Neutral Citation Number: [2025] EWHC 774 (Admin)

Case No: AC-2024-LON-002263
AC-2024-LON-001929

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/04/2025

Before :

MR JUSTICE CALVER

- -

Between :

THE KING
(On the application of)

(1) HJK
(2) PLJ
(3) JNB
(4) DSR — **Claimants**

- and -

THE DIRECTOR OF LEGAL AID CASEWORK — **Defendant**

- and -

CRIMINAL INJURIES COMPENSATION AUTHORITY

Intervener

- -
- -

Shu Shin Luh and Maria Moodie (instructed by **the Anti Trafficking and Labour Exploitation Unit (ATLEU)**) for the **Claimants**
Malcolm Birdling (instructed by **the Government Legal Department**) for the **Defendant**
Ben Collins KC (instructed by **the Government Legal Department**) for the **Intervener**

Hearing dates: 5-6 March 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on Tuesday 01 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Calver:

INTRODUCTION

1. The Criminal Injuries Compensation Scheme ("**CICS"**) is a statutory scheme created by the Secretary of State for Justice (pursuant to the Criminal Injuries Compensation Act 1995) to compensate victims for their injuries sustained as a result of 'crimes of violence'. The Criminal Injuries Compensation Authority ("**CICA"**) is the executive agency responsible for administering the CICS. As a result of the 2012 CICS, compensation was extended to victims of human trafficking and modern slavery (provided that the applicant satisfied certain conditions set out in those rules).

2. HJK (C1), PLJ (C2), JNB (C3) and DSR (C4) ("**the Claimants**")[1] are victims of trafficking and modern slavery who were brought to the UK for the purposes of sexual and labour exploitation. They suffered repeated physical and sexual violence and

[1] On 18 February 2025 this Court made an Order granting the Claimants' applications for anonymity.

psychological abuse at the hands of their traffickers (who remain at large) before escaping. Unsurprisingly, they have been traumatised by their ordeal.

3. The Claimants were not informed of their right to apply for compensation under the CICS until well after the two-year time limit for making such an application had expired in their respective cases. As discussed below, in those circumstances the CICS confers a discretionary power upon claims officers to grant an extension of time to applicants, subject to various conditions.

4. The Anti-Trafficking and Labour Exploitation Unit ("ATLEU") applied on behalf of the Claimants to the Director of Legal Aid Casework ("**the Defendant**") for Exceptional Case Funding ("**ECF**") pursuant to s. 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("**LASPO**"), for the purpose of obtaining legal advice and assistance in order to apply for compensation from CICA[2]. The Claimants' ECF applications were originally refused between November 2023 and January 2024 ("**the original decisions**"). Following requests for reviews by the Claimants, the Defendant upheld the refusals in March 2024 ("**the First Refusals**"), on the basis that (a) no rights under the European Convention on Human Rights ("**ECHR**") were engaged so as to require the exercise of s. 10 LASPO to grant ECF; and (b) in any event, an application for compensation to CICA is so straightforward that the denial of legal aid would not adversely affect the Claimants.

5. Following the Claimants' decision to issue these proceedings, the Defendant decided to withdraw and remake the ECF decisions, which she did in August 2024. However, she maintained her refusal of the applications ("**the Second Refusals**") on essentially the same grounds as the First Refusals, although she now accepted that an application for compensation under the CICS did involve the determination of a civil right and thus engaged Article 6 ECHR. She nevertheless determined that the refusal of ECF would neither breach nor risk breaching that right.

6. By this claim, the Claimants challenge the Second Refusals on the basis that they are unlawful and/or irrational, on the following grounds:

[2] On 17 October 2023 (C1); 18 December 2023 (C2); 2 January 2024 (C3) and 27 September 2023 (C4).

(a) **Ground 1:** The Defendant erred in holding that the Claimants' Article 6 ECHR rights were not breached/at risk of being breached;

(b) **Grounds 2 and 3:** The Defendant erred in holding that the Claimants' Article 4 and 8 ECHR rights were not engaged (and had it done so, it ought to have found that those rights were breached/at risk of being breached); and

(c) **Ground 4:** The Defendant's (continued) denial of ECF funding amounts to a breach of the Claimants' Article 4 and/or 8 ECHR rights.

THE LEGISLATIVE AND PROCEDURAL FRAMEWORK

The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012

7. The provision of civil and criminal legal aid funding in England and Wales is governed by LASPO. Section 4(1) of LASPO provides for the creation of the office of Director of Legal Aid Casework, whose role is to make 'determinations' in relation to applications for civil legal aid. In doing so, the Defendant is required to have regard to any guidance given by the Lord Chancellor (s. 4(3)(b) LASPO). The relevant guidance is the *Lord Chancellor's Exceptional Funding Guidance (Non Inquests)* (July 2023) ("**the Lord Chancellor's Guidance**").

8. Section 9 of LASPO provides that civil legal aid is generally available to individuals if the services are '*in scope*', i.e., if they are '*described in*' Part 1, Schedule 1 to LASPO. Although certain legal services for the benefit of trafficking victims are in scope, assistance with applications under the CICS are not within scope (see paragraph 16 of Part 2, Sch. 1). Consequently, legal aid for the purpose of making an application for compensation under the CICS may only be provided by way of the ECF mechanism, as set out in s. 10 LASPO.

9. Insofar as relevant, s. 10 LASPO provides:

> *"10. Exceptional cases*
>
> *(1) Civil legal services other than services described in Part 1 of Schedule 1 are to be available to an individual under this Part if subsection (2) … is satisfied.*

(2) This subsection is satisfied where the Director—

(a) has made an exceptional case determination in relation to the individual and the services, and

(b) has determined that the individual qualifies for the services in accordance with this Part,

(and has not withdrawn either determination).

(3) For the purposes of subsection (2), an exceptional case determination is a determination—

(a) that it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of—

(i) the individual's Convention rights (within the meaning of the Human Rights Act 1998) …

(b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach".

10. Accordingly, s. 10(2) requires the Defendant to make two separate determinations: first, an 'exceptional case determination' pursuant to the criteria in subsection (3); and second, a determination that the applicant qualifies for the services in accordance with the 'means' and 'merits' tests prescribed in ss. 21 and 11 of LASPO respectively.

11. Guidance on the correct approach to be applied to the section 10(3) criteria was provided by the Court of Appeal in *R (Gudanavicine) v Director of Legal Aid Casework* [2015] 1 WLR 2247 as follows:

(a) As a starting point, although s. 10 LASPO is headed "exceptional cases", the test is not exceptionality. Thus, decisions to grant ECF are not assumed to be rare (§§29, 44, 76).

(b) Under section 10(3)(a), the Director had to determine whether a denial of legal aid would be a breach of an individual's Convention rights. However, the application of the case law as to Convention rights is not "hard-edged" and this

requires an assessment of the likely shape of the proposed litigation and the individual's ability to have effective access to justice in relation to it (at §32).

(c) Under section 10(3)(b), the Director had to consider whether there was any risk of a breach of Convention rights and take that risk into account when deciding whether it would be appropriate to make a determination. At this stage of the analysis, the Director can take into account all the circumstances of the case (at §32).

(d) As to Article 6(1) ECHR, the Court acknowledged that "*the cases demonstrate that article 6(1) does not require civil legal aid in most or even many cases. It all depends on the circumstances.*" The critical question was "*whether an unrepresented litigant is able to present his case effectively and without obvious unfairness*". Accordingly, "*the greater the complexity of the procedural rules and/or the substantive legal issues, the more important what is at stake and the less able the applicant may be to cope with the stress, demands and complexity of the proceedings, the more likely it is that article 6(1) will require the provision of legal services (subject always to any reasonable merits and means test)*" (at §56).

(e) Thus, whether legal aid is required will depend on the particular facts and circumstances of each case, including (i) the importance of the issues at stake; (ii) the complexity of the procedural, legal and evidential issues; and (iii) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity (§72) [3].

12. *Gudanavicine* was considered by this Court in *R (Alhasan) v Director of Legal Aid Casework* [2024] EWHC 2031 (Admin), in which Fordham J summarised the standard of review to be applied in challenges to ECF decisions:

> "*67. …[T]he first limb (s.10(3)(a)) engages an objective correctness standard of review; whereas the second limb (s.10(3)(b)) engages a reasonableness standard of review. This two-tiered approach reflects the nature and structure of the questions; and finds support in Gudanaviciene §§90-91, 123;*

[3] Section 3A of the Lord Chancellor's Guidance (in [13] below) is based upon this analysis.

> *Thompson v Director of Legal Aid Casework [2017] EWHC 230 (Admin) [2017] 1 Costs LR 163 at §§23, 34, 37; and Oji at §29.*
>
> *71. …The question [under the First Limb] is not whether the Claimant's position would have been "improved by representation", which "will very often be the case" (Thompson §34). The question is whether the circumstances fell below a line of inability to participate effectively in the administrative asylum proceedings without obvious unfairness, having regard to the process as a whole and all the circumstances…*"

13. While making clear that each case falls to be determined on its own individual facts, paragraph 1.1 of the Lord Chancellor's Guidance (to which the Defendant must have regard) sets out, under the heading '*3A. The right to legal aid under the ECHR*', the following questions to guide caseworkers' consideration when making a determination under section 10(3):

    (a) How important are the issues at stake?

    (b) How complex are the procedures, the area of law or the evidence in question?

    (c) How capable is the applicant of presenting their case effectively?

14. An applicant for ECF has the right to apply for a review of a decision taken in relation to it under reg. 69 of the Civil Legal Aid (Procedure) Regulations 2012.

The ECF application process

15. Before turning to consider the framework for applying for compensation under the CICS, it is necessary briefly to consider the process for applying to the Defendant for ECF.

16. The ECF application form is 14 pages long and is divided into two parts. Part A is entitled '*Applicant and case details*' and Part B is entitled '*Providers only*'. For the purposes of this claim the court is concerned only with Part A. The first page of Part A requires the applicant to provide their contact details and date of birth. The remaining pages in that part are large boxes inviting paragraph-style answers, although the form notes that it is only necessary to provide this information where "*you have not already*

included it in the other forms or documents that you are supplying". An applicant is required to provide information in response to the following:

> "*Tell us briefly about the case, how complex it is (and if you know it, the area of law it relates to).*
>
> "*Why are the issues in the case important for you?*
>
> "*Tell us what you must do to present the case.*
>
> *You may also include information about your education or relevant skills/experience and any relevant disability or capacity issues (attaching a copy of any incapacity certificate where available).*
>
> *"Tell us any extra information you think is relevant."*

17. It is easy to see how a person suffering from trauma, with limited English literacy, would find it difficult to provide coherent or indeed any answers to these questions without assistance.

The Criminal Injuries Compensation Scheme (CICS) 2012

18. The CICS was created by the Secretary of State for Justice pursuant to s. 11(1) of the Criminal Injuries Compensation Act 1995. Its purpose is to compensate individuals who have sustained injuries "*directly attributable to their being a direct victim of a crime of violence*": paragraph 4 of and Annex B (paragraph 1) to the CICS. Paragraphs 2-3 of Annex B define a 'crime of violence' as including acts of violence such as physical attacks (paragraph 2(a)) and sexual assaults to which a person did not in fact consent (paragraph 2(d)), as well as "*threats against a person causing fear of immediate violence in circumstances which would cause a person of reasonable firmness to be put in such fear"* (paragraph 2(c)), and "*any other act or omission of a violent nature which causes physical injury to a person"* (paragraph 2(b)).

19. Trafficking is not considered a crime of violence *per se*; instead, the Claimants are required to show that during the course of their time being trafficked, they suffered injuries as a result of (at least one of) the types of acts described above.

20. In addition to meeting the 'crime of violence' requirement, applicants are also required to satisfy other eligibility conditions. These include:

    (a) **residence** (paragraph 10): the applicant must be (a) "ordinarily resident" in the UK on the date of the incident giving rise to the criminal injury, or (b) a British citizen, a national of the EU or the EEA, a member of the armed forces (paragraph 11(a)-(g)); (c) an asylum seeker (paragraph 10(c) and 13) who has had their claim granted (paragraph 15); or (d) *a person who has been referred to the National Referral Mechanism for identification as a victim of human trafficking (rule 10(c) and 13) and been conclusively identified as such* (paragraph 15) (emphasis added);

    (b) **reporting the crime to the police as soon as reasonably practicable** (rule 22);

    (c) **cooperating as far as is reasonably practicable to bring the assailant to justice** (paragraph 23);

    (d) **cooperating with the claims officer or other body or person in the course of the determination of their compensation application** (paragraph 24).

21. An application for compensation *"must"* be made using the form specified by CICA (paragraph 91), which is available online and also in hard copy (available on request from CICA)[4]. The application form is only available in English or Welsh.

22. CICA has published a digital guide to assist applicants with the CICS compensation application process ("**the Digital Guide**"). The Digital Guide is 31 pages long and again is only available in the English and Welsh languages. It is intended to be broadly accessible to any person reading it, but they must obviously be able to read English or Welsh. It contains the CICA support telephone number.

23. The other publicly available document for applicants under the scheme is CICA's Customer Charter ("**the Charter**"), which is available online on their website. That

[4] Applications can also be made over the telephone and captured using the online application service.

document sets out the rights and responsibilities of anyone applying for compensation under the CICS. Section 4 of the Charter provides as follows:

> "***4. Ease of access***
>
> *We will:*
>
> - *publish a guide to claiming compensation on our website.*
> - *provide an efficient and simple to use online application system and a telephony helpline service for those who need support.*
> - *respect your preferred method of contact, support special communication needs and provide foreign language support, where possible (including information and application forms in Welsh if you ask us).*"

In his witness statement served on behalf of CICA, Mr McMahon suggests that it is clear from the quoted section above that applicants are invited to make contact with CICA if they require support to complete an online application, and also to advise them of any issues they may have which make communicating difficult.

24. CICS paragraph 92 provides that the applicant "*must provide*" such information in connection with their application as the claims officer may reasonably require, in particular:

(a) evidence that the applicant satisfies the requirements of paragraph 10 (above) in relation to eligibility;

(b) medical evidence in relation to the injury giving rise to the application;

(c) where the application includes a claim for a payment other than an injury payment, evidence in support of that part of the application; and

(d) such information as the applicant has, or which is reasonably available to them, in relation to their eligibility for a payment from any other source in relation to the injury or other losses to which their application under this Scheme relates.

25. Consistently with this, in a section entitled '*Evidence*', the Digital Guide distinguishes between what applicants will need to provide, and what inquiries CICA will themselves undertake:

> *"You will need to provide us with the evidence necessary to decide your case. In particular, we may ask you to provide the following evidence:*
> - *proof that you meet the residency requirements;*
> - *medical evidence that shows you suffered an injury that can be compensated under the Scheme;*
> - *evidence to support a claim for loss of earnings or special expenses;*
>
> *We will collect the following information before we ask you to obtain medical evidence:*
> - *confirmation from the police that the incident in which you were injured was reported to the police;*
> - *confirmation from the police that your behaviour did not contribute to the incident in which your injuries were received;*
> - *confirmation from the police that you co-operated with them;*
> - *evidence from the police about your criminal record, should you have one"*

26. Paragraph 94(a) provides that CICA will only meet the reasonable costs of obtaining the medical evidence concerning the injury if the claims officer is satisfied that (i) the applicant cannot reasonably obtain that information but CICA can; and (ii) the applicant cannot afford to obtain it; or (iii) the cost of obtaining it exceeds £50.

27. It may also be necessary (as in cases such as the present) for an applicant to adduce medical evidence not only concerning their injuries but also to explain why they are unable to conduct the application themselves. As to that, CICA has drawn up internal guidance for its claims officers in determining applications for compensation ("**CICA's Internal Guidance**"), and in respect of rule 92 it is stated that:

> *"The applicant must provide us with information we need to progress and decide their application, in particular:…*
>
> *Medical evidence about the injury they are claiming for …*
>
> *Where medical evidence is required to determine whether or not an applicant has the capacity to conduct an application themselves or instruct a representative to*

> *do so it is the responsibility of the applicant/representative to obtain such evidence. We will not normally meet any costs associated with this.*
>
> *It is the applicant's responsibility to provide evidence in a format that we can use. If an applicant provides medical or other evidence in a foreign language you should ask that the applicant provide a translation or suitable alternative evidence. We will not normally meet the costs of translating such evidence. However, if you consider it is necessary to have a translation of the evidence and there are exceptional circumstances why we, rather than the applicant, should meet the cost of obtaining it, you should arrange this."* (emphasis added)

28. Consistently with this, under a section in the Digital Guide entitled '*Your obligations*', the guide explains applicants' obligations under paragraphs 91-92 in making their application. It then provides:

> *"You are required to help us as far as reasonably practicable with your application. This may include providing any documentation which you can reasonably be expected to obtain and attending a medical examination arranged to support the assessment of an injury.*
>
> *Normally you will be required to provide evidence in support of your claim in a format that can be used by us. If you provide us with an application, medical or other evidence in a foreign language we will ask you to provide a translation or suitable alternative evidence. We will not normally meet the costs of translating such evidence. However, if we consider it necessary to have a translation of the evidence and there are exceptional circumstances which mean you are unable to meet the cost of obtaining it, we may arrange this for you."* (emphasis added)

The Digital Guide accordingly emphasises the burden upon the applicant to provide evidence in support of the application (including medical evidence as to their injuries and their inability to conduct the application themselves) which is normally at their cost, including in respect of any required translations, unless '*exceptional circumstances*' obtain. Mr Ben Collins KC (who appeared on behalf of CICA as intervener[5]) stated that CICA *can* provide translation and interpretation services upon request by applicants, but in order to do so, applicants will, however, first need to make that request through the CICA telephone helpline, and it can be seen that exceptional circumstances must be shown to subsist.

[5] Pursuant to the order of Sir Peter Lane dated 18 February 2025.

29. The Internal Guidance and Digital Guide are consistent with paragraph 93 of the CICS which generally provides that CICA will '*not normally*' meet any costs incurred by the applicant in connection with an application under the scheme, particularly the costs of legal or other representation (paragraph 93). Indeed, it is this prohibition which has caused the Claimants to apply for ECF.

30. Yet further, paragraph 87 of CICS requires that an application *"must be sent"* to CICA *"as soon as reasonably practicable"* after the incident giving rise to the criminal injury, and in any event *"within 2 years"* of the date of the incident. Annex A ('Interpretation') to the CICS provides that "*in the case of a series of incidents, a reference to the date of the incident means the date of the first incident in the series.*"

31. The requirement in paragraph 87 is easily applicable in the case of an isolated incident, such as a singular assault committed upon a victim. However, in cases such as trafficking or physical or sexual abuse, where the wrongdoing repeatedly occurs over a prolonged period, the Annex A definition is potentially problematic, since the victim may still be subject to the trafficking/abuse by the time the two-year limit has expired in respect of that first incident. Moreover, even after their rescue or escape, victims are frequently traumatised, making it difficult or impossible for them to recount their experiences and apply in time.

32. If the applicant fails to comply with the two-year time limit (as in the case of these Claimants), relief can only be found in the form of paragraph 89 of CICS, which gives the claims officer a discretion to extend the time limit, but only if the officer *"is satisfied that"*:

> (a) due to *"exceptional circumstances"* the applicant could not have applied earlier; and
>
> (b) the evidence *"presented in support of the application"* means that it can be determined without further '*extensive enquiries*' by a claims officer.

33. Under the heading '*Time limits for applying*', the Digital Guide makes reference to the two requirements under paragraphs 87 and 89 for out-of-time applications:

> *"You must apply as soon as it is reasonably practicable for you to do so. If you were an adult at the time of the incident, this should normally not be later than two years after it occurred. We can only extend this time limit where:*
>
> - *due to exceptional circumstances an application could not have been made earlier; and*
> - *the evidence provided in support of the application means that it can be determined without further extensive enquiries by a claims officer.*
>
> *… If you wish us to consider your application more than two years from the date of the incident you will need to provide us with evidence that shows why this application could not have been made earlier. You must also be able to provide supporting evidence for your claim that means that the claims officer can make a decision without further extensive enquiries."*

34. The Guide therefore emphasises the burden placed upon the applicant in an out-of-time application to provide both (i) reasons and supporting evidence as to why the application could not have been made earlier[6] and (ii) evidence in support of the claim, which means that the claims officer can make a decision without having to make further extensive enquiries.

35. In CICA's Internal Guidance, there is guidance as to how claims officers should approach the question of whether to exercise their discretionary power to extend the two-year time limit:

> *"(i) Exceptional circumstances – Paragraph 89(a)*
>
> *Exceptional circumstances involve something out of the ordinary. <u>They must explain the whole period of the delay, not just the reasons why an application was not made within the two year period. In practice, if an application could have been made at any date earlier than the date on which it was made, it should not be admitted.</u> You must consider all the circumstances of the particular case in deciding whether there are exceptional circumstances which mean the application could not have been made sooner. Some matters you should consider include:*
>
> *Whether the applicant was physically or mentally incapable of making an application. You should take into account what the applicant was able, or unable, to do during the period between the incident and the application being received.*

[6] There is no explanation as to what constitutes "*exceptional circumstances*" for this purpose.

(…)

The length of the delay. In general the longer the period of delay the stronger you should expect the applicant's reasons for the delay to be. However, a case for extension can still be made out even after a very lengthy delay.

Exceptional circumstances are more likely to exist in cases involving sexual abuse, especially where the applicant was a child at the time of the offence. This is because the silence of the victim, and ongoing psychological and emotional trauma, are well known to be direct consequences of such crimes. These effects continue into adulthood.

(ii) Further extensive enquiries – Paragraph 89(b)

It is the applicant's responsibility to explain why their application was not made within the time limit and to provide the evidence necessary to support the application. It is for you to decide if the applicant has provided sufficient information to allow the application to be determined.

If you decide the applicant has not provided sufficient information to allow the application to be determined you should reject it unless you are satisfied that any further enquiries necessary to determine the application will not be extensive[7]*. The assessment of this will depend upon the particular circumstances of the case and the evidence presented by the applicant. Some factors you should consider include:*

The number of enquiries that are likely to be needed.
How long will it take to make the enquiries?
How much will it cost to make the enquiries?
How complex are the enquiries likely to be?
How much time has passed between the incident and the application? The more time that has passed the less likely it may be that supporting information will be available and the more difficult it may be to obtain the information.

(iii) Discretion under Paragraph 89

[7] Although it is ultimately a matter for the claims officer's judgment whether or not to seek additional information, Mr Collins KC asserted (on instructions) that those routine enquiries which would be carried out on the part of the CICA in respect of an application under the CICS (such as to the police) would not be considered to be '*extensive*'.

> *Where Paragraphs 89(a) and (b) are satisfied you still have discretion which allows you to refuse to extend the time limit. However, once 89(a) and (b) are satisfied, you must have good reasons not to extend the time limit.*
>
> *If there is evidence that the claim would fail under another paragraph of the Scheme then you should refuse to extend the time limit even where paragraphs 89(a) and (b) are satisfied. In this case extending the time limit would be meaningless because the application would fail anyway. The reason for not extending the time limit should be clearly explained to the applicant and a formal decision on the other eligibility issues should be made."*
>
> (emphasis added)

36. It can be seen that applying for an extension of the two-year time limit is likely to prove to be a burdensome task for a trafficked applicant, and almost certainly requiring legal assistance.

37. Where an application made out of time is refused (i.e., the claims officer decides not to exercise their discretionary power to extend the time limit), the applicant may apply for a review of that decision pursuant to paragraph 117(e) CICS. Paragraph 119 provides that an application for review must, likewise, "*be made in writing and accompanied by the grounds on which review is sought and any supporting evidence*". The written grounds and supporting evidence must be received by CICA within 56 days of the written notice of the impugned decision.

38. If the applicant is dissatisfied with the outcome of the review, they have a right of appeal to the First-tier Tribunal in accordance with paragraph 125 CICS.

BACKGROUND FACTS

The personal circumstances of the individual Claimants

39. I shall next summarise the personal circumstances of these individual Claimants, whose witness statements I have read in full. Their stories are harrowing.

HJK

40. HJK is an Austrian national born in Cameroon who was trafficked to the UK in 2017 for the purposes of domestic servitude and forced labour. She had been brought to the

UK by a man she had believed to be her friend. Her passport was taken away from her; her movements were controlled; and she was forced to clean and cook for the man and his associates without pay. She was raped on almost a weekly basis. She was also subject to other physical violence, threats of serious harm and death, and suffered multiple physical injuries, including a suspected broken wrist. She reported her situation to the police and was rescued on 4 May 2020. Although she cooperated with the police into the investigation, a decision was subsequently made on 7 October 2020 to close the investigation into her trafficker and his associates, and no further action has since been taken in her case.

41. As a result of her experiences, HJK was diagnosed with PTSD (which causes her to become confused and have memory problems) and paranoid schizophrenia, and has ongoing anxiety and fear. She has been diagnosed with learning difficulties. HJK did not receive any formal education and has difficulty reading and writing English and still requires a French interpreter. She considers that even if the application form were translated into French, she would still have difficulties completing it, and in understanding the CICS. She struggles to deal with paperwork generally and requires the assistance of her daughter to book appointments or go anywhere.

42. HJK continues to be affected mentally by the exercise of recounting her experiences being trafficked and would therefore face considerable difficulty in expressing these experiences in detail in written format. In preparing for HJK's anonymity application in these proceedings, Ms Duncan-Bosu (of ATLEU) required eight meetings with her simply to take instructions and work on her witness statement. Although HJK accepts that she might in theory be able to request her daughter's assistance to fill out the application form, she quite understandably has no wish to reveal the full extent of her trafficking experience to her young child.

43. HJK explained in her witness statement that she intends to use the CICS compensation to "*change [her] life and begin to move on from what happened*". The compensation would go towards paying rent on a home, thereby allowing her to move out of the room in which she has been living.

44. HJK is currently residing lawfully in the UK as an EU national. Having been referred to the National Referral Mechanism (the UK's formal victim identification process),

the Home Office has issued a decision recognising that there are reasonable grounds to believe HJK is a victim of trafficking. The Defendant has also previously accepted that she would be financially eligible for legal aid if an exceptional case determination was made in her favour.

PLJ

45. PLJ is an Albanian national who was trafficked to the UK in October 2015 by a man she believed was her fiancé for the purposes of domestic servitude and forced labour. For a period of six months, she was forced to clean and cook for him and his associates, without pay. Her freedom of movement was restricted. She was also subjected to physical violence (including being strangled and having her head banged against the wall), threats of serious harm and death, and was repeatedly and violently raped and subjected to sexual violence. She managed to escape in April 2016. In November 2016, she was arrested for an unrelated incident but the investigation into her was dropped. During the investigation, she informed the police about her history of being trafficked, and she was subsequently referred to the NRM.

46. PLJ has been diagnosed with PTSD, depression, anxiety and panic attacks with low mood, manifesting in low self-esteem, suicidal ideation, self-harm, and avoidance of her past traumatic experiences. It is said that she is too fragile to engage in therapy as treatment. Her English proficiency is also not good enough to read and complete formal documents without assistance. She considers that she would struggle to understand the CICS and complete the CICA application form as she finds it too difficult to explain what happened to her and put this in writing. This is supported by Ms Duncan-Bosu's evidence, where she recounts that in making the anonymity application for PLJ, she required six meetings to finalise her witness statement.

47. Although PLJ has a partner, he would not be able to assist as he is a non-UK national with limited English proficiency who is also struggling with his own trauma. PLJ considers that reliving and explaining the details of what happened to her again in the detail required by the CICA application form would be a traumatic experience for both of them. She is also unable to seek assistance from her sister or her parents (the latter having disowned her) in Albania.

48. PLJ explains in her witness statement that she wishes to use the money to start rebuilding her life. In particular, she points to the recent birth of her youngest child in May 2024.

49. PLJ was granted refugee status in January 2023. The Home Office has concluded that she is a victim of modern slavery. The Defendant also accepts that PLJ would be financially eligible for legal aid if an exceptional case determination were made in her favour.

JNB

50. JNB is a Hungarian national who, from the age of 18, was subjected to seven years of forced prostitution between 2014 and 2021, in Austria, Germany and the UK. Her trafficker was a man who she believed was her boyfriend. She was locked in a room, forced to have sex with men (including her trafficker) and beaten daily in all three countries. JNB was trafficked to the UK in June 2015, where she was also forced to work as a street prostitute in Leeds. When she became pregnant at the end of 2015, her trafficker beat her for three days and tried to strangle her; she subsequently suffered a stillbirth in January 2016. Her trafficker's behaviour escalated, including stabbing and beating her until she could not walk, burning her with cigarettes, cutting her hair to her scalp and threatening to kill her. JNB escaped in 2017 and reported her trafficking to the police. She was assisted with a move to Amsterdam to be with her mother, but her trafficker found her and threatened to harm her mother. She was forced to return to the UK where she was again subjected to repeated physical and sexual violence. She made a second attempt to escape in 2018 but was unsuccessful. She became pregnant later that year and her baby was taken from her by her trafficker. In 2021, she became pregnant again; this time, hospital and social care staff intervened, and JNB was subsequently rescued and assisted to ger her child back. During this time, JNB cooperated with police and provided information about her experience being trafficked.

51. JNB was first informed of the possibility of claiming compensation by her then-support worker in April 2022, who also arranged for her to meet with solicitors from ATLEU. At the meeting in October 2022, JNB became overwhelmed and distressed by the process of recounting her traumatic experiences, needing to leave the room several

times. The meeting subsequently caused her to become deeply depressed and she fled her safe house accommodation in December 2022.

52. Having now undergone a period of mental health treatment (on referral from her GP), JNB considers that she is now emotionally prepared to make a CICS application. Notwithstanding this, however, she also struggles with poor English literacy and her mental health remains fragile. Ms Duncan-Bosu required four meetings with JNB in order to finalise her witness statement for her anonymity application. She requires an English interpreter when dealing with legal or complicated matters. JNB struggles to read English documents and can sometimes take days to work through one; and she considers that she simply would not know what evidence to obtain for (and how it might be relevant to) a CICS application. Ms Luh, counsel for the Claimants (together with Ms Maria Moodie) makes the additional point that JNB, having been forced into prostitution at the age of 18, has never had the opportunity to develop resilience, independence and coping mechanisms during her formative early adult years. She does not have any family or friends who could assist her.

53. JNB considers that the compensation money would be 'life-changing' for her. It would allow her to access private counselling and therapies for which there are long waiting lists on the NHS. She would be able to afford childcare for her three-year old son whilst she attended those sessions. She would also be able to have English lessons, with the aim of eventually getting a job. She hopes to be able to work with children one day and understands that she will need to further her studies in order to do so. She wants to provide the best possible life for her son.

54. JNB is currently residing lawfully in the UK as an EU national. The Home Office has determined that there are reasonable grounds to conclude that she is a victim of modern slavery. The Defendant also accepts that JNB would be financially eligible for legal aid if an exceptional case determination were made in her favour.

DSR

55. DSR is a Nigerian national who was trafficked within Nigeria and then to the UK for the purposes of forced labour for several months. In Nigeria she was forced to do domestic work by a woman who took her in after she was asked to leave by her family

for having a teenage pregnancy. The woman later sent her to the UK in August 2011 where she was taken to a house controlled by a man who forced her to cook and clean, without pay and without being permitted to leave. DSR was subject to verbal abuse and physical violence whilst trafficked in the UK. In or around October 2011, she was taken to a brothel where it was apparent she was going to be forced into prostitution. Terrified that she would be raped, DSR escaped through a door that had been left open. She subsequently took refuge with a woman who sheltered her until she moved out to live with her new partner in 2016 after she became pregnant. She suffered from domestic abuse and subsequently ran away with her daughter in November 2019. Social services and police were involved during this period, and DSR communicated her experience of being trafficked to social services (who passed this information on to the police on her behalf).

56. DSR suffers from a fragile mental health, and experiences recurring flashbacks and nightmares, hypervigilance, and fear resulting in panic attacks. Although she had a therapist for a few months, she found recounting her experiences to be very distressing and had to stop. She struggles to remember exact details and dates of what happened and has memory problems. To finalise her witness statement for her anonymity application in these proceedings, Ms Duncan-Bosu required five meetings with DSR. DSR also has poor English literacy and received only a few years of primary education in Nigeria. She struggles to fill out forms on her own without the assistance of her former support worker. She does not have any family in the UK other than her daughter. She currently has a support worker, but they are unable to assist her with making a CICS application.

57. DSR seeks compensation to help her move on from her past horrific experiences and make a good and positive life for herself and her child.

58. DSR was granted asylum in the UK on 25 July 2022. The Home Office has determined that there are reasonable grounds to conclude that she is a victim of modern slavery. The Defendant has not made any means decision in respect of her.

The First Refusals

59. Having learned of the possibility of applying for criminal injuries compensation, all four Claimants subsequently instructed ATLEU to assist them. Between September 2023 to January 2024, ATLEU made individual ECF applications on behalf of the Claimants for legal aid to fund their legal expenses associated with the CICS applications. They provided detailed written representations and evidence about the facts which I have already set out above, i.e., the Claimants' individual trafficking experiences, their injuries, the complexity of their CICS applications (including that these were substantially out of time, and the additional evidence needed in those circumstances), and the reasons why they were inhibited from making those applications on their own. This included:

    (a) HJK: an 18-page written submission and a witness statement;

    (b) PLJ: a 25-page written submission, a witness statement, and a medical expert report outlining her mental health and the impact of her trauma;

    (c) JNB: a 22-page written submission and a witness statement; and

    (d) DSR: a 19-page written submission and a witness statement.

60. Between November 2023 and February 2024, the Defendant issued the original decisions. Since the review of these decisions, the First Refusals, were subsequently withdrawn and the decisions remade by the Defendant, I can deal with them very briefly.

61. The Defendant's reasoning in respect of the original decisions is largely identical and can be found in the decision letters addressed to the individual Claimants. The original decisions were made on the basis that the criteria under s.10(2) and (3) LASPO 2012 were not met because: (i) rights under Article 6 ECHR (a civil right or obligation) and fair trial rights were not engaged; and (ii) even if Article 6 ECHR was engaged, refusing to provide ECF funding did not deny the Claimants access to the CICS. Accordingly, there was no risk of Article 6 being breached. The Defendant did not explicitly accept that Article 6 ECHR was engaged. The original decisions did not engage with the

detailed representations made on behalf of each Claimant as to the barriers that they would individually face in making their CICS applications without ECF.

62. It is notable that in the original decisions, the Defendant did not make any reference whatsoever to the additional evidential and procedural burden upon the Claimants in applying out of time for CICS compensation. This was so despite the fact – as Ms Luh strongly impressed upon this Court – that these matters had indeed been drawn to the Defendant's attention in the written submissions submitted on behalf of each Claimant.

63. As noted above, the Defendant did accept that had an exceptional case determination been made, HJK, PLJ and JNB satisfied the 'means' test and were financially eligible for legal aid. No such determination was made in respect of DSR.

64. The Claimants then applied for a review of the original decisions, that resulted in the First Refusals, made further to a review request.

    (a) HJK's ECF application was first refused on 17 January 2024. She subsequently applied for a review on 31 January 2024. The First Refusal was maintained on 7 March 2024.

    (b) PLJ's ECF application was first refused on 31 January 2024. She subsequently applied for a review on 13 February 2024. The First Refusal was maintained on 21 March 2024.

    (c) JNB's ECF application was first refused on 7 February 2024. She submitted her review application on 20 February 2024. The First Refusal was maintained on 21 March 2024.

    (d) DSR's ECF application was first refused on 18 November 2023. She submitted her first review application on 8 December 2023. A further refusal on different grounds was made on 26 February 2024. She then submitted a second review application on 11 March 2024. The First Refusal was subsequently maintained on 21 March 2024.

65. The Claimants' review applications (and in respect of DSR, the second review application) all largely covered the same ground, namely that the Defendant had erred in law by concluding that neither Articles 4, 6, or 8 ECHR were engaged.

66. In the respective decision letters for the First Refusals, the Defendant maintained the position which she took in the original decisions.

The issuing of proceedings and the Second Refusals

67. Following the Defendant's decision to maintain the First Refusals, the Claimants issued a pre-action protocol letter on 7 May 2024, in which they contended that the Defendant had unreasonably fettered her s. 10 LASPO discretion, unlawfully failed to apply the Lord Chancellor's Guidance to the Claimants' applications, and failed to make individual decisions based on the facts of each application. The Defendant denied these allegations in her reply dated 21 May 2024.

68. The Claimants accordingly issued these proceedings on 6 and 13 June 2024. In the Defendant's Acknowledgement of Service dated 8 July 2024, the Defendant decided to withdraw the First Refusals and consider the Claimants' applications afresh. On this basis, the Defendant argued that the claims had been rendered academic and permission for judicial review should therefore be refused. This contention was rejected by Ritchie J, who granted permission on the papers on 28 August 2024.

69. On 12 August 2024, in the Second Refusals the Defendant again refused each of the Claimants' ECF applications, although contrary to the First Refusals, the Defendant now accepted that the determination by CICA *did* involve the determination of a civil right or obligation for the purposes of Article 6 ECHR, and accordingly that right was engaged. The Defendant stated as follows in each case:

> *"I am satisfied that, given the stage of the process at which your client is at, and the steps that are required in order to make an application for criminal injuries compensation, your client will be able to do so effectively and without obvious unfairness. The process for making an application is straightforward in nature and legal advice and assistance is not needed. Details of how a compensation application is made can easily be found online. There are dedicated web pages that set out in a clear and intelligible way (including to non-native English speakers) how the application process works and what the*

eligibility rules are. Help in making the application is also offered by telephone.

The content of the application form itself consists largely of Yes/No questions and questions requiring the provision of basic factual information such as:

- *date and location of the crime*
- *name of the police force to which the crime was reported*
- *crime reference number*
- *name and address of GP*
- *details of any previous CICA applications*
- *details of any unspent criminal convictions*

There is no requirement in the application to set out complex points of law or evidence. Supporting medical evidence is not required when making the application and neither are detailed submissions required to be made with the application. The Applicant may provide a brief description of the crime, but this is not a mandatory part of the application.

(…)

Ultimately, and giving particular weight to (a) the importance of the issues at stake, (b) the complexity of the procedure, law or evidence, (c) the capability of the applicant is making the initial application, I have concluded that the overarching test is not met, in particular in light of the straightforward nature of the application process (including the straightforward nature of information required to be provided in the application) and my assessment that the personal circumstances of your client are not so debilitating that they will be unable to participate in the application process unless legal advice and assistance is provided."

On this basis, the Defendant concluded that there was no breach or risk of a breach of the Claimants' Article 6 ECHR rights if they did not receive legal assistance. She added that in the event of an unsuccessful CICS application, the Claimants had a right of review (and onwards appeal rights), which further acted to mitigate any risk of a breach of their Article 6 rights.

70. The Defendant further considered that "*the grant or refusal of compensation would [not] have a sufficiently significant impact on the essence of [the Claimants'] private and family life to engage Article 8*". Whilst she accepted that the Claimants' lives would be made materially better by a significant compensation award, the Defendant considered that this alone was insufficient to engage Article 8.

71. Similarly, the Defendant denied that Article 4 ECHR was engaged by any of the Claimants' proposed applications for compensation, on the ground that it did not fall within the positive obligations imposed by that right (to provide protective operational measures and conduct an effective investigation in respect of allegations of slavery and forced labour).

72. The Defendant also stated that even if the Defendant was wrong about Articles 4 and/or 8 not being engaged in these cases, the refusal of legal aid would not give rise to a breach (or a risk of a breach) of either of those rights, as "*(a) I do not consider that any procedural right conferred by those articles (where they apply) would go any further than that provided by Article 6; and (b) I am satisfied that (for the reasons set out above in respect of Article 6) your client would be able to make an effective application without obvious unfairness without the benefit of legal assistance.*"

ANALYSIS

Ground 1 – Article 6 ECHR: The Defendant erred in holding that the Claimants' Article 6 ECHR rights were not breached/at risk of being breached

73. Article 6(1) ECHR (right to a fair trial) provides that '*1. In the determination of his civil rights and obligations… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …*'.

74. The parties are agreed that the determination of CICS applications involves the determination of civil rights and therefore engages Article 6(1) ECHR. Consequently, the only issue which this Court must determine is whether the Defendant was correct to find that the Claimants' Article 6 rights were not breached (or not at risk of being breached) by a refusal of ECF funding in order that the Claimants could obtain legal assistance to make an application for compensation under the CICS.

75. As explained above, under section 10(3)(a) of LASPO, the Defendant had to determine whether a denial of legal aid would be a breach of the relevant Claimant's Convention Rights, including Article 6.

76. The critical question is that set out by the Court of Appeal in *Gudanaviciene* "*whether an unrepresented litigant is able to present his case effectively and without obvious unfairness*". Accordingly, "*the greater the complexity of the procedural rules and/or the substantive legal issues, the more important what is at stake and the less able the applicant may be to cope with the stress, demands and complexity of the proceedings, the more likely it is that article 6(1) will require the provision of legal services (subject always to any reasonable merits and means test).*"

77. This is an objective correctness standard of review, requiring an individual assessment of all the circumstances of the particular Claimant's case, and the question is not whether the Claimant's position would have been improved by legal representation – which will very often be the case – but rather whether the circumstances fell below a line of inability to participate effectively in seeking compensation under the scheme without obvious unfairness, having regard to the process as a whole and all the circumstances.

78. Mr. Birdling (counsel for the Defendant) rightly accepted, applying *Gudanaviciene* and *Alhasan*, that since the first limb of section 10 LASPO (s.10(3)(a)) engages an objective correctness standard of review, it is for this court to decide whether, objectively, the Defendant was right or wrong in her assessment.

79. More specifically, in considering that issue in the present case, the court will take into account (i) the importance of the issues at stake; (ii) the complexity of the procedural, legal and evidential issues; and (iii) the ability of the Claimant to represent herself without legal assistance, having regard to her personal attributes, including her mental capacity/fragility.

80. In my judgment it is clear from the foregoing that each of the Claimants, as unrepresented litigants, would be unable to present their case effectively and without obvious unfairness as a result of the denial of ECF for legal aid; and the factual

circumstances of each of their cases fall well below "the line of inability to participate effectively in seeking compensation under the scheme without obvious unfairness".

81. It is not suggested that the Defendant adopted the wrong test to the Article 6(1) ECHR question; rather it is said that she applied it wrongly. In the Second Refusals, the Defendant rightly stated that the relevant overarching question is that set out in the Lord Chancellor's Guidance, namely whether the relevant Claimant "*could make an effective application effectively [sic] and without obvious unfairness without the benefit of legal assistance*." However, she considered that the answer to that question was affected by, and fell to be assessed by reference to, the stage of proceedings for which legal aid is sought, and "*[h]ere your client seeks legal aid for the initial stage of making an application*."

82. Thus, in each of her Second Refusals, the Defendant concluded that Article 6(1) ECHR would neither be breached (nor be at risk of being breached) should the Defendant decide not to grant ECF based on the information provided in the Claimants' applications "*at this very early stage in the process*".

83. The Defendant accordingly stated that in answering that question, she must have regard to the following factors:

"(a) the importance of the issues at stake, (b) the complexity of the procedure, law or evidence and (c) the capability of the applicant *in making the initial application*."

84. As to factor (a), the Defendant accepted that seeking and obtaining compensation is of importance to each of the Claimants, which was self-evidently the case.

85. As to factor (b), the Defendant concluded that the complexity of the procedure was not such that each of the Claimants would be unable to participate in the application process without the need for legal assistance.

86. As to factor (c), the Defendant accepted that each of the Claimants would face the difficulties that are identified below in making an application themselves without legal assistance (which they maintained rendered them incapable of making an application to the CICA) as follows:

HJK

"• English is not the Applicant's first language

• The Applicant is particularly vulnerable, as a victim of trafficking.

• The Applicant will not have the psychological capacity to present her case effectively.

• The Applicant does not have family members or friends that can assist her in preparing legal arguments in support of the application.

• The Applicant is required to make detailed submissions of the sexual abuse she suffered."

PLJ

"• English is not the Applicant's first language.

• The Applicant lacks sufficient distance from the case.

• The Applicant does not have family members or friends that can assist her in preparing legal arguments in support of the application.

• There are few organisations assisting trafficking survivors.

• The Applicant has PTSD, depression, anxiety, panic attacks and is at risk of suicide."

DNB

"• English is not the Applicant's first language.

• The Applicant does not have family members or friends that can assist her in preparing legal arguments in support of the application.

• The charitable organisation assisting the Applicant cannot provide legal advice and assistance.

• The Applicant is unable to prepare a witness statement and instruct medical experts.

• The Applicant does not have the psychological capacity to make the application."

JSR

"• English is not the Applicant's first language.

• The Applicant is distressed and has been diagnosed with PTSD and anxiety.

• The charitable organisation assisting the Applicant cannot provide legal advice and assistance.

• The Applicant does not have family members or friends that can assist her in preparing legal arguments in support of the application.

• The Applicant does not have the psychological capacity to make the application."

87. The Defendant accordingly accepted that in the case of all Claimants, none of them has family members or friends that can assist her in preparing legal arguments in support of her application. Furthermore, in the case of HJK, she will not have the psychological capacity to present her case effectively; in the case of PLJ, she lacks sufficient distance from the case to make an application and moreover has PTSD, depression, anxiety, panic attacks and is at risk of suicide; and in the case of both DNB and JSR, they did not have the psychological capacity to make the application themselves. The Defendant was right to accept this, as the witness statements of the Claimants and of Ms Duncan-Bosu clearly establish, in my judgment, that without the benefit of legal assistance none of these Claimants would be able to make an effective application for compensation without obvious unfairness.

88. However, despite the Defendant's acceptance of these critical features of the circumstances of each of the individual Claimants, she nonetheless considered that "*given the stage of the process at which your client is at, and the steps that are required in order to make an application for criminal injuries compensation*", each of the Claimants "*will be able to do so effectively and without obvious unfairness*". (emphasis added)

89. More particularly, in relation to her case regarding factors (b) and (c), the Defendant asserted in each of her Second Refusals that:

(1) "the process for making an application is straightforward in nature and legal advice and assistance is not needed";

(2) "Details of how a compensation application is made can easily be found online", with dedicated web pages.

(3) Help in making the application is also offered by telephone.

(4) The content of the application form consists largely of yes/no answers;

(5) There is no requirement to set out complex points of law or evidence;

(6) Supporting medical evidence is not required;

(7) The applicant may provide a brief description of the crime but that is not necessary.

(8) If an application is made outside of the two-year time limit, the applicant is prompted in clear terms to explain "Tell us the reason why this application could not be sent before now."

90. The Defendant concluded that having particular regard to these factors, each of the Claimants "*would be able to make an effective application to [CICA] without legal assistance and that this would not cause obvious unfairness*."

91. Aside from the clear inconsistency between this conclusion and her acceptance that each of these Claimants were in no position to make an application themselves and yet they had nobody to assist them in making an application, I reject the Defendant's assessment that these Claimants were able to make an effective application without legal assistance. I consider it to be clear that they were not.

92. It can be seen from the passages of the Second Refusals recited above that the Defendant's surprising conclusion appears to have been reached by reason of her assertion that legal aid was not necessary because of the "*very early stage*" of the

process, such that it was a simple matter for each of the Claimants to submit an initial claim.

93. In his clear and impressive oral submissions, Mr. Birdling elaborated on this stance of the Defendant. He submitted that it was not necessary at the stage of making an application for the Claimant to put in detailed evidence or submissions; the Claimants simply had to answer some basic questions, for which assistance was available to them by telephone. If the application was out of time, the Claimant just needed to explain why the application could not be sent before it was. Mr. Birdling referred to this as "*just needing to get your foot in the door at this stage.*" He accepted that there will be cases where an applicant needs a lawyer even to get their foot in the door, but submitted that that was not so here.

94. Mr. Birdling accordingly submitted that the Defendant's decisions were correct. Each of the Claimants could, he submitted, have filled in the application form online, or they could have called the telephone helpline to obtain assistance in making their applications. All that they needed to do was 'get their foot in the door' by filling out the form. If CICA required further information and evidence to support the application, then at that stage the Claimants could apply for ECF. Alternatively, if CICA rejected the application by reason of its lack of information/evidence, then there is a review and appeal process and the Claimants could apply for ECF to pursue that.

95. I do not accept Mr. Birdling's submissions.

96. An applicant in the shoes of these Claimants is not afforded the ability to participate *effectively* in the application process without obvious unfairness simply by reason of the fact that it is said that they can fill out the online form, no matter how poorly, just to "get a foot in the door". They cannot thereby present their case "properly and satisfactorily" in this way: *Gudanaviciene* at [46] and [56]. There is no provision in the CICS for some sort of initial or preliminary "foot in the door application". Indeed, a "foot in the door" application is unlikely to satisfy the claims officer and is likely to lead to refusal of the application (or, at the very least, requests for further information

and evidence)[8]. Fairness demands that these Claimants should be able to present their cases for compensation effectively at the first time of applying. They can only do that with legal assistance because of their personal circumstances. Moreover, it is obviously unfair to expect these traumatised Claimants additionally to have to make a subsequent application for ECF, after a 'foot in the door' application is refused, in order to support a review of or appeal against the refusal.

97. These are Claimants who cannot themselves complete the application form but who have nobody to assist them in doing so; who are traumatised; who do not speak, read or write English as their first language[9]; who have serious mental health issues and who could not afford to pay for documents to be translated. Having access to online materials in English is simply not going to help them; and there is the obvious point to be made that if the Claimants cannot read English they would almost certainly not know how to call the CICA telephone helpline. I accept the submission of Ms Luh that the individual circumstances of these particular Claimants prevent them from personally engaging <u>at all</u> with the CICS application and evidence gathering processes (without help from ATLEU), whether on a "foot in the door basis" or otherwise.

98. So far as the complexity of the application procedure itself is concerned, I also reject the Defendant's claim that "*the process for making an application is straightforward in nature and legal advice and assistance is not needed*" and I reject the claimed "*straightforward nature of information required to be provided in the application*." The application procedure for these Claimants, whose applications were, by reason of the crimes that they suffered, unsurprisingly being made outside the two-year time limit for applying, was complex, potentially costly (in terms of translation of documents and obtaining medical reports) and required supporting evidence. This was a procedure which these Claimants were unable to undertake at all without the assistance of a lawyer. I find that to be so for the following reasons.

99. <u>First</u>, this was certainly not a simple yes/no tick-box application process for these Claimants. Since their applications were made outside the two-year time limit, they

[8] That conclusion is supported by the fact that the Claimants' ECF applications were refused by the Defendant on three separate occasions (including their requests for review) despite the substantial and compelling body of evidence that they put forward to support their applications with the benefit of legal assistance in this case.

[9] The CICS application form is only available in English and Welsh.

needed to provide both (i) reasons and supporting evidence as to why the application could not have been made earlier, explaining the whole period of the delay, and (ii) evidence in support of the claim which means that the claims officer can make a decision without having to make further extensive enquiries.

100. Indeed, in order even to understand that they were each out of time under paragraph 87 (so that they needed to answer the question in the CICS application form "*if the crime happened more than two years ago: Tell us why this application could not be sent before now*"), the Claimants had to first understand what the relevant "incident" was and when it is deemed to have occurred in each of their cases. That is by no means obvious, particularly in trafficking cases which take place over a considerable period of time during which multiple acts of violence tend to occur one after another. One has to look to Annex A of the CICS to find the definition of *incident*:

> *"…a reference in this Scheme to an incident includes a series of incidents and, in the case of a series of incidents, a reference to the date of the incident means the date of the first incident in the series.*"

101. This again demonstrates that submitting merely a "foot in the door" application would plainly not be a fair or effective means of applying in the case of these four Claimants who were trafficked over a lengthy period and who failed as a consequence to submit an application within two years from the date of the "incident". Any out of time application will be rigorously scrutinised by the claims officer and subjected to a stringent test: see the terms of the internal guidance concerning paragraph 89, referred to in paragraph 32 above.

102. Accordingly, a "foot in the door" application by these Claimants, without the submission of supporting information and evidence (such as medical reports), would be very likely to be rejected. And yet all that the Defendant states in her Decision Letter in the case of each Claimant in this regard is: "*If an application is made outside of the 2-year time limit, the applicant is prompted in clear terms to explain, "Tell us the reason why this application could not be sent before now*." She says nothing about the need for each of these traumatised Claimants to (i) explain the <u>whole period</u> of the delay, (ii) explain why her application was not made within the time limit, and (iii) provide the evidence necessary to support the application herself, meaning that it can be determined

without further extensive enquiries by a claims officer. This again goes well beyond a simple yes/no application process. The nature of the application is anything but straightforward.

103. Second, the nature of the questions in the application form itself, which reflect CICS paragraph 91 and 92, include questions requiring substantive description and explanation from an applicant, going well beyond Yes/No questions.

104. The complete CICS application form was annexed to Mr. Collins KC's written submissions[10]. This form incorporates both 'Yes/No' questions and more substantial questions for applicants to answer. Examples of the latter questions and accompanying prompts include:

> *"If the crime happened more than two years ago: Tell us why this application could not be sent before now.*
>
> *If the crime took place in more than one of these countries, you can provide additional details later in the application.*
>
> *Tell us more why there was a delay in reporting the crime to the police.*
>
> *What was the crime that caused your injuries*
>
> *Tell us briefly about the crime (optional)*
>
> *Tell us about each injury you received due to this violent crime.*
>
> *You should give us as much detail as you can about each injury.*
>
> *Briefly say how your injuries have affected your daily life.*
>
> *This helps us understand how the crime has affected you. You can leave this blank, but we may have to ask for more information later.*

[10] The application form which is exhibited to Ms. Keith's witness statement dated 28 November 2024 and served on behalf of the Defendant, is misleading in containing only Yes/No questions, because it is not the complete application form and, as Ms Keith explains, was prepared by clicking through the online application form only up until the point of entering contact details.

What treatment are you receiving for your physical injuries

What mental health treatments have you had?

Tell us why you have not applied for or received any other compensation or damages

Additional information

You can provide any extra information, including additional crime reference numbers, details of additional crimes, locations, dates, and/or offenders here."

105. Third, the suggestion that all of this can be cured by the provision of a telephone helpline in the case of these Claimants (even less so by an online guide) is wholly unrealistic. Mr. Collins KC explained that there is a CICA telephone helpline to assist in the making of an application and that the helpline is managed by trained staff who are used to dealing with victims of trauma. However, the applicant must first know that this helpline exists. It is referred to at page 3 of the CICS application form and within the Guide, but this assumes that the Claimants will be able to find reference to it, in circumstances where they are traumatised, do not speak, read or write English as their first language and where they have serious mental health issues.

106. Even if the Claimants can access this helpline, its utility to these Claimants is highly unlikely to be sufficient, given their personal characteristics: in particular, that English is not their first language and they are traumatised and/or have serious mental health issues as a result of their having been trafficked.

107. As the modern slavery statutory guidance for England and Wales provides:

"*13.13 Complex PTSD is more likely to occur in the aftermath of multiple and repeated trauma over long periods, which is often the case for victims of modern slavery. It is also more likely to occur if trauma is experienced during childhood.*

Interviewing people who have experienced trauma

…

13.15 Victims of modern slavery should be interviewed in an appropriate way to avoid re-traumatising victims. Interviewers and decision makers must not automatically draw

negative assumptions if a victim cannot recount details of their experience when assessing credibility.

13.16 It is not uncommon for traffickers and exploiters to provide stories for victims to tell if approached by the authorities. Errors, omissions and inconsistencies maybe because their initial stories are composed by others and they are acting under instruction. They can also arise due to the impact of trauma, which can, for example, lead to delayed disclosure or difficulty recalling facts.

13.17 Victims may have problems in dealing with direct interviewing, especially in contexts which seem to them to be adversarial."

108. These Claimants have serious issues of trust. It is clear that they will not be able simply to run through the application process on the telephone with a stranger. As Ms Luh persuasively pointed out, in order just to address the Claimants' application for anonymity in this case, this required no fewer than 8 face-to-face meetings between HJK (who has PTSD; paranoid schizophrenia and a learning disability) and Ms Duncan-Bosu (a solicitor at ATLEU) whom she trusted; 6 meetings between Ms Duncan-Bosu and PLJ (who is traumatised with depression and anxiety and suicidal ideation); 4 meetings between Ms Duncan-Bosu and DNB (who was controlled by a trafficker since the age of 18; who becomes overwhelmed if she is asked to recall details about her trafficking; and who has serious mental health issues); and 5 meetings between Ms Duncan-Bosu and JSR (who has trauma-related memory difficulties; flashbacks and who cannot engage in therapy because she cannot trust people).

109. The use of a telephone helpline is made even more problematic in the case of these particular Claimants because they would all additionally require an interpreter. In the context of trafficked victims, as the modern slavery statutory guidance provides:

"13.31 … Ideally only professional interpreters should be used to interview individuals. People claiming to be friends or supporters should not be used as formal interpreters. The following good practice applies:

Where possible victims should be given a choice over the gender of their interpreter. If preferences aren't accommodated it is more likely that full disclosures will not be made.

… If a victim appears distressed in the presence of an interpreter, the session should cease immediately."

110. Further still, even assuming that the Claimants could fill out the application form to a limited degree with telephone assistance in order to "get a foot in the door", as stated above the consequence of such an application is likely to be either a refusal of the application or a request from CICA for more information and evidence. The latter course of action is obviously problematic in the case of these traumatised Claimants: it would be both highly stressful for, and unfair to them to have to submit to an extended application process which would require them (particularly as they do not speak English as their first language) to have to engage in a lengthy dialogue with CICA officers about their trafficking in order to fill in the holes in their "foot in the door" application, as opposed to their submitting a persuasive application from the outset with the assistance of a sympathetic and trusted lawyer. That is highly unlikely to be a process which allows these Claimants to participate *effectively* in it and without obvious unfairness.

111. Fourth, it is not an answer to this to say that if the "foot in the door" application is rejected, there is a right to seek a review of the refusal of compensation or a decision not to extend time, followed by an appeal to the Tribunal. By CICS paragraph 119, "*an application for a review must be made in writing and be accompanied by the grounds on which review is sought and any supporting evidence. It must be sent by the applicant so that it is received by the Authority within 56 days after the date of the written notice of decision to which the application relates*." Each of the Claimants would obviously not be able to do this without a lawyer; but in any event, if one asks the question - *does this right of review/appeal mean that it can be said that despite everything adverted to above, these Claimants are thereby able to participate effectively in the application process without obvious unfairness?* - the answer is plain: it cannot.

112. Finally, Mr. Birdling further argued that the Claimants' complaint impermissibly seeks to impugn the lawfulness of the procedures operated by CICA. CICA, he submits, operates a system which is intended to be fairly accessible by all applicants without any need for legal assistance. He suggested that it is the Claimants' case that the system operated by CICA could not operate compatibly with the Human Rights Act 1998 in the absence of publicly funded legal assistance. However, he submits, the Defendant's obligation under Article 6 was to make a system for applying for compensation available, which she has, and that any criticisms of the application of the system should be directed at CICA, not the Director.

113. I do not accept this submission. As Ms Luh points out, the Claimants do not seek to challenge any rule of the CICS or the processes themselves for applying for criminal injuries compensation. There is no claim that the CICS itself, or any of the CICS rules, is/are incompatible with the Human Rights Act 1998. The challenge in this case concerns the complexity of the process as experienced by these particular Claimants, based on their individual personal circumstances and attributes, and whether in the light of their particular circumstances/attributes and taking account of their Convention rights, the Defendant ought to have granted them ECF so that they were able to access the CICS through the assistance of a lawyer.

114. It follows that I find that the Defendant's failure to make an exceptional case determination under sections 10(2)(a) and 10(3)(a)(i)[11] of LASPO on the facts of the Claimants' individual cases was unlawful, as a failure to make the services available would result in a breach of their Article 6 rights.

Ground 2 – The Defendant erred in holding that the Claimants' Article 4 ECHR rights were not engaged

115. Whether Article 4 is engaged on the facts of each of the Claimants' cases is a question of law for this court.

116. Article 4 ECHR imposes positive obligations upon Member States to take operational measures to protect victims and potential victims of human trafficking: *Rantsev v Cyprus* [2010] 41 EHRR 1 at [286] and *SM v Croatia* (2020) 72 EHRR 1, [306]. Protective measures include those which assist victims in their physical, psychological and social recovery: *Chowdury v Greece* App No 21884/15 at [110].

117. The Claimants submit that there is now ECtHR authority which confirms that the positive obligation under Article 4 to protect victims and potential victims includes measures to ensure that victims are able to access compensation <u>from the state</u> for criminal injuries suffered in the course of their trafficking, especially where the state has voluntarily made such access to compensation available to victims to confer a

[11] It necessarily follows that an exceptional case determination ought also to have been made under section 10(3)(b), as there must have been a risk of a breach of Article 6 if there was in fact a breach (but that adds nothing).

degree of protection to them under Article 4. Ms Luh submits that this follows from *Krachunova v Bulgaria* (2024) 79 EHRR 6, when read together with *R (A and B) v CICA* [2021] 1 WLR 3746.

118. It is important to appreciate that *R (A and B)* was a case concerning Article 14. Two victims of trafficking had challenged a provision of the CICS, which prevented applicants with unspent convictions from being eligible to receive an award of compensation, as being discriminatory contrary to Article 14 ECHR, when read together with the substantive right under Article 4. The Court was therefore concerned with whether the UK's voluntary application of CICS to victims of trafficking was "sufficiently connected to" or "within the ambit" of Article 4 so as to engage Article 14. At [39], Lord Lloyd-Jones JSC (giving the judgment of the Court) held that it was, stating:

> "*In the present case, while the CICS is not limited to victims of trafficking, it extends its benefits to them. In the preparation of the scheme specific attention was paid to its application to victims of trafficking and provisions included in order to accommodate them. (See paragraphs 10(c), 13-16 of the CICS.) The United Kingdom, in applying the scheme to victims of trafficking, has chosen to confer a degree of protection to promote their interests. I consider that in doing so it is applying a measure which has a more than tenuous connection with the core value of the protection of victims of trafficking under article 4. The rights voluntarily conferred in this way under the scheme on victims of trafficking fall within the general scope of article 4 and must, therefore, be made available without discrimination.*"

119. In arriving at this conclusion, at [38] of his judgment Lord Lloyd-Jones applied the approach of Judge Sir Nicholas Bratza in *Zarb Adami v Malta* (2006) 44 EHRR 3:

> *"… it is indisputable that a wide interpretation has consistently been given by the court to the term 'within the ambit'. Thus, according to the constant case law of the court, the application of article 14 not only does not presuppose the violation of one of the substantive Convention rights or a direct interference with the exercise of such a right, but it does not even require that the discriminatory treatment of which complaint is made falls within the four corners of the individual rights guaranteed by the article …*

> *… the 'ambit' of an article for this purpose [article 14] must be given a significantly wider meaning than the 'scope' of the particular rights defined in the article itself …"*

120. However, in addressing the Article 14 "ambit" issue, Lord Lloyd-Jones also considered, obiter, whether and to what extent Article 4 ECHR imposed a positive obligation upon the State to provide compensation to victims for injuries suffered in the course of trafficking. In doing so he referred to both *Rantsev* and *Chowdury* (both being cases relied upon by Ms Luh before me) as well as Article 15(4) of the Council of Europe Convention on Action against Trafficking in Human Beings ('ECAT') (also relied upon by Ms Luh). I set out Lord Lloyd-Jones' analysis on this issue in full in view of its importance in respect of Ms Luh's Article 4 argument in this case:

> "A duty on States to make provision for compensation for victims of trafficking
>
> 27. *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 is significant in that it was the first occasion on which the ECtHR acknowledged that trafficking falls within the scope of article 4. …The Court then went on to set out general principles in relation to article 4. It emphasised (at paras 284-285) that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. The Court reiterated that article 4 entails a specific positive obligation to penalise and prosecute effectively any act aimed at maintaining a person in a situation contrary to article 4. It observed that the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime 2000 ("the Palermo Protocol") and ECAT referred to the need for a comprehensive approach to combat trafficking which includes measures to prevent trafficking and to protect victims, in addition to measures to punish traffickers. It considered that it was clear from the provisions of those two instruments that only a combination of measures addressing all three aspects could be effective in the fight against trafficking. The extent of the positive obligations arising under article 4 was required to be considered within this broader context. The judgment in Rantsev does not, however, provide any support for the proposition that states are under an obligation to provide compensation to the victims of trafficking perpetrated by private third parties.
>
> 28. *Chowdury v Greece* (Application No 21884/15, 30 March 2017) concerned the treatment of Bangladeshi migrants working without work permits on a strawberry farm in Greece. When they asked for their wages, the Greek farmers fired on them, seriously injuring a number of them. The ECtHR (First

Section) (at paras 86-89) reiterated that states have positive obligations, in particular to prevent human trafficking and protect the victims thereof and to adopt criminal law provisions which penalise such practices. It identified three strands. First, states are required to adopt a comprehensive approach and to put in place, in addition to the measures aimed at punishing the traffickers, measures to prevent trafficking and to protect the victims. Secondly, in certain circumstances, the state will be under an obligation to take operational measures to protect actual or potential victims of treatment contrary to article 4. Thirdly, article 4 imposes a procedural obligation to investigate potential trafficking situations. On behalf of the appellants Ms Kaufmann draws attention to the following passage in the judgment of the Court at para 126:

"Lastly, the Court finds that, even though TA and one of the armed guards were found guilty of grievous bodily harm, the Assize Court only ordered them to pay compensation of EUR 1,500, ie EUR 43 per injured worker … However, article 15 of the Council of Europe's Anti-Trafficking Convention obliges Contracting States, including Greece, to provide in their domestic law for the right of victims to receive compensation from the perpetrators of the offence, and to take steps to, inter alia, establish a victim compensation fund."

Ms Kaufmann places particular emphasis on the closing words which, she submits, are a recognition by the ECtHR that there is an obligation on states to provide compensation to victims of trafficking.

29. I am unable to accept this submission. It is made clear by the heading to the section of the judgment in which this passage appears that it is concerned with the State's positive obligations in relation to the effectiveness of the investigation and judicial proceedings. As William Davis J explained in *R (Tirkey) v Director of Legal Aid Casework* [2018] 1 WLR 2112, para 43, in *Chowdury* the Court was addressing the failure of the police to investigate and the failure of the judicial system to reach appropriate findings in relation to the status of the victims. In the passage on which particular reliance is placed, the Court added the observation that this level of compensation for such serious injuries did not meet the requirements of article 15 of ECAT. The Court was not addressing any obligation on the state to pay compensation to victims of trafficking but the obligations of the perpetrators of trafficking to pay compensation[12] and the state's obligation to secure effective judicial remedies for the vindication of the rights of victims against perpetrators. Moreover, it is highly significant that in the earlier section of its judgment, in which it set out certain general principles relating to article 4 (at paras 86-89), the Court made no reference to a general duty on states to compensate victims of trafficking

[12] Emphasis added

perpetrated by private third parties. Had it been the Court's intention to recognise such a duty, such a development in the law would undoubtedly have been given considerable prominence[13].

30. In *SM v Croatia* (Application No 60561/14, Grand Chamber, 25 June 2020) a Grand Chamber of the ECtHR stated (at para 305) that the nature and scope of the positive obligations under article 4 ECHR were set out comprehensively in *Rantsev*. The Grand Chamber then set out paras 283 to 288 of Rantsev and concluded at para 306:

"It follows from the above that the general framework of positive obligations under article 4 includes: (1) the duty to put in place a legislative and administrative framework to prohibit and punish trafficking; (2) the duty, in certain circumstances, to take operational measures to protect victims, or potential victims, of trafficking; and (3) a procedural obligation to investigate situations of potential trafficking. In general, the first two aspects of the positive obligations can be denoted as substantive, whereas the third aspect designates the states' (positive) procedural obligation."

Once again, there is nothing here to support the existence of a general duty to compensate victims of trafficking perpetrated by private third parties for which the appellants contend[14].

31. On behalf of the appellants it is further submitted that the state's positive obligations under article 4 must be construed in the light of ECAT and that, as a result of article 15(4) of ECAT, article 4 imposes on states a positive obligation to provide compensation to the victims of trafficking. It is submitted that this conclusion is supported by the position of article 15 in Chapter III of ECAT, the title of which makes clear that it is directed at measures to protect and promote the rights of victims. It is correct that the ECtHR has had regard to the provisions of ECAT in its consideration of article 4 ECHR as applicable to trafficking (see, for example, *Rantsev* at paras 285-286; *Chowdury* at paras 104, 126; *SM v Croatia* at para 295) and that, as a result, ECAT has influenced the development of article 4 ECHR in certain respects. Nevertheless, there are several difficulties in the path of this submission on behalf of the appellants.

32. First, article 15(4) ECAT does not impose on contracting states a general obligation of the kind for which the appellants contend. It provides that each party "shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under

[13] Emphasis added

[14] Emphasis added

> its internal law". It then goes on to give examples, stating that this may be achieved "through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims". The Explanatory Report to ECAT makes clear (at para 198) that the setting up of a compensation fund is a suggestion and not an obligation. It is one option open to a contracting state. Other options, it seems, would not involve the payment of compensation but programmes of social assistance and social integration.
>
> 33. Secondly, although the United Kingdom is a party to ECAT and its provisions are binding on the United Kingdom in international law, they have not been incorporated into domestic law within the United Kingdom. The provisions of ECAT are, therefore, not directly applicable in this jurisdiction. They have effect here only to the extent that they are adopted and given effect by article 4 ECHR. The approach adopted by the ECtHR has not involved a wholesale adoption of the provisions of ECAT. On the contrary, the Court made clear in *Rantsev* (at para 274) that it was necessary to take account of any relevant rules and principles of international law applicable between the contracting parties and that the ECHR should so far as possible be interpreted in harmony with other rules of international law of which it forms part. Similarly, in *Chowdury* (at para 104) and SM v Croatia (at para 295) the Court considered that the member states' positive obligations under article 4 must be construed in the light of ECAT. It does not follow that, as a result, the obligations undertaken by contracting states in article 4 ECHR are necessarily co-extensive with those under ECAT or that obligations under ECAT may simply be read across. In this instance, I am not persuaded that the ECtHR has yet gone so far as to accept that article 4 ECHR imposes an obligation on contracting states to provide financial compensation to victims of trafficking perpetrated by private third parties.[15] However, it is not necessary to express a concluded view on this issue because of the conclusion to which I have come on the appellants' alternative case."

121. It follows that the Supreme Court was not required to rule upon whether, in the context of *R (A and B),* there was a breach of Article 4 ECHR, since no such breach was alleged on the facts. However, Lord Lloyd-Jones expressed the view (albeit not a concluded view) that the ECtHR had not yet gone so far as to accept that Article 4 imposes an obligation on contracting states to provide financial compensation to victims of trafficking perpetrated by private third parties.

[15] Emphasis added

122. Ms Luh accepts this analysis and realistically accepted in argument that "*there is a limit to what I can say about how far this goes*", but she contended that the law has moved on since *R (A and B)* was decided, as illustrated by the recent decision of *Krachunova v Bulgaria* (2024) 79 EHRR 6.

123. In *Krachunova,* the Third Section of the ECtHR considered that contracting states' positive obligation under Article 4 ECHR required them to enable victims of trafficking to claim compensation from their traffickers in respect of lost earnings. The Court considered the object and purpose of Article 4, construed in the light of ECAT ([164], [168]). Ms Luh relies upon the Court's analysis in particular at [158] and [169]-[173] as follows:

> *"158. The Court has consistently held that Article 4 of the Convention lays down positive obligations for the Contracting States (see Siliadin v. France, no. 73316/01, § 89, ECHR 2005-VII; Rantsev, cited above, §§ 285-86; and S.M. v. Croatia, cited above, § 306). The general framework of those positive obligations has so far been held to include: (a) the duty to put in place a legislative and administrative framework that prohibits and punishes trafficking; (b) the duty, in certain circumstances, to take operational measures to protect victims, or potential victims, of trafficking; and (c) a procedural obligation to investigate situations of potential trafficking (see S.M. v. Croatia, cited above, § 306).*
>
> ...
>
> *169. To date, the Court's case-law relating to after-the-fact responses to trafficking has focused on investigation and punishment. However, although essential for deterrence, such measures cannot wipe away the material harm suffered by the victims of trafficking that has already taken place or practically assist their recovery from their experiences.*
>
> *170. Indeed, the recent case of V.C.L. and A.N. v. the United Kingdom … highlighted, albeit from a different perspective, the need to protect trafficking victims after the fact. That case concerned the criminal prosecution of trafficking victims; the Court found that such prosecution could be problematic in some situations, on the grounds that it could be detrimental to their recovery, create an obstacle to their reintegration into society, and impede their access to the support and services envisaged by the Anti-Trafficking Convention. An analogous line of reasoning had underpinned … J. and Others v. Austria (no. 58216/12, §§ 110-11, 17 January 2017) [which was] concerned*

with whether the applicants had been duly identified and supported as trafficking victims.

171. Similar considerations apply in respect of affording compensation to trafficking victims – particularly in respect of lost earnings. The possibility for them to seek compensation in respect of lost earnings, especially earnings withheld from them by their traffickers, would constitute one means of ensuring restitutio in integrum for those victims by making good the full extent of the harm suffered by them. It would also go a considerable way (by providing them with the financial means to rebuild their lives) towards upholding their dignity, assisting their recovery, and reducing the risks of their falling victim again to traffickers. This cannot therefore be seen as a secondary consideration; it must be considered an essential part of the integrated State response to trafficking required under Article 4 of the Convention. Moreover, redress for the victim should be the overarching consideration from a human rights perspective.

172. It is true that this is but one aspect of the State response to the issue of trafficking, and that other measures, notably those in the field of criminal and sometimes immigration law, are likewise integral to it. But all those measures are complementary – even from the perspective of the need to deter trafficking, which is often (if not always) carried out for financial gain. Making it possible for victims to recoup lost earnings from their traffickers would go some way towards ensuring that those traffickers are not able to enjoy the fruits of their offences, thus reducing the economic incentives to commit trafficking offences. Indeed, the recent trend in law enforcement more generally has been to target not only the persons of criminals but also the proceeds of their offences, and then to use (at least a portion of) those proceeds to compensate victims. This can also reduce the burden on the public resources sometimes used to support the recovery of trafficking victims. Moreover, it can give victims an additional incentive to come forward and expose trafficking, thereby increasing the odds of holding human traffickers accountable and thus preventing future instances of it.

173. In the light of the above, and of the fact that trafficking in human beings as a global phenomenon has increased significantly in recent years (see Rantsev, cited above, § 278), it can be concluded that Article 4 of the Convention, construed in the light of its object and purpose and in a way that renders its safeguards practical and effective, lays down a positive obligation on the part of the Contracting States to enable the victims of trafficking to claim compensation from their traffickers in respect of lost earnings."

124. Ms Luh contends that, although the Court in *Krachunova* was considering the scope of the contracting state's Article 4 obligations in respect of compensation claims against traffickers, the logic of the Court's approach applies equally to contracting states' positive obligation to ensure victims of trafficking are able to access state compensation schemes (such as the CICS), which are intended to facilitate the victims' recovery from injuries suffered in the course of human trafficking. That conclusion, she argues, is further supported by Article 15(4) of ECAT, as well as Article 2 of the European Convention on the Compensation of Victims of Violent Crimes ("**the Compensation Convention**") as follows:

> *Article 2*
>
> *1. When compensation is not fully available from other sources the State shall contribute to compensate:*
>
> > *a. those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;*
> >
> > *b. the dependents of persons who have died as a result of such crime.*
>
> *2. Compensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished.*

125. Ms Luh further contends that this reflects the domestic courts' approach to the purpose of compensation awards made available under the CICS, citing *JT v First-tier Tribunal and CICA* [2019] 1 WLR 131 at [14] (which cites Article 2 of the Compensation Convention above); [20] and [22] (referring to Government statements of the purpose of the CICS being to provide payments to those who suffer serious physical or mental injury as the direct result of violent crime, including sexual offences); and [98] (referring to the fact that the principle underpinning the CICS reforms was to ensure that the UK complied with its domestic and European obligations under, in particular, the Compensation Convention).

126. As I have noted above, in her oral argument, Ms Luh further relied upon Article 15(4) of ECAT, which reads:

> "*Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its*

internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23."

127. She points out that in *Chowdury*, the ECtHR stated at [104] that:

"*the member States' positive obligations under Article 4 of the Convention must be construed in the light of the Council of Europe's Anti-Trafficking Convention and be seen as requiring, in addition to prevention, victim protection and investigation, together with the characterisation as a criminal offence and effective prosecution of any act aimed at maintaining a person in such a situation…*"

And at [110]:

"The Court observes that the Council of Europe's Anti-Trafficking Convention calls on the member States to adopt a range of measures to prevent trafficking and to protect the rights of victims. The preventive measures include measures to strengthen coordination at national level between the various anti-trafficking bodies and to discourage the demand, which promotes all forms of exploitation of persons, including border controls to detect trafficking. Protection measures include facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery."

And finally at [126]:

"However, Article 15 of the Council of Europe's Anti-Trafficking Convention obliges Contracting States, including Greece, to provide in their domestic law for the right of victims to receive compensation from the perpetrators of the offence, and to take steps to, inter alia, establish a victim compensation fund."

128. Ms Luh argues that it is relevant that the government has chosen to confer benefits on victims of trafficking by setting up the CICS and extending it to them. She submits that having voluntarily chosen to do so, in order to comply with its positive obligation under Article 4 to protect victims and potential victims of trafficking, it must ensure that they are able to access compensation <u>from the state</u> for criminal injuries suffered in the course of their trafficking.

129. I do not accept Ms Luh's argument, skilfully as it was presented. It can be seen from paragraphs [31]-[33]) of Lord Lloyd-Jones' judgment in *R (A and B)* above that having considered the line of authority referred to by Ms Luh, the judge expressly considered and rejected the argument that Article 4 ECHR should be construed in the light of

Article 15(4) ECAT so as to impose a general obligation on contracting states to compensate victims of trafficking.

130. *Krachunova* does not dictate a different result. That was, as Mr. Birdling pointed out, a chamber decision and not a Grand Chamber decision of the Strasbourg Court, which makes it unlikely that the Court was intending to extend the law in the way suggested by Ms Luh. But in any event, it is clear from the passages recited above that the Court was only concerned with the narrower question of whether there was a positive obligation on contracting states to enable the victims of trafficking to claim compensation from their traffickers in respect of lost earnings (see the conclusion at [177]). It would be wrong to extract from this decision a wider policy obligation for contracting states themselves to have to compensate victims of trafficking.

131. Indeed, it can be seen from [174]-[175] of the Court's judgment that the language of the international instruments relied upon by the Court is fully focused on the question of compensation for victims *from the traffickers*:

> *"174. The above conclusion is reinforced by the relevant international instruments. Those instruments lay down generally recognised international standards that can be a powerful argument to read into the Convention rights or obligations not expressly mentioned in its text…*
>
> *175. Both the Palermo Protocol (Article 6 § 6) and the Anti-Trafficking Convention (Article 15 § 3), which are in force with respect to all forty-six Contracting States, lay down a general duty to enable trafficking victims to seek compensation. The latter instrument, which post-dates the former by five years, contains more prescriptive language ("shall provide ... for the right ... to compensation", as opposed to "offer the possibility of obtaining compensation for damage suffered"). It also specifies that the compensation must be "<u>from the perpetrators</u>" – a point that is also elaborated upon in the explanatory report to the Anti-Trafficking Convention (see paragraphs 67 and 76-77 above; see also Chowdury and Others, cited above, § 126)…The right to compensation under Article 6 § 6 of the Palermo Protocol, the wording of which is quite general, is seen as comprising compensation <u>from traffickers for lost earnings</u>. Of the bodies within the United Nations system, the General Assembly, the Human Rights Council and the Committee on the Elimination of Discrimination against Women have all urged States to enable trafficking victims to obtain compensation for damage suffered (<u>in particular, from perpetrators</u>), even referring to "back pay" and "lost income and due wages" (see paragraphs 69-75 above). For its part, GRETA was emphatic in its third-party submissions in this case (see paragraph*

> *144 above), as well as in its report on France mentioned in paragraph 94 above, that the right to compensation under Article 15 § 3 of the Anti-Trafficking Convention likewise comprises a right to compensation from traffickers in respect of lost earnings. The Parliamentary Assembly of the Council of Europe has also recommended that offenders should pay compensation to the victims of trafficking (see paragraph 80 above), and, more generally, that the restoration of victims' rights and dignity should remain at the centre of actions undertaken with respect to trafficking (see paragraph 81 above).* (emphasis added)

132. It is clear in my judgment that the ECtHR has still not gone so far as to accept that Article 4 ECHR imposes an obligation on contracting states themselves to provide financial compensation to victims of trafficking perpetrated by private third parties. The duty of national courts is to keep pace with Strasbourg jurisprudence as it evolves over time; no more, but certainly no less: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323.

133. It follows that the Defendant was correct to conclude in the case of each of these Claimants that (i) the voluntary extension of CICS to victims of trafficking did not engage Article 4 ECHR, and (ii) Article 4 ECHR was not engaged by the decision not to grant ECF to fund legal aid and assistance for the purpose of applying to the CICA for criminal injuries compensation.

Ground 3 – The Defendant erred in holding that the Claimants' Article 8 ECHR rights were not engaged

134. Whether Article 8 is engaged on the facts of each of the Claimants' cases is also a question of law for this court.

135. Since Article 4 is not engaged in the Claimants' cases, Ms Luh faces an uphill struggle in establishing that Article 8 was engaged. I do not consider that it is.

136. Article 8 ECHR protects the rights of individuals to respect for their private and family life. The concept of "private life" is a broad term not susceptible of exhaustive definition[16]. The case law of the ECtHR *does not exclude* that treatment which does not reach the severity of Article 3 ill-treatment[17] may nonetheless breach Article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral

[16] *Pretty v UK* [2002] 35 EHRR 1 at [61].

[17] "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

integrity; and mental health must be regarded as a crucial part of private life associated with the aspect of moral integrity. However, not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8: *Bensaid v UK* (2001) 33 EHRR 10 at [46]-[47].

137. In her skeleton argument, the Defendant states as follows:

> *70. The Defendant does not dispute that the CICS is intended to compensate the victim for injuries suffered as a result of violent crime and to aid the victim's recovery. Nor does the Defendant dispute that an award of compensation under the CICS can help to improve a victim's physical and psychological wellbeing.*
>
> *71. However, in the Claimants' cases, the grant or refusal of compensation under the CICS would not have a sufficiently significant impact on the essence of the Claimants' private and family life to engage Article 8.*

138. The Claimants submit that on the back of what they term "this concession", access to compensation under the CICS is no less connected with the "core value" of the protection of private and family life under Article 8 as it is the protection and assistance of victim recovery under Article 4 ECHR. They contend that where the state has expressly decided to demonstrate respect for the family and private life of victims of crimes of violence by granting them access to and a potential award of compensation, the compensation comes within the scope of Article 8 ECHR. Ms Luh cites in support of this submission *Petrovic v Austria* (1998) 33 ECtHR 14, applied in *R (DA and Ors) v SSWP* [2019] 1 WLR §35-37, as well as in *R (A and B)* (*supra*); and *KM v First-Tier Tribunal and CICA* [2023] UKUT 239 (AAC) (suggesting that the Upper Tribunal upheld a finding by the First-tier Tribunal that criminal injuries compensation falls within the scope of Article 8 ECHR).

139. However, I do not consider that these authorities support Ms Luh's argument. Her argument in this respect rests upon Article 14 cases, but the test of whether a measure falls "within the ambit" of a Convention right for the purposes of Article 14 is less demanding than the test of whether a Convention right is engaged on its own. The cases relied upon by Ms Luh do not, in my judgment, go far enough to support the Claimants'

case that there is a breach of Article 8 in this case as a stand-alone right. I take each authority in turn.

140. *Petrovic* was an Article 14 ECHR case where the ECtHR held that there had been no violation of Article 14 taken together with Article 8, and no discrimination against a father on grounds of sex, in respect of the refusal of the Austrian authorities to grant him parental leave allowance when the allowance was available to mothers. It was accepted, for Article 14 purposes, that the parental leave allowance fell within the *ambit* of the applicant's rights under Article 8.

141. Similarly, paragraphs 35-37 of *R (DA)* concerned whether the disputed measure (the reduction of housing benefit under the revised welfare benefit cap) fell within the *ambit* of Article 8 in the context of an Article 14 complaint. The Supreme Court held that it did: "*provisions for a reduction of benefits well below the poverty line will strike at family life"* (per Lord Wilson at [37]).

142. Lord Wilson further stated (*ibid*):

> "*The effect of the provisions for the cap may be that the mother goes to work and escapes it; if so, her children below school age have to be cared for in some other way. Or the effect may be that the cap is imposed, with a variety of possible results: that, as expressly suggested by the government to be an option, the family, no doubt with great difficulty, has to move to cheaper accommodation; or that the mother builds up rent arrears and so risks eviction or otherwise falls into debt; or that, like one of the DA mothers, she has to cease buying meat for the children; or, as in cases recorded by Shelter, that she has to go without food herself in order to feed the children or has to turn off the heating. Whatever their individual effect, provisions for a reduction of benefits to well below the poverty line will strike at family life*."

143. That is a very different situation to the present. The consequences of the reduction in the benefit cap for the mothers/the families in *R (DA)* were very serious (up to and including eviction or cutting back on basic necessities like food and heating). They were closely connected to family and private life, and much more closely connected than the consequences for these Claimants of not receiving a compensation payment under the CICS.

144. Similarly, in *KM* at [24]-[25], the Tribunal merely noted in the context of Article 14 that "*more recent decisions have given a wider interpretation to the meaning of ambit"* and that "*a claim to compensation under the 2012 Scheme fell within the ambit of articles 3 and 8*". That observation is consistent with Lord Lloyd-Jones' analysis in *R (A and B)* at [38] in which he referred to the fact that, in the context of Article 14, whilst the English courts have made rather heavy weather of the ambit point, the ECtHR has taken a much more relaxed approach to the issue.

145. My conclusion that the cases relied upon by the Claimants do not go far enough to support their argument that there is a breach of Article 8 ECHR as a standalone right in their cases, is further reinforced by the court's analysis in *R (Oji) v Director of Legal aid Casework* [2024] 4 WLR 53.

146. In *Oji*, the claimant sought judicial review of the Defendant's refusal to grant her ECF for legal aid in order to make a claim under the Windrush Compensation Scheme ("WCS"). The claimant contended that the Defendant misdirected herself as to the scope of Article 6 ECHR, and the refusal of ECF breached her Article 8 rights. The claimant submitted that Article 8 was engaged as a result of the serious personal and practical consequences to the claimant should her compensation claim not succeed: "*The claimant invites me to conclude that any state action which might alleviate mental anguish or allow access to better financial resources engages Article 8*" (at [38]).

147. At [82]-[85], Judge Bird, sitting as a Judge of the High Court, held as follows:

> "*82… Where the consequences of a state action would include the separation of families (see the Gudanaviciene deportation cases, the family reunion case and the trafficking case) or interference with the private life rights built up over long periods of lawful residence (see the Balijigari cases) article 8 is very likely to be engaged. Equally if the state grants time-limited rights to remain when it ought to grant longer-term rights and the consequences on a given individual are "significant" article 8 will be engaged (see XY). Once article 8 is engaged, the target of the state act (the person to be deported, the mother who wanted to be reunited with her husband and child, the victim of trafficking or the person who is granted inferior rights and suffers as a result) is entitled to meaningfully participate in the decision making process.*
>
> *83 I do not accept, and in my view the authorities do not support, Mr Buttler KC's submission that any consequence which has an impact on the day-to-day*

> *life of an applicant is sufficient to engage article 8. The cases deal with interference that goes to the very essence of article 8 rights.*
>
> *84 In my judgment article 8 is not engaged on the facts of the present case. The grant or refusal of WCS compensation does not in my judgment engage article 8. It is no coincidence that all of the cited cases are concerned with immigration rights. Article 8 has been a particular focus in those cases because article 6 has no application and because it is common for immigration decisions to interfere with established rights recognised under article 8. Balijigari is a clear example. XY is an example of a decision having a "significant moral and financial impact" on the applicant. I do not accept Mr Buttler KC's attempts to classify XY as a case where the impacts were minimal.*
>
> *85 In the claimant's case the grant or refusal of compensation would not in my judgment have a sufficiently significant impact on the essence of her private and family life to engage article 8. The outcome of her claim does not dictate if the claimant would continue to enjoy a family life or a private life. I accept that her life would be made materially better by a significant award, but in my judgment that is not enough."*

148. I consider the judge's reasoning in *Oji* to be sound. As in that case, I consider that in this case too whilst the lives of each of the Claimants would be made materially better by an award of compensation, the refusal of an award of compensation under the CICS does not have a sufficiently close or significant impact upon the Claimants' family life or private life to engage Article 8.

149. I do not accept Ms Luh's submission that *Oji* may be distinguished from this case on its facts, on the basis that *Oji* concerned an ex-gratia (voluntary) scheme to correct historic wrongdoing to the Windrush generation, whereas the CICS is a *statutory* scheme for compensation for criminal injuries. It is plain from paragraphs [67]-[69] of the judgment in *Oji* that the relevance of the scheme being non-statutory was that it did not give rise to a civil right in the sense understood in Article 6. That portion of the judgment has no relevance to Judge Bird's Article 8 analysis which I have cited above.

150. Ms Luh further submits that *Oji* is distinguishable from the present claim "*where it is made clear (and accepted by the Defendant) that the CICS' purpose is to provide a financial means by which victims of crimes of violence can be helped to recovery from physical and psychological criminal injuries*" (implementing Article 2 of the European Convention on the Compensation of Victims of Violent Crimes), whereas the primary

purpose of the WCS was to correct historic wrongs done to the Windrush generation. She submits that there is no dispute in the present case that there is psychological injury in the case of each of the Claimants from which they have not yet recovered. The compensation would have a significant impact on their private lives as they recount in the last paragraph of each of their respective witness statements.

151. I do not accept Ms Luh's submission. Whilst the WCS was non-statutory, it was still a scheme providing for compensation for the consequences of state wrongdoing in the immigration context. As paragraph 1 of the *Oji* judgment recounts, "*As the claimant grew up she encountered various difficulties because she was unable to prove her immigration status. They include not being able to secure work, being forced to live through domestic violence because she was unable to secure homelessness assistance and an inability to leave the country with the confidence that she could return*." Despite that, Article 8 was not engaged. As the Judge rightly stated, "*the cases where article 8 is engaged deal with interference that goes to the very essence of article 8 rights*".

152. In all the circumstances, I do not consider that the refusal to provide ECF so as to enable these claimants to have the benefit of legal assistance in making their applications for compensation can be said to have a sufficiently significant and close impact upon their Article 8 rights.

153. It follows that the Defendant was correct to conclude in the case of each of these Claimants that (i) the voluntary extension of CICS to victims of trafficking did not engage Article 8 ECHR, and (ii) Article 8 ECHR was not engaged by the decision not to grant ECF to fund legal aid and assistance for the purpose of applying to the CICA for criminal injuries compensation.

Ground 4 – The Defendant's (continued) denial of ECF funding amounts to a breach of the Claimants' Article 4 and/or 8 ECHR rights

154. In the light of my findings that Articles 4 and 8 are not engaged in the Claimants' cases, this Ground also fails.

CONCLUSION

155. It follows that I find that the Defendant's failure to make an exceptional case determination under sections 10(2)(a) and 10(3)(a)(i) of LASPO on the facts of the Claimants' individual cases was unlawful, as a failure to make legal aid available would be a breach of their Article 6 ECHR rights. Ground 1 succeeds to that extent.

156. Grounds 2-4 fail.