. 77587/12 and 74603/12, judgment 16 February 2021), which significantly contributed to the interpretation of the European Convention on Human Rights (**ECHR**) in relation to victims of trafficking.

8. Of particular relevance to the issues arising in the Asylum Aid appeal, the Special Rapporteur under her mandate has:

   a. provided oral evidence to Parliament on 23 September 2021 along with representatives of UNHCR and the then UK Independent Anti-Slavery Commissioner, Dame Sara Thornton,[1] on the Nationality and Borders Bill;

   b. communicated Other Letters with other Special Rapporteurs concerning the incompatibility of the UK-Rwanda arrangements with international human rights obligations (e.g. Other Letters OL

[1] House of Commons Nationality and Borders Bill (Fourth sitting), 23 September 2021

GBR11/2021, 5 November 2021;[2] OL GBR 3/2022, 11 February 2022;[3] OL GBR 9/2022, 1 July 2022[4]);

c. submitted observations to the President of the ECtHR on 13 June 2022 in *K.N. v. United Kingdom*, Application No. 28774/22[5]); and

d. on 3 August 2022 applied for permission to intervene in *R (ETO & Others) v Secretary of State for the Home Department* (CO/2197/2022) ("**ETO**") **(**which is pending) concerning distinct policy issues regarding the UK-Rwanda arrangements and confirmed victims of trafficking which do not arise in the current appeals.

9. In light of this relevant experience and expertise, the Special Rapporteur considers that she is uniquely well placed to assist the Court in a proposed intervention concerning the human rights obligations owed to asylum seeking potential victims of trafficking which arise in this appeal.

Issues for the proposed intervention

10. The Divisional Court, insofar as it is relevant, held that the UK-Rwanda arrangements were not procedurally unfair (§§389-394, 399, 402, 403, 421-2), in particular (in summary) because procedural fairness does not require a duty to allow an opportunity to make representations on refoulement or human rights, access to lawyers (even to provide evidence on their specific claims), or in the circumstances that seven days is enough time to do so (§402).

11. The proposed intervention is in the appeal of Asylum Aid in relation to the issues raised in grounds 2, 3 and 5 of the grounds of appeal.[6]

12. The Special Rapporteur proposes to intervene on the central issue in the appeal concerning the scope and requirements of procedural fairness in the asylum and human rights context, where there are particular implications for asylum seeking potential victims of trafficking, as a vulnerable group.

13. The proposed intervention will address the incompatibility between the UK's obligations to effectively identify and protect potential victims of trafficking, and the UK-Rwanda arrangements and decision-making insofar as potential victims are detained and liable to be removed. The intervention does not address the situation of confirmed victims, as this does not apparently arise in this appeal.

14. The proposed intervention will address the question of whether the abridged UK-Rwanda arrangements breach the UK's positive legal obligations to identify and protect asylum seekers who are potential victims of trafficking under Articles 3, 4 and 14 ECHR and ECAT. There are two principal issues:

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[2] Mandates of the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26788

[3] Mandates of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on trafficking in persons, especially women and children and the Working Group on discrimination against women and girls. Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27073

[4] Mandates of the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and the Special Rapporteur on violence against women, its causes and consequences. Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27407

[5] Available at https://www.ohchr.org/sites/default/files/2022-06/Urgent-Rule39-K.N.-v-UK.docx.pdf

[6] Ground 2 (access to lawyers) addresses whether the Court was wrong to conclude that fairness does not require asylum-seeking individuals to have access to lawyers in order to make representations. Ground 3 (seven days) addresses whether a seven day period is sufficient time to give individuals the opportunity to make representations. Ground 5 (access to justice) addresses whether the Court erred in concluding that the Asylum Aid's access to justice argument falls away if its procedural fairness arguments are dismissed.

a. Whether the arrangements breach the UK's positive obligations to identify and protect victims of trafficking (*Rantsev v Cyprus and Russia*, App. No. 25965/04 [2010] 51 EHRR 1 at §§286, 296; TDT, *R (On the Application Of) v The Secretary of State for the Home Department (Rev 1)* [2018] EWCA Civ 1395 (19 June 2018) at §§80, 82); in particular owing to the need for:

   i. fair and effective protection procedures (*V.C.L. and A.N. v. United Kingdom*, Apps. No. 74603/12 and No. 77587/12, § 153; Articles 10-13 ECAT) including a fair and effective opportunity to make any or any effective representations on individualised issues, including experiences and indicators of trafficking and exploitation, and psychological and physical indicators and health;

   ii. the state to discharge the duty to identify and protect (*SM v Croatia* (2019) 68 EHRR 7 at §34), which is not to be reversed by requiring victims to self-identify, owing to well recognised barriers to disclosure and/or delayed disclosure which are severely compounded by a victim's personal situation of detention and being subject to removal (*LE v Greece,* Application 71545/12, 21 April 2016);

   iii. entitlements that potential victims have to access legal advice, lawyers and access to justice, and effective remedies, and the need to be assisted in relation to a range of matters including trafficking identification, referral, and decision-making, issues relating to detention and release on bail, safety and support under the MSVCC, the reflection and recovery period (*R (Detention Action) v Secretary of State for the Home Department* [2014] EWCA Civ 1634, [2014] 12 WLUK 538); and

   iv. sufficient time, even with lawyers, to provide instructions, disclosure and to obtain evidence, including witness and medical evidence.

b. Whether the arrangements breach the duty to put in place a fair and effective system to protect potential or confirmed victims of trafficking, including in the context of asylum procedures, in the absence of procedurally fair process for identification of status and of human rights implications to take place, where the duty to protect arises upon sufficient indicators and not at the RG stage (*Rantsev* at §287, *Chowdury & Ors v Greece*, App. No. 21884/15, judgment 30 March 2017 at §87).

15. The Special Rapporteur considers that these proposed issues arise from and add value to the grounds of appeal raised by the Appellants. The Special Rapporteur seeks to assist the Court through brief, focussed and non-duplicative written submissions (limited to a maximum of 10 pages).

16. The Special Rapporteur does not seek permission to intervene in *R (AAA & Ors) v Secretary of State for the Home Department* or *R (RM) v Secretary of State for the Home Department*, noting that the skeleton argument in *R (AAA & Ors)* at §73 adopts and support the submissions of Asylum Aid in full. We have nevertheless copied representatives of the parties in these appeals to this letter for their information.

17. As with her previous interventions, the Special Rapporteur will act responsibly and not in substance as principal party. To that end, the Special Rapporteur has instructed Counsel and solicitors with extensive experience of third party interventions at in the Court of Appeal as well as in this field.

Costs

18. The Special Rapporteur wishes to intervene on a costs-neutral basis, i.e. that she will not seek her costs from the principal parties and she invites the principal parties to confirm that they will not seek costs from her.

Next steps

19. We should be grateful if the principal parties to these judicial review proceedings would confirm by 4pm on Wednesday 1 March 2023 whether they are prepared in principle to consent to Special Rapporteur's proposed application for permission to intervene and that, if permission is granted, they will not seek costs against the Special Rapporteur.

If you have any queries, please do not hesitate to contact Maeve Hanna or Frances Beddow of this office.

Yours faithfully

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IN THE COURT OF APPEAL (CIVIL DIVISION) **CA-2023-000189**

THE KING on the application of (ASYLUM AID)

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

-and-

UNITED NATIONS SPECIAL RAPPORTEUR ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN

Proposed Intervener

WRITTEN SUBMISSIONS ON BEHALF OF THE UNITED NATIONS SPECIAL RAPPORTEUR ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN

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1. These are written submissions by the United Nations Special Rapporteur on trafficking in persons, especially women and children (the **Special Rapporteur**), in respect of AA's[1] appeal.

2. AA's grounds of appeal upon which permission has been granted pursuant to the Order of Lord Justice Lewis and Mr Justice Swift dated 17 January 2023 and the Order of Mr Justice Swift dated 26 January 2023 include the following:

   (a) Ground 1: The Court was wrong to conclude that the Migration and Economic Development Partnership (**MEDP**) is not systemically unfair.

   (b) Ground 2: The Court was wrong to conclude that fairness does not require access to a lawyer to make representations. That is in part because representations cannot effectively be made on the complex matters at issue (including trafficking) without a lawyer: see AA's CA skeleton §§19, 43 and 49.

   (c) Ground 3: The Court was wrong to conclude that seven days is enough time to make representations. That is in part because particular difficulties may arise where there is a history of trafficking; and investigations and representations must be conducted on

[1] The abbreviations used in the Appellant's skeleton argument are adopted here.

issues including trafficking indicators and National Referral Mechanism (**NRM**) referrals: see AA's CA skeleton §23(2).

(d) Ground 5: The Court was wrong to conclude, having dismissed AA's procedural fairness arguments, that five working days to bring a challenge and obtain an injunction against removal, is sufficient to give the asylum seeker effective access to justice.

3. The Special Rapporteur supports the above grounds of appeal. A summary of her submissions is as follows:

(a) Common law fairness requires that asylum seekers, prior to removal to Rwanda, have a fair and effective opportunity to make representations and put forward information about whether they should be referred to the NRM as a potential victim of trafficking.

(b) In particular, they should be able to address the indicators set out in statutory guidance about whether they are a potential victim of trafficking, and whether article 4 ECHR and the Council of Europe Convention on Action against Trafficking in Human Beings (**ECAT**) require an NRM referral. Access to early legal assistance is needed. Under the system challenged, in a significant number of cases asylum seekers will not be able to do so.

(c) Common law fairness is informed by the context, including here the statutory guidance, article 4 ECHR and ECAT. Those measures provide that the early identification of a potential victim of trafficking is of paramount importance. There must be an effective system in place to identify a potential victim, including in well-recognised cases where that person is unable to disclose what happened to them. The identification of a potential victim is complex and must ensure regard is had to a potentially wide range of factors. This will often require detailed and lengthy inquiries.

(d) The present system does not reflect that context or meet those requirements. There will inevitably be a significant number of cases in which a victim has neither the time nor support necessary to obtain and produce information about all of the relevant factors.

Statutory guidance on modern slavery

4. As AA argue, in this particular context, common law procedural fairness requires that the applicant has an effective opportunity to put forward all information and representations that are relevant to the decision at issue (*Citizens UK* [2018] 4 WLR 123, at §82). The decision at issue here is that by a First Responder (or otherwise) as to whether the asylum seeker is a potential victim of trafficking and so should be referred into the NRM. An asylum seeker must, in respect of that decision, have an effective opportunity to put forward information and representations about any of the indicators which the trafficking statutory guidance indicates should be taken into account, and representations about the relevant obligations in article 4 ECHR and ECAT.

5. The Home Office has produced the *Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015… version 3.1* (January 2023) (the **Guidance**)[2]. The 2015 Act specifically requires guidance on "*the sorts of things which indicate that a person may be a victim of slavery or human trafficking*": section 49(1)(a). Any unjustified departure from the Guidance will be potentially challengeable by way of judicial review: *R (TDT) v The Secretary of State for the Home Department* [2018] 1 WLR 492, at §25.

6. As AA argue, procedural fairness is informed by the context (*Citizens UK*, §85). The Guidance is an important part of that context. Section 49(1)(a) of the 2015 Act specifically requires guidance on indicators that a person may be a victim. This envisages that relevant officials (for example, those deciding whether to refer an asylum seeker into the NRM) who are deciding whether a person may be a victim, will have regard to those indicators. To ensure the person has a fair opportunity to participate in that important decision-making process, they should be in a position to put forward information and representations about those indicators.

7. The Guidance includes the following: "*3.6. In practice it is **not easy** to identify a potential victim – there are many different physical and psychological elements to be considered as detailed below*." (Original emphasis) The Guidance then specifies a very large range of indicators that a person may be a victim of modern slavery: §3.7-3.20 and Annex A (child victims and specific situations).

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[2] These submissions refer to the January 2023 version of the Guidance, but the version in force at the time of the decisions challenged was equivalent in relation to the matters referred to. A previous version of what became the Guidance was summarised in *TDT*, §26-33.

8. The Guidance states: "*Victims may not be aware that they have been exploited or may be unwilling to self-identify for another reason*." §6.2. Annex D, states, inter alia: "*13.1. Victims' early accounts may be affected by the impact of trauma. This can result in delayed disclosure, difficulty recalling facts, or symptoms of post-traumatic stress disorder… 13.11. Victims of modern slavery may initially be unwilling to disclose details of their experience or identify themselves as a victim for a variety of reasons. These reasons include, but are not limited to…*". Annex D then sets out a number of reasons why a victim may initially be unwilling to disclose, which include the mental health impacts of trafficking, fear of reprisals or distrust of the authorities. Further detail of the real barriers to disclosure is set out at §13.18-13.24.

9. In such cases, an effective identification process will require external input. For example, medical and psychological input will be required to properly explore whether the physical or psychological indicators at §3.16-3.17 are present. External input, from a lawyer or other representative, is likely to be necessary to obtain evidence of situational or other indicators of trafficking identified at §3.18-3.20 and Annex A. Examples are objective evidence of abusive working or living conditions or of substandard accommodation (§3.10, 3.19 and 10.4-10.5). In many cases, to obtain objective evidence of the relevant factors which the Guidance says should be considered will take time, for example, to visit and obtain records about the work and accommodation.

10. In summary, the Guidance indicates that the identification of a victim of trafficking is complex, may take time and may require external support, including from a lawyer. Firstly, there are many potential indicators of trafficking, which should be investigated and considered. Secondly, the victim may not self-identify or be unable to disclose what happened to them.

11. The process set out in the Guidance includes the following. First, a First Responder is expected to identify potential victims of modern slavery, gather information in order to understand what has happened to them, and refer victims into the NRM: §4.7 and 12.42. A person identified as a potential victim is then referred into the NRM.

12. Thereafter, a Competent Authority decides whether there are reasonable grounds to believe that the person is a victim of modern slavery. In making that decision: "*A decision maker must base their decision on objective factors to have real suspicion and therefore meet the RG threshold... Ordinarily, a victim's own account, by itself, would not be sufficient absent objective factors to have real suspicion*" (§14.52). "*The most useful objective factors*

(information or evidence) … includes, but is not limited to, information provided by First Responders based on observable fact, medical or expert reports, and Police reports" (§14.54). Thus, the information provided by the First Responder is likely to be of real importance at later stages of the NRM, including in respect of the reasonable grounds decision, particularly where the victim is unable to provide an account.

13. If a positive reasonable grounds decision is made, it appears that inadmissibility action is paused: Divisional Court's judgment §85 and 129.

14. The obligations relating to the early identification of a victim of trafficking or modern slavery set out above relate to the period *before* a decision is made as to whether or not to refer the person to the NRM. Those obligations need to be satisfied, regardless of the protections that are in place *after* that decision has been made.[3] The initial identification at this stage is "*of paramount importance*" (see below). That is in part because later NRM decisions, such as the reasonable grounds decision, are heavily based on evidence obtained at this stage. But more importantly, if the victim is not identified in the 7 (or 14) day period prior to removal, they will irreversibly lose all of the legal protections guaranteed by the ECHR and domestic law set out herein. Those protections will not be guaranteed in Rwanda. §14 of the MOU does not contain a binding requirement that Rwanda must satisfy the Respondent's legal obligations identified above, and §14 is not effectively enforceable in Rwanda.

ECHR article 4 and ECAT

15. As noted above, the asylum seeker must have a fair and effective opportunity to put forward information and make representations about whether a referral should be made to the NRM on the basis that they are a potential victim of trafficking. Article 4 read with ECAT may require a referral, and the asylum seeker must have a fair opportunity to make representations that they do. They are relevant to the common law fairness issues on this appeal for two other reasons. Firstly, as the Respondent accepts, it would be an error of law if the NRM guidance (which is set out above) does not accurately reflect the requirements of ECAT: *MS (Pakistan) v SSHD* [2020] 1 WLR 1383 (SC) §20. Secondly, common law fairness can be expected to reflect the requirements of the ECHR (*R (Osborn) v Parole Board* [2014] AC 1115, §61-63).

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3 The lawfulness of the process after an asylum seeker has been found to be a victim of trafficking is not at issue in this case, and the Special Rapporteur reserves her position on that matter.

16. The European Court of Human Rights (**ECtHR**) has recognised that, to effectively combat trafficking: "*member states are required [by article 4 ECHR] to adopt a comprehensive approach… states must, firstly, assume responsibility for putting in place a legislative and administrative framework providing real and effective protection of the rights of victims of human trafficking…*": *Chowdury v Greece* App. No. 21884, 30 March 2017 §87.

17. The state's positive obligations under article 4 of the ECHR include "*facilitating the identification of victims by qualified persons*": *VCL and AN v United Kingdom* (2021) 73 EHRR 9, §153. The "*early identification is of paramount importance*" *ibid* §160. This is in part because the duty to facilitate identification in article 4 must be interpreted and applied so as to make its safeguards practical and effective (*SM v Croatia* (2021) 72 EHRR 1, §295).

18. The ECtHR has emphasised that there "*may be different reasons why victims of human trafficking … may be reluctant to cooperate with the authorities and to disclose all the details of the case. Moreover, the possible impact of psychological trauma must be taken into account. There is thus a risk of overreliance on the victim's testimony alone, which leads to the necessity to clarify and – if appropriate – support the victim's statement with other evidence.*": *SM v Croatia*, §344 (relying on the Council of Europe Group of Experts on Action Against Trafficking in Human Beings, **GRETA**). Another reason why the victim may be unable to disclose what happened, may be that a victim who has been detained may well remain under the influence of their traffickers: *TDT,* §82. Victims may "*not be aware that they have been trafficked, or … may be too afraid to disclose this information to the authorities … Consequently, they cannot be required to self-identify or be penalised for failing to do so*" (*VCL and AN v United Kingdom,* §199).

19. ECAT states, in article 10: "*(1) Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims… so that victims can be identified in a procedure duly taking into account the special situation of women and child victims… (2) Each Party shall adopt such legislative or other measures as may be necessary to identify victims…*"

20. The explanatory report to ECAT explains at §127: "*Identification of victims is crucial, is often tricky and necessitates detailed enquiries*". Further, the competent authorities involved in the identification process must have "*trained, qualified people so that victims can be identified*": §130.

21. ECAT has not been directly incorporated into domestic law. But it is nevertheless relevant to common law fairness that is at issue here. That is in part for the reasons in §4 and 14 above. Statutory guidance must reflect the requirements of ECAT (*MS (Pakistan)).* Moreover, the ECtHR has held that it is guided by ECAT in this context, and that the positive obligations in article 4 ECHR must be construed in light of ECAT: *VCL and AN v United Kingdom* §150 and 160. Similarly, the explanatory report to ECAT is relied on by the ECtHR to interpret the obligations under article 4: e.g. *SM v Croatia* §163, and has been relied on domestically in construing the scope of the UK's obligations to victims of trafficking under ECAT: *R (PK (Ghana)) v SSHD* [2018] 1 WLR 3955, §60.

22. The ECtHR's approach to article 4 is also guided by the manner in which ECAT has been interpreted by GRETA (which is the monitoring body for ECAT): *VCL and AN v United Kingdom,* §104. In that case the ECtHR relied on §94 of GRETA's Fifth General Report, at §44.

23. GRETA's Fifth General Report noted "*Victim identification is a process that takes time*…" (§94). "*Due to their 'complex nature', claims based on the harms of human trafficking are particularly unsuited to accelerated processing and may limit the likelihood of identification of victims.*" (§116). As to expedited removal procedures: "*One problem with these is that, by their very nature, they allow only limited time to assess each individual case. There may not be enough time to identify the trafficked person*." (§125).

24. Similarly, GRETA's *Guidance Note on the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection (2020)* states: "*Access to fair and efficient asylum procedures, early legal counselling and specialised assistance in accordance with article 12 of the Convention is essential if victims of trafficking are to be enabled to present an asylum claim effectively. ... Given the complex nature of the crime of trafficking, and the trauma endured by victims or presumed victims of trafficking, such asylum claims require an examination on their merits in regular procedures. Therefore, claims based on the harms associated with human trafficking are particularly unsuited to accelerated processing and may impede identification of victims*" (§38).

25. GRETA's *Evaluation Report on the United Kingdom, Third Evaluation Round, Access to justice and effective remedies for victims of trafficking in human beings (2021)* urged UK authorities to "*ensure that victims, and in particular children, receive legal assistance during the identification process… before entering the NRM*." (page 4). It explained: "*The great*

impact of a negative decision further highlights the crucial role of legal assistance during the victim identification process" (§87).

26. Finally, the office of the Special Rapporteur has made observations consistent with what is set out above as a matter of their personal expertise. For example, the report of the Special Rapporteur dated 14 May 2018 (A/HRC/38/45) states at §9 "*victims often do not come forward at first contact with assistance providers, much less at first contact with law enforcement authorities, especially when they have suffered severe forms of exploitation. Identification is possible when a safe space and a relationship of trust have been created to allow victims to share a traumatizing experience. It is therefore difficult to successfully identify victims of trafficking at arrival areas…*".

Systemic unfairness

27. In grounds 1-3 and 5, AA submits that the MEDP is systemically unfair, and 7 days is not sufficient in all cases to make representations, or 5 days for judicial review is inadequate. The requirements relating to trafficking set out above support those submissions. In particular:

    (a) A significant number of asylum seekers will not, under the scheme, have a fair opportunity to put forward all relevant information and make representations about all relevant matters. That is firstly because the indicators of trafficking are often complex and there are many different elements and indicators which should be considered in the initial identification of a victim (Guidance). The matters which should be considered include objective evidence of the asylum seeker's circumstances, such as of their work and/or accommodation. It will often take more than 7 days to visit those places and obtain the necessary objective evidence, particularly when the asylum seeker's ability to do so is impeded because they are in detention.

    (b) Secondly, it is well-recognised that where the asylum seeker is unable or unwilling to disclose what happened to them, it will be necessary for an external person to be appointed to obtain objective evidence of all of the relevant matters. There is no such person who will be appointed under the scheme, including a lawyer. Even if there was, and even if that person is appointed before the end of the 7 day period, it is highly unlikely they will have time to obtain the objective evidence which the guidance says should be considered. For example, it is highly unlikely they will be able to obtain medical and psychological evidence, to visit the asylum seeker's work and

accommodation, to establish the relevant facts and obtain the relevant records. It is inevitable that in many cases the system will not give the asylum seeker a fair opportunity to produce information and make representations about all of those matters.

(c) Under the MEDP, the screening interview question regarding exploitation (Q.2.5), does not ensure that the applicant has a fair opportunity to provide all relevant information and make representations about all of the relevant legal issues at stake. The screening question is far too narrow to address the range of types of exploitation identified in the Statutory Guidance (MacPherson §28 [SB76]). It depends on the victim self-disclosing all of the relevant circumstances, whereas the Guidance and other law set out above makes clear that in a number of cases the victim will be unable to do so (see also *SM v Croatia* at §344; MacPherson §30 [SB77]; Schleicher §44 [SB149]). That simple question cannot discharge the positive obligations on the State under article 4 ECHR and article 10 ECAT.

(d) Trafficking issues must be taken together with the other myriad of complex issues upon which the asylum seeker may need to provide information and representations. When that is done, the above matters make clear that in a significant number of cases it is inevitable that an asylum seeker will not have the time and the support from a lawyer to be able to put forward all of the relevant information and to make effective representations.

6 March 2023

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