

Exploring the issues of detention after being a victim of trafficking (R (on the application of XYL) v Secretary of State for the Home Department)

27/04/2017

Immigration analysis: The correct approach to detention pending removal of a potential victim of trafficking is considered by Shu Shin Luh, barrister, of Garden Court Chambers, and Kirsten Powrie, solicitor, of Wilson Solicitors LLP, in the light of the Administrative Court's decision in R (on the application of XYL) v Secretary of State for the Home Department.

Original news

R (on the application of XYL) v Secretary of State for the Home Department [\[2017\] EWHC 773 \(Admin\)](#), [\[2017\] All ER \(D\) 91 \(Apr\)](#)

The Administrative Court held that the claimant's detention pending her removal became unlawful after the expiry of the period, contained in the defendant's guidance, in which the competent authority was expected to determine whether there were reasonable grounds to believe that she had been a victim of human trafficking.

What was the background to the case?

This case relates to the unlawful detention of a potential victim of trafficking under the Detained Asylum Casework. The claimant was encountered in an enforcement raid at a massage parlour and discovered not to have regularised her immigration status in the UK.

Following a period of detention under immigration powers, the claimant made a claim for asylum. On 30 August 2016, during the screening interview, she disclosed to the defendant's interviewing officer that she was brought to the UK for the purposes of sexual exploitation and was taken to a massage parlour and forced into prostitution. The disclosure contained indicators of trafficking and the defendant conducted a further interview to explore whether she might potentially have been a victim. This interview was conducted on the same day and a decision was made by the defendant to make a referral for the claimant to be formally identified as a victim of trafficking via the National Referral Mechanism (NRM).

That referral was received on 31 August 2016 by the competent authority, which in this case was the defendant itself. The defendant's Victims of Modern Slavery: Competent Authority Guidance states that a reasonable grounds decision should be made within five working days of the NRM referral. That did not happen in this case—the defendant decided to defer the reasonable grounds decision until a joint trafficking and asylum substantive interview could be carried out, and the claimant was held in detention pending that interview.

The claimant brought judicial review proceedings to challenge the decision to postpone a reasonable grounds decision until after the joint interview, the decision to examine her asylum claim in detention in circumstances where there was a pending NRM trafficking investigation, and the decision to maintain her detention in the meantime.

An injunction was successfully obtained to suspend the claimant being interviewed in detention and, on 15 September 2016, the defendant made a positive reasonable grounds decision and released her from immigration detention on the same day.

What issues arose for the court's consideration?

Four main issues arose from this claim:

- whether the claimant's immigration detention following the NRM referral was unlawful
- if so, at what point after the NRM referral did the detention become unlawful
- whether it was lawful to postpone the reasonable grounds decision until a joint trafficking and asylum interview, pending which the claimant's detention was maintained
- whether all or any part of the period of detention complained of, from 31 August 2016 to 15 September 2016,

and the defendant's conduct in dealing with the claimant's claim as a victim of trafficking constituted a breach of Article 4 of the European Convention on Human Rights (ECHR)

What did the court decide and why?

On the facts of this case, the trial judge found that there was no explanation or justification for requiring a substantive interview in this case before the making of a reasonable grounds decision. This was borne out by the minute recording the reasonable grounds decision, which was based on the material that the defendant had all along, as contained in the NRM referral. There was no reason, on the facts of this case, why the positive reasonable grounds decision which was ultimately made could not have been made significantly earlier. Had it been made earlier, the claimant would have been released earlier. The court found that the claimant was unlawfully detained from the point when a positive reasonable grounds decision ought to have been made to the point at which she was released. It did not accept the argument that the claimant ought to have been released sooner than the five working days permitted for a reasonable grounds decision even though it found that there was no explanation as to why the decision could not have been made sooner than five working days.

The court did not accept the claimant's argument that her detention was in breach of Article 4 ECHR, and the positive obligations to identify her as a victim of trafficking promptly, to provide for her social and psychological recovery as a potential victim, and to not detain her. It rejected that argument in the light of the Court of Appeal's judgment in *Hoang v Secretary of State for the Home Department* [2016] EWCA Civ 565, which held that the procedural obligation under Article 4 ECHR, could not arise until after a positive reasonable grounds decision had been made and, even then, the defendant acting as a competent authority decision-maker did not have constitutional responsibility for investigating the crime of trafficking.

To what extent is the judgment helpful in clarifying the law in this area?

This judgment is a helpful illustration of how a claim for unlawful detention in the Detained Asylum Casework may succeed, notwithstanding the High Court's decision in *Hossain and others v Secretary of State for the Home Department* [2016] EWHC 1331 (Admin), [2016] All ER (D) 40 (Jun). In that case, Cranston J found that there was no systemic unfairness in the operation of a detained asylum process even though the detained fast track process was suspended on 2 July 2015. Cranston J went on to find that each of three individual claimants also did not suffer individual unfairness in being included in the detained asylum process.

It was clear to us from the *Hossain and others* litigation that a challenge to being included in the detained asylum casework would have difficulties succeeding on an argument as to procedural unfairness. This claim was thus not put on the basis of unfairness on either a systemic or individual basis. Rather it focused on public law breaches related to the defendant's failure to follow its own policies relating to detention generally and the handling of potential trafficking claims.

Are there still any grey areas for which practitioners will need to watch out?

The effect of the Court of Appeal's decision in *Hoang* is to restrict the procedural obligation under Article 4 ECHR, to that of law enforcement agencies charged with constitutional responsibility for investigating or prosecuting crime or identifying wrongdoers. This restrictive interpretation of the ambit of Article 4 ECHR is incongruent with the interpretation set out in a long line of Strasbourg case law culminating most recently in the judgment of *Chowdhury and others v Greece* (21884/15) (unreported, 30 March 2017).

In that case, the European Court of Human Rights (ECtHR) confirmed that the positive obligation under Article 4 ECHR included facilitating the prompt and effective identification of potential victims of trafficking by trained persons. This obligation arises as soon as there are indicators that an individual may be a potential victim of trafficking. Applied to the UK context, this would arise upon an individual being referred to the NRM. The ECtHR in *Chowdhury* further held that the positive obligation under Article 4 ECHR included assisting in such individuals' physical, psychological and social recovery. This, in our view, includes not depriving individuals of their liberty, save in exceptional circumstances.

We conclude that the ECtHR's interpretation of the ambit of the Article 4 ECHR obligations is in contrast with the Court of Appeal's judgment in *Hoang*. This raises a significant wider point of importance as to the nature and scope of Article 4 ECHR, as applied in the UK which the Court of Appeal will have to resolve.

Shu Shin Luh, instructed by Wilson Solicitors LLP, appeared for the claimant in this case.

Interviewed by Robert Matthews.

This article was first published on Lexis®PSL Immigration on 27 April 2017. Click for a free trial of [Lexis®PSL](#).

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