

Trafficking Victims and Immigration Status

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Article 14 of the Trafficking Convention

Each party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:

- (a) the competent authority considers that their stay is necessary owing to their personal situation;
- (b) the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.

The non-renewal or withdrawal of a residence permit is subject to the conditions provided for by the internal law of the party.

The granting of a permit according to [article 14] shall be without prejudice to the right to seek and enjoy asylum.

Domestic provision

Executive policy instead of legislation: the National Referral Mechanism (“**NRM**”)

- Victims of Modern Slavery – Competent Authority Guidance (“**CAG**”) (21/3/16)
- Discretionary leave considerations for victims of modern slavery (“**DLC**”) (10/9/18)

A conclusive decision that the person was trafficked does not automatically lead to a grant of leave to remain.

Following a positive conclusive decision:

- Any outstanding asylum claim / humanitarian protection or Article 8 rights should be determined (and be informed by the NRM process);
- If asylum/humanitarian protection is refused, consider whether to grant discretionary leave to remain.

Asylum



- Experience of trafficking / acts associated with trafficking would in most cases amount to persecution
- Consented trafficking can still amount to persecution: *AM & BM (trafficked women) Albania CG* [2010] UKUT 80 (IAC)
- Assessment of credibility in trafficking determination will usually be adopted in the protection determination
- Victims of trafficking are most likely to face persecution by reason of membership of a “particular social group” – see Country Guidance cases for Moldova ([2008] UKAIT 00002), Nigeria ([2009] UKAIT 00046), Thailand ([2010] UKUT 118 (IAC)), Albania ([2010] UKUT 80 (IAC), and China ([2009] UKAIT 00027).
- Even if no general insufficiency of state protection, may rely on particular circumstances and requirements for protection.

Humanitarian protection

- Real risk of “serious harm” – Immigration Rules para. 339C
- Article 3 – real risk of inhuman or degrading treatment
- Article 4 – prohibition on slavery, servitude, compulsory labour:
 - *Siliadin v France* [2005] ECHR 545
 - *CN v UK* [2012] ECHR 1911
 - *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 (finding that trafficking falls within the scope of Article 4 – see para. 282)
 - *MS (Trafficking – Tribunal’s Powers – Art 4 ECHR) Pakistan* [2016] UKUT 00226 (IAC) (considers lawfulness of removal where positive procedural obligations under Article 4 have not been discharged)
- Article 8

Discretionary leave criteria – the CAG policy

- particularly compelling personal circumstances which justify a grant of discretionary leave to allow them to remain in the UK for a temporary period of time
- a need to stay in the UK in order to pursue a claim for compensation against their traffickers (the fact that someone is seeking compensation will be relevant to the consideration but does not in itself merit a grant of leave - leave must only be granted where it would be unreasonable for them to pursue that claim from outside the UK)
- the victim needs to stay in the UK to assist with police enquiries (the victim needs to have agreed to cooperate with the enquiry, and the police must make a formal request for them to be granted leave on this basis)

(p.74 CAG)

PK (Ghana) v SSHD [2018] 1 WLR 3955 (13 February 2018)



- “Compelling personal circumstances” criterion challenged as being inconsistent with the requirement in Article 14(1)(a) that leave be granted where “*the competent authority considers that their stay is necessary owing to their personal situation*”.
- High Court (Picken J) rejected the challenge, but Court of Appeal (Hickinbottom, Singh & Patten LJ) allowed the appeal.

PK (Ghana) v SSHD [2018] 1 WLR 3955 (13 February 2018)



Hickinbottom LJ:

- Article 14(1)(a) does not give the SSHD an “open-ended discretion” (otherwise it would be otiose).
- “Necessary” means necessary to achieve the objectives of the Trafficking Convention.
- Article 12 (rights and support while in the country) does not assist in construing Article 14(1)(a).

PK (Ghana) v SSHD [2018] 1 WLR 3955 (13 February 2018)



- SSHD's policies "fail to engage with the relevant Convention criteria at all": [49]
- "The protection and assistance of victims of trafficking" is "one of the primary objectives of the Convention": [50]
- The SSHD's guidance "is entirely silent as to the purpose for which it must be necessary for the victim to remain": [51]
- "Compelling" has "a particular connotation in the immigration context, involving a particularly high threshold" [54], and the use of this word gives the impression that the same high threshold applies in trafficking cases.

New DLC guidance – 10 September 2018

- Issued in response to *PK (Ghana)* – does not expressly supersede the CAG, but this must be the intention.
- New formulation: “*assess whether a grant of leave to a recognised victim is necessary for the UK to meet its objective under the Trafficking Convention - to provide protection and assistance to that victim, owing to their personal situation*”

Non-exhaustive list of relevant considerations:

- Eligibility for another form of leave
- Significant and real risk in light of objective evidence that the person may be re-trafficked or become a victim of modern slavery again
- Whether, if returned home, the person would face harm or ill-treatment from those who first brought them to the UK, or exploited them in their home country
- Whether the receiving state have the willingness and ability to provide through its legal system a reasonable level of protection to the person
- Whether the victim needs necessary medical treatment in the UK (“the support duty calls for the provision of support, not that the person is supported until they achieve full physical, psychological or social recovery”)

The other criteria for DL

Pursuing compensation - depends on:

- the type of compensation being sought
- the grounds of the claim
- the likelihood of the claim succeeding - in reference to the claims accepted or rejected by the Competent Authority
- the likely length of the claim
- whether it is necessary for the person to be physically in the UK for the duration of their claim or can be returned for the hearing

Assisting police - Applicant responsible for providing information about the details of the investigating officers and of their assistance (either victim or police may apply)

Nature and length of DL

- recourse to public funds with no prohibition on work, and entitlement to enter higher education (but no entitlement to a student loan)
- 30 months is the norm, with scope for more/less if the facts justify it (must be distinguished “to a high degree” from other cases)
- Further DL periods can be sought (for a fee, unless destitute, will be made destitute by the fee, or other exceptional circumstances apply)
- ILR: “*Victims of modern slavery granted discretionary leave to remain in the UK are not considered to be on a route to indefinite leave to remain in the UK.*” To be determined in accordance with the asylum discretionary leave instruction.



Cases involving children

Where the child or their parent meets the criteria for a grant of DL based on modern slavery, consideration should be given when determining length of DL to factors such as:

- the length of residence in the UK
- where the child was born
- whether the child's life would be adversely affected by a grant of limited leave rather than ILR

Parents of children granted extended leave must separately demonstrate that there are compassionate factors, in their own right, to warrant departure from the standard grant of DL under this policy.

EEA nationals



EEA nationals, who are identified as victims of modern slavery generally retain the ability to exercise free movement rights in accordance with The Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations).

If an EEA national makes a DL application, there is no need to demonstrate an exercise of Treaty rights.

Foreign national offenders



- “Criminals or extremists should not normally benefit from leave on a discretionary basis because it is a Home Office priority to remove them from the UK”
- If granted, should be for 6 months to enable regular review, with no scope for temporary leaving the UK (similar to restricted leave policy for those excluded from refugee status)

Ending or curtailing leave

Two circumstances in the DLC guidance:

- The basis for the grant of leave has ceased
- Refugee exclusion / criminality / danger to national security / obtaining DL by deception (in which case, restricted leave or removal action may be appropriate)