Neutral Citation Number: [2018] EWHC 2725 (Admin)

Case No: CO/5021/2017

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

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 18/10/2018

Before:

MR JUSTICE GARNHAM

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Between:

The Queen **(on the application of ZV)**	**Claimant**
- and -	
Secretary of State for The Home Department	**Defendant**

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- -

Ms Samantha Knights QC & Zoe McCallum (instructed by **Duncan Lewis**) for the **Claimant**
Mr Tom Brown (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 2nd & 3rd July 2018

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Approved Judgment

Mr Justice Garnham:

Introduction

1. ZV, a national of Lithuania, alleges that in 2009 she was "trafficked" into the UK by an abusive partner. She says she was beaten, forcibly injected with heroin and forced into prostitution for some eight years. She says, that during the period in which she was controlled by her trafficker, she committed a "string of petty shoplifting offences at his direction" for which she received convictions.

2. The man whom the Claimant says trafficked her was deported to Lithuania in early 2017. On 20 June 2017, the Claimant was served with a Notice of Liability to Deportation by the Secretary of State for the Home Department ("the Secretary of State"), on the basis that she was a persistent offender. On 23 June 2017, she was taken into immigration detention.

3. By these judicial review proceedings, ZV challenges her treatment by the Secretary of State. In particular, she challenges his decision to deport her and to declare inadmissible her asylum claim. She further alleges that her detention between 24 June 2017 and 30 October 2017 was unlawful, that the Secretary of State failed to discharge his obligations to her under the EU Trafficking Directive and that he committed breaches of his policy in relation to potential victims of torture. The Defendant resists all these claims.

4. I heard argument in this case on 2 & 3 July 2018 from Ms Samantha Knights QC and Zoe McCallum on behalf of the Claimant and from Mr Tom Brown for the Defendant. On the evening of the first day of the hearing in this case, the Claimant received notification from the "Competent Authority", a department of the Home Office, that they had concluded that she was indeed a victim of trafficking. I gave the Secretary of State time to consider the consequences of that decision and the parties, the opportunity to make written submissions in response to any decisions the Secretary of State might make in the light of that decision.

5. On 10 October, as I was completing the drafting of this judgment, Mr Brown sent me a note about the decision of Nicol J in *H v SSHD* [2018] EWHC 2191 (Admin) a case in which Ms Knights had represented the Claimant and in which judgment was handed down in August 2018. I allowed both parties to make additional submissions on the significance of that decision for this case.

6. I am grateful to counsel for their clear and helpful submissions, both orally at the hearing and subsequently in writing.

The History

7. I set out here the essential outline chronology of events relevant to this case. I will return to particular aspects of the chronology in more detail at the appropriate points during the course of this judgment.

8. The Claimant was born on 8 July 1984. Her parents divorced when she was four and between the ages of 18 and 21 she suffered multiple bereavements including the loss

of her mother in 2006. Shortly after her mother's death, she began a relationship with a man I shall call DE. In 2008, her stepfather died.

9. The Claimant says that as her relationship with DE progressed, he became physically abusive and demanded money from her. She says that in November 2009, he drugged her and brought her to the UK. On arrival, DE kept the Claimant locked in a house and demanded that she work for him as a prostitute. When she resisted he beat her and forcibly injected her with Heroin. She was forced into prostitution and raped repeatedly by different men. She said that after a year DE allowed her to leave the house, but only to shoplift for him.

10. Between 8 July 2010 and 27 June 2012, the Claimant was convicted of theft on five occasions. She was sentenced to 42 days imprisonment in March 2012 and 28 days in June 2012. She says that on release from prison in April 2012 she discovered that DE was in prison. She then began a relationship with a female friend she had made at HMP Holloway. The two women then relocated together to Lithuania believing that DE was in the UK.

11. The Claimant reports, however, that they were spotted by family or friends of DE and subsequently kidnapped, taken to woods and gang-raped. She says that DE appeared at the site of the rape. The Claimant alleges that he threatened them with death if the Claimant did not return to him. The Claimant was shortly thereafter brought back to the UK to resume captivity and forced prostitution for a further four years until, in 2017, DE was deported. During this period the Claimant was again convicted of theft or attempted theft.

12. The Claimant says that after DE was deported she began working as a gardener and cleaner. On 17 June 2017, she was convicted of possession of cannabis and of other offences and a suspended sentence was activated. She was taken into custody at HMP Bronzefield.

13. On 20 June 2017, the Claimant was served with a Notice of Liability to Deportation. The following day she was served with a notice that she was liable to deportation in accordance with the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") and given the opportunity to submit any reasons as to why she should not be deported. On 23 June 2017 she was detained under immigration powers at the same establishment.

14. On 18 July 2017, whilst in detention, the Claimant prepared a detailed handwritten statement ("the 18 July Letter") on her circumstances, setting out why she said she should not be deported. That described the abuse she had suffered at the hands of DE and the reasons why she feared return to Lithuania. I return to the detail of that letter below.

15. The Home Office conducted its first detention review on 21 July 2017 and decided to maintain detention. On 28 July 2017, the Defendant made a deportation order against the Claimant and certified it, pursuant to Regulation 33 of the 2016 Regulations. The same day she was transferred to Yarl's Wood IRC.

16. On 8 August 2017, the Claimant completed a form for potential adult victims of modern slavery for the National Referral Mechanism ("NRM"). That was sent to the NRM's Competent Authority.

17. The Defendant conducted a second detention review on 23 August 2017 and decided to maintain detention. On 25 August 2017, the Claimant's solicitors made representations regarding temporary release, the Regulation 33 certification and the delay in reaching what is called "the Reasonable Grounds Decision" under the NRM. On 31 August 2017, the Defendant refused the Claimant's temporary release.

18. On 19 September 2017, a general practitioner, Dr Mahmood, carried out an examination at Yarl's Wood IRC, pursuant to Rule 35 of the Detention Centre Rules 2001. On 22 September 2017, the Defendant conducted a third detention review in response to the Rule 35 report and decided to maintain detention.

19. The Home Office wrote to the Claimant on 26 September 2017, noting that she had applied for asylum under the Refugee Convention on the basis that she had a well-founded fear of persecution in Lithuania. Referring to paragraph 326E and 326F of the Immigration Rules, the Home Office declared her asylum claim inadmissible.

20. On 4 October 2017, the Competent Authority wrote to the Claimant at Yarl's Wood IRC, indicating that there were reasonable grounds for believing that the Claimant had been a victim of modern slavery (human trafficking), a decision which is referred to hereafter as "a positive Reasonable Grounds Decision".

21. On 10 October 2017, the Home Office emailed the Salvation Army, a charitable organisation that provides accommodation for potential victims of trafficking, referring the matter for them, with a view to their providing appropriate accommodation for the Claimant.

22. On 12 October 2017, the Defendant conducted a fourth detention review which supported release. On 13 October, the Claimant's release referral was approved.

23. On 24 October 2017, the Home Office confirmed that the certification was maintained and a release referral had been made. On 27 November 2017, Mrs Justice Yip ordered the Claimant's release from detention to suitable accommodation, which release was to take place by no later than 30 November 2017. She ordered the Defendant to ensure that the Claimant received appropriate psychological therapy and counselling treatment within ten days of release. On 30 November 2017, the Claimant was released from detention to a safe house. She was then assigned a key worker, was registered with a GP and was provided with eight sessions of counselling, anti-depressants and medication to treat her drug dependence.

24. As noted above, the Competent Authority made a positive conclusive grounds decision on 29 June 2018, which it communicated to the Claimant on 2 July 2018. On 12 July, the Defendant withdrew the Regulation 33 certification and indicated he had decided to maintain the Deportation Order.

The 18 July 2017 letter

25. The 18 July letter features large in this case and it is convenient to set out here the detail it contained. The handwriting is good and, although at times the English is less than perfect, its meaning is tolerably clear. The letter contains the following assertions:

- On previous occasions, the Claimant says, she had reported that her partner was abusing her. She says that he was "beating me up". She says that she opened up about both his physical abuse and his sexual abuse after her partner was deported. She was really scared about the prospect of being deported to the same place where she had been ten years previously.
- Her uncle died when she was 17. Her mother was badly depressed. Her grandfather passed away when she was 19 and her mother was "lost in herself". When she was 20, her best friend was killed, and when she was 21, her partner killed himself. When she was 22, her mother died from lung and stomach cancer. The following day her aunt died. She explained how the effect of these bereavements meant she could not continue with her personnel management course at university and she tried to kill herself "a couple of times".
- Initially, DE provided her with considerable support. But then he got her to try drugs and she "liked them" because for a little while she could forget her life. She says that her mother left her a lot of money but she spent it all in two years. That, she said, was related to her relationship with DE. She acknowledges it was "my fault as well because I was using drugs and loved him".
- Her stepfather and godmother died, and shortly thereafter DE changed. He moved in with her and started to beat her up. She said he persuaded her to sell the house and as a result the last of her money was gone. She intended to escape from him and go to Spain but he discovered her plan. He "took me to a minibus" on which people were travelling to England and gave her tablets. As a result, she slept all the way. She says he put a bottle of alcohol between her legs so that when she woke up and started to ask where she was he would laugh at her and conclude that she was drunk.
- Referring to the occasion when she arrived in England, nearly eight years previously, she said that DE had locked her in a room and told her that because she "had the habit" she would have to go out and make money. She said that he told her that she could work as a prostitute and he began to send men to her. When there were no customers for a couple of hours, she said, DE would send her out to shoplift. If she made less than £50 he would beat her up and deprive her of drugs. She said that her "customers" were raping her even when she was sick. She said that she lived like that for eight years.
- She was imprisoned on four occasions but when she was released he was always waiting for her outside. She said that during this period, she "always liked girls; I hate men". On the one occasion when she left prison when DE was not waiting for her outside, she left with another female prisoner.
- She said that she and her girlfriend then decided to run away together. The implication is that she and her girlfriend then returned to her home country, Lithuania. She says that in her country "they hate gays".

- When DE left prison in England, his parents contacted him and told him that "everyone was laughing" because she was gay. Friends of DE beat her up and then put her into the boot of a car and took her to a forest. There she said "they raped us for two days". Then DE came to her saying he was saving her and that "it's disgusting who I became – a gay". She said she believed she would never see her friend again because he said he was going to shoot them both. She said he told them to dig a grave for themselves. For four hours they were digging and begging not to be killed. She then promised to go back to England to continue life with him. She was doing everything he said, so as to avoid being beaten. He let her girlfriend go.
- He allowed her to go onto a script of methadone and she remained "clean for two years". After that, she began to think about how to escape. She was arrested for an offence and had to go to court. Whilst preparing for that appearance she asked her solicitor to speak to the probation service because she was ready to tell them what had been going on.
- She told everything to her friend, but her friend was sleeping with DE and she reported the matter to him. As a result, he again locked her in the house. However a friend visited and released her.
- She said that before her next appointment with the probation service DE beat her so badly that she was not able to attend.

The Grounds

26. The Claimant advances 5 grounds of challenge. They are as follows:

> **"Ground 1:** The decision to certify under Regulation 33 of the 2016 Regulations is unlawful because (a) evidence before the Defendant at the time of the decision indicated a real risk that the Claimant's removal pending appeal would breach Articles 3 and 8 ECHR and would therefore be unlawful under section 6 of the Human Rights Act 1998 ("HRA"), (b) notwithstanding this evidence, the Defendant conducted insufficient inquiries into the circumstances of the Claimant's case and consequently failed to discharge his duty to satisfy himself on adequate information that certification would not breach section 6; and (c) in any event, judged as at the date of the hearing on the evidence now before the court, the evidence that certification would breach section 6 is now overwhelming.
>
> **Ground 2:** The decision of 26 September 2017 to declare the Claimant's asylum claim inadmissible without further investigation is unlawful because (a) it was made prior to final determination of the Claimant's VOT status and was therefore in breach of the Defendant's published policy; (b) it was a blanket decision taken without reference to any of the underlying facts and as such, created an unacceptable risk of breach of Article 3 ECHR and the Refugee Convention; and (c) it was contrary to Paragraph 326F of the Immigration Rules.

> **Ground 3:** The Claimant's immigration detention was unlawful from soon after 24 June 2017, to 30 October 2017 when she was released into safe accommodation. This is based upon the failure to identify her as a potential victim of trafficking at the outset as should have been clear had adequate or any medical assessments been carried out; delays in referring her to the NRM and delays within the NRM which would have led to a reasonable grounds decision having been made soon after her detention commenced; failures in conducting an adequate Rule 35/Rule 21 procedure which would also have identified her an unsuitable for detention; and *Hardial Singh* principles.
>
> **Ground 4:** The Defendant unlawfully failed to discharge his obligation to provide the Claimant with assistance and support on receipt of a Reasonable Grounds decision under Articles 11(2) and (5) Directive 2011/36/EU and his published policy. That is so because (a) the Claimant's medical and welfare needs *required* her release from detention and yet Defendant unlawfully failed to discharge her, (b) the psychological support the Claimant required was not provided to her in detention; (c) the Defendant made no adequate assessment of the Claimant's medical and welfare needs until her release from detention on 30 November 2017; and (d) the Claimant did not receive adequate mental health treatment whilst in detention.
>
> **Ground 5:** The Defendant committed further breaches of its policy in relation to the Claimant as a potential victim of torture by (a) failing to refer the Claimant to the NRM even once the trafficking background was very obvious; (b) seriously and unreasonably delaying in taking the Reasonable and Conclusive Grounds decision and (c) unlawfully prioritising her removal over and above his responsibilities to identify and protect her as a prospective VOT. Such breaches are of wider concern as they are symptomatic of a wider problem and not isolated events."

27. I deal with each ground in turn. But first, I set out the relevant legal framework in respect of modern slavery.

Modern Slavery - The Legal Framework

28. Article 4 of the European Convention on Human Rights (ECHR) provides that no one should be held in slavery or servitude and no one should be required to perform forced or compulsory labour.

29. That provision has been supplemented by a Council of Europe Convention on Action against Trafficking in Human Beings, signed on 16 May 2005 ("the Trafficking Convention" or "ECAT"). That Convention was ratified by the UK on 17 December 2008 and came into force on 1 April 2009. The pre-amble to the Trafficking Convention recognises that protection of victims is one of its paramount objectives and Article 1(b) identifies as a particular purpose in the Convention the design of "a comprehensive framework for the protection and assistance of victims". Article 10 of

the Trafficking Convention deals with the identification of victims of trafficking. Article 12 provides for the assistance to victims and Article 13 provides for recovery and reflection periods.

30. The Trafficking Convention came into force in the UK on 1 April 2009 whereupon the UK established a National Referral Mechanism. That mechanism tasked "Competent Authorities" with determining whether those who claimed to have been trafficked for the purpose of exploitation, had in fact been trafficked.

31. On 14 October 2011, EU Directive 2011/36 on preventing and combating trafficking of human beings and protecting its victims ("the Trafficking Directive") came into force in the UK. The directive has direct effect (see *Hounga v Allen* [2014] 1 WLR 2889, paragraph 61). Article 8 of the Convention makes provision for non-prosecution or non-application of penalties to the victims of trafficking. Article 11 makes provision for assistance and support for victims of trafficking.

32. On 31 July 2015, the Victims of Modern Slavery ("VMS") Guidance came into force. Its purpose was to implement the relevant provisions of the Trafficking Convention in domestic law. The guidance is directed towards staff in Competent Authorities to help them to decide whether a person referred under the NRM is a victim of trafficking. The guidance sets out the status of the NRM process. Specified public authorities and frontline staff are required to refer potential victims of trafficking to the NRM as soon as practicable. The Competent Authority should then make "a Reasonable Grounds Decision" within 5 working days of referral. The Competent Authority will then make a Reasonable Grounds Decision as to whether, on available information, there are reasonable grounds to believe a person has been a victim of trafficking.

33. In *PK (Ghana) v Secretary of State for the Home Department* [2018] EWCA Civ 98 at [94], the Court of Appeal held that the Secretary of State's policy guidance was intended to give effect to the Trafficking Convention and that in so far as it failed to do so that would be a justiciable error of law.

34. If a Reasonable Grounds Decision is made, the policy provides for a series of actions to be taken by the Competent Authority. Action 1 is to "provide the potential victim with support if they want it for a minimum of 45 days during a recovery and reflection period." Action 7 directs there to be consideration "whether a potential victim can be released from detention". The guidance goes on "if the potential victim of trafficking…is in immigration detention they will normally need to be released on temporary admission or temporary release by the Home Office unless in the particular circumstances their detention can be justified on grounds of public order." Action 8 directs that there be liaison "with asylum decision makers to ensure that any negative asylum decision is not made until after the Conclusive Grounds Decision has been taken."

35. The guidance also sets out actions to be taken by the Competent Authority if a Conclusive Grounds decision is positive, in other words if the Home Office decides conclusively that the person concerned is a victim of trafficking. In those circumstances, Action 5 requires that a decision is made "on any outstanding asylum claim". Action 6 directs consideration as to "whether the victim is eligible for discretionary leave".

36. The guidance also notes that:

> "if a potential victim of modern slavery has an existing immigration case which concludes that they cannot remain in the UK, no removal action will be taken by the Home Office before a Conclusive Grounds Decision has been made on their human trafficking and slavery case within the NRM process and they will not be detained save in limited circumstances i.e. where their detention is necessary on grounds of public policy."

37. On 31 July 2015, the Modern Slavery Act 2015 came into force. Section 45 provided a defence to victims of trafficking who had been compelled by their traffickers to do an act which constitutes an offence. That Act did not have retrospective effect. However, trafficking victims may appeal their convictions on the basis that the courts should have stayed their prosecution as an abuse of process (see *R v Joseph (Anti-Slavery International Intervening)* [2017] EWCA Crim 36.

Ground 1 – Unlawful Certification of Deportation Appeal

38. By this ground, the Claimant alleges that the decision to certify under Regulation 33 of the 2016 Regulations was unlawful.

39. Regulation 23(6)(b) of the 2016 Regulations provides that an EEA national may be removed from the UK if "the Secretary of State has decided that the person's removal is justified on grounds of public policy... in accordance with Regulation 27". Regulations 2 and 36 provide a right of appeal against removal under Regulation 23(6) to the First Tier Tribunal.

40. Regulation 32(3) provides:

> "Where a decision is taken to remove a person under regulation 23(6)(b), the person is to be treated as if the person were a person to whom section 3(5)(a) of the 1971 Act…applies…"

41. Regulation 33 provides as follows:

> "Human rights considerations and interim orders to suspend removal
>
> (1) This regulation applies where the Secretary of State intends to give directions for the removal of a person ("P") to whom regulation 32(3) applies, in circumstances where—
>
> (a) P has not appealed against the EEA decision to which regulation 32(3) applies, but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time with permission); or
>
> (b) P has so appealed but the appeal has not been finally determined.

> (2) The Secretary of State may only give directions for P's removal if the Secretary of State certifies that, despite the appeals process not having been begun or not having been finally determined, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of P's appeal, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).
>
> (3) The grounds upon which the Secretary of State may certify a removal under paragraph (2) include (in particular) that P would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed."

42. Ms Knights argues that the decision to certify under Regulation 33 was taken with insufficient enquiry into the circumstances of the Claimant's case. She says that the letter of 18 July 2017 was powerful evidence that the Claimant had been trafficked and faced a risk of re-trafficking. As such, she says, it was incumbent on the Defendant not to certify unless and until he had satisfied himself on adequate information that there would be no breach of Section 6 HRA. She said that the decision to make a deportation order and certify the case was contrary to the Defendant's policy and the opposite of what his international obligations demanded.

43. Second, she argues that the evidence before the Defendant when he certified the case demonstrated that deportation pending appeal created a real risk of breach of Articles 3 and 8. As regard Article 3, she said that the Claimant had raised a case that she was a victim of trafficking and torture and had sustained abuse over eight years, that her trafficker had re-trafficked her from Lithuania and that she was terrified of removal. In certifying her claim, Ms Knights argued, the Defendant disregarded the risk of trafficking and deterioration in her mental health pending an appeal against deportation.

44. As regards Article 8, Ms Knights contends that the public order justification for certification was extremely weak. She said that it was wrong to rely on her previous criminal convictions because they were a product of the trafficking abuse she had suffered. She said that the error in the approach of the Defendant was obvious from his decision letter which asserted that the Claimant had "provided no reasons as to why you should not be removed before your appeal is heard." She said that the reasons were obvious from the Claimant's letter, namely that removing her to Lithuania would expose her to a significant risk of being re-trafficked.

45. On these bases, Ms Knight sought a declaration that the certification of the Claimant's "protection and human rights claim" is unlawful. In fact only the latter is in issue; a protection claim is a claim for asylum or humanitarian protection (see s82 (Nationality, Immigration and Asylum Act 2002)) and, as is implicitly acknowledged by Ms Knights, given the focus of her arguments under this ground, the certification here related to the Claimant's human rights.

46. However, as noted above, on 12 July the Defendant withdrew the Regulation 33 certification. Ms Knights has therefore achieved more than she sought. She has obtained not just a declaration that the certificate was unlawful but its actual withdrawal. In my judgment, the effect of that is to make this ground academic.

47. Ms Knights resists that conclusion, arguing that the withdrawal of the certificate strengthens her claim. It may well be that, in a general sense, it does. But that does not make the challenge in these proceedings any less academic now the decision under challenge has been withdrawn.

48. Ms Knights points to existing vulnerabilities in the Claimant's position. She says the Claimant still faces the prospect of removal. That may be right. But that too does not alter the fact that the decision under challenge was the certificate, and the relief sought was a declaration that the certificate was unlawful. Its withdrawal means there is nothing left to challenge. If there are indeed vulnerabilities in the claimant's position and these are not addressed in the remainder of this challenge, then, should those vulnerabilities lead to adverse decisions in the future, the Claimant will have to consider further challenges.

49. This court does not act in the abstract; it does not hold a standing brief to supervise the Secretary of State in the performance of his statutory duties either in individual cases, or generally. Instead it resolves particular challenges on particular facts. The challenge under Ground 1 no longer requires resolution.

Ground 2 – The Asylum Claim

50. By this ground of challenge, the Claimant attacks the Secretary of State's decision of 26 September 2017, to declare inadmissible her asylum claim.

51. Mr Knights relies on the terms of the VMS guidance and in particular, Actions 8 and 5. Action 8 requires the Competent Authority to "liaise with asylum decision makers to ensure any negative asylum decision is not made until after the Conclusive Grounds Decision has been taken". Ground 5 requires that the "Home Office should not make a negative decision on an asylum claim whilst a person is being considered under the NRM process". Ms Knights acknowledges that the Home Office's 'Asylum Policy Instruction EU/EA Asylum Claims' states at paragraph 5.4 and 5.5:

> "5.4 Victims of Modern Slavery/Trafficking
>
> EU nationals must still be referred to the National Referral Mechanism where there are indicators that the individual has been a victim of modern slavery or trafficking. The asylum claim must still be declared inadmissible because victims could seek redress from the authorities in their country of origin, they may nevertheless qualify for leave to remain in the UK under the Discretionary Leave policy. Caseworkers can refer to guidance on Modern Slavery and the Discretionary Leave instruction for further information.
>
> 5.5 Exceptional circumstances

> EU Member States are required to abide by the ECHR and under the Spanish Protocol it is considered that the level of protection afforded to individuals' fundamental rights and freedoms in EU Member States means that they are deemed to be safe countries of origin. As such, there is no risk of persecution for individuals entitled to reside in EU countries that would give rise to a need for international protection. It is expected that there will be very few claims that are not declared inadmissible and are instead admitted to the asylum process for full consideration and even fewer, if any, who qualify for international protection-based leave in the UK.
>
> An asylum claim from an EU national will only be admissible if the claimant sets out exceptional circumstances which require the claim to be fully considered in accordance with paragraph 326F."

52. The Spanish Protocol referred to, is part of the Treaty of Amsterdam. The Protocol provides:

> "Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in the following cases:
> if the Member State of which the applicant is a national proceeds, availing itself of the provisions of Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to take measures derogating from its obligations under that Convention;
> if the procedure referred to in Article I-59(1) or (2) of the Constitution has been initiated and until the Council, or where appropriate, the European Council, adopts a European decision in respect thereof with regard to the Member State of which the applicant is a national;
> if the Council has adopted a European decision in accordance with Article I-59(1) of the Constitution in respect of the Member State of which the applicant is a national or if the European Council has adopted a European decision in accordance with Article I-59(2) of the Constitution in respect of the Member State of which the applicant is a national;
> if a Member State should so decide unilaterally in respect of the application of a national of another Member State; in that case, the Council shall be immediately informed; the application shall be dealt with on the basis of presumption that it is manifestly unfounded without affecting in any way, whatever the case may be, the decision-making power of the Member State."

53. Ms Knights argues that the Spanish Protocol preserves a broad discretion for member states to decline to apply the presumption that claims from EEA nationals are not admissible, that Section 2 of the Asylum, Immigration and Appeals Act 1993 requires that nothing in the immigration rules may lay down any practice which would be contrary to the Refugee Convention, and that where a trafficking risk is raised in an asylum claim, it is a principle of law that the claim cannot be adequately considered without investigation of the pattern of trafficking in the country of origin and the individuals particular circumstances.

54. She says the declaration of inadmissibility here, was made after referral to the NRM and so conflicted with the VMS guidance. She says that the inadmissibility decision was a "blanket decision taken without reference to the Claimant's individual circumstances." She says that the inadmissibility decision was contrary to paragraph 326F of the Immigration Rules and that the Claimant had raised exceptional circumstances.

55. Ms Knights further argues that her case on Ground 2 is strengthened by the Secretary of State's decision to withdraw the Reg 33 certificate.

56. In my judgment, these arguments are misconceived. The Spanish Protocol is clear. In the light of the level of protection available, member states are to be regarded as safe. Asylum claims by members of national states are only to be declared admissible in the very unusual circumstances identified in the Protocol. The final paragraph of that Protocol needs to be read in the light of the nature of the other categories. The fact that the Council is to be informed if a member state ever decides unilaterally to consider an application of a national of another member state, and that even in those circumstances, that application has to be dealt with on the basis of a presumption that it is manifestly unfounded, underlines the truly exceptional nature of the circumstance contemplated by the Protocol.

57. In my judgment, the asylum claim in the present case does not come close to falling into such a category of exceptionality.

58. It is right that, at first blush, there appears to be a conflict between the VMS guidance and Actions 8 and 5 on the one hand, and the Home Office asylum policy instruction. But in my view, it is clear that the VMS guidance applies to trafficking cases from around the world, whereas the policy instruction is specific to EA cases. In my judgment, the VMS guidance applies only to properly admissible asylum claims and not to asylum claims declared inadmissible.

59. In any event, the Spanish Protocol reflects a principle of English domestic law, that a claim for asylum can only succeed where the claimant shows a real risk that the country of origin would be unable or unwilling to discharge its duty to establish an operating system for the protection against persecution of its own nationals (see *Horvath v SSHD* [2001] 1 AC 489 at 495). As Mr Brown submits, State parties are not required to guarantee the safety of their citizens. Here, the home country is a member of the EU and a party to the Anti-Trafficking Convention and Directive. Lithuania is also a member of the Council of Europe and a signatory to the European Convention on Human Rights. There is no evidence before me to suggest that

Lithuania does not provide an adequate system of criminal law enforcement in respect of trafficking or does not operate that system properly.

60. For all those reasons, the Secretary of State was, in my judgment, entitled to declare ZV's asylum claim inadmissible.

61. The withdrawal of the certificate does not change that position. As Mr Brown further submits, since ZV's claim was not even admissible, it was not an asylum claim which remained outstanding at the time her case was referred to the NRM. There was no decision to await the outcome of the NRM process.

62. Furthermore, there was nothing, in my judgment, inconsistent with Section 2 of the 1993 Act in the Secretary of State's compliance with the Spanish Protocol. Paragraph 326F of the Immigration Rules does not offend the Geneva Convention by recognising the safety of other member states.

Ground 3 – Detention

63. By this ground, the Claimant challenges the lawfulness of her detention from 24 June 2017, the day after she was taken into immigration detention, to 30 November 2017 when she was finally released.

The Legal Principles and Policy

64. The legal foundation for this claim is common ground.

65. Paragraph 2(3) of Schedule 3 to the Immigration Act 1971, empowers the Secretary of State to detain a person against whom there is a deportation order in force, pending her removal from the UK. That power to detain is subject to limits imposed by the common law. Those limits were first described in *R v Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704, and subsequently considered by Dyson LJ (as he then was), in *R(I) v SSHD* [2002] EWCA Civ 888 at paragraph 46;

> "i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
>
> ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
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> iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
>
> iv) The Secretary of State should act with the reasonable diligence and expedition to effect removal."

66. That formulation of the principles was approved in *R (Lumba) v SSHD* [2011] UKSC 12.

67. Central to this claim, in addition, are the Detention Centre Rules 2001 and the 'Adults at Risk' (or "AAR") policy.

68. The Detention Centre Rules impose further obligations on the Secretary of State. By Rule 34:

> "(1) Every detained person shall be given a physical and mental examination by the medical practitioner (or another registered medical practitioner in accordance with rules 33(7) or (10)) within 24 hours of his admission to the detention centre.
>
> (2) Nothing in paragraph (1) shall allow an examination to be given in any case where the detained person does not consent to it.
>
> (3) If a detained person does not consent to an examination under paragraph (1), he shall be entitled to the examination at any subsequent time upon request".

69. Rule 35 provides:

> "(1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.
>
> (2) The medical practitioner shall report to the manager on the case of any detained person he suspects of having suicidal intentions, and the detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State.
>
> (3) The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.
>
> (4) The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay.
>
> (5) The medical practitioner shall pay special attention to any detained person whose mental condition appears to require it, and make any special arrangements (including counselling arrangements) which appear necessary for his supervision or care."

70. From September 2016, a Home Office policy, the AAR applied "in all cases in which considerations been given" to detaining an adult in order to remove her. It is common ground that the Secretary of State is obliged to follow that policy unless there are good reasons to depart from it. The AAR policy provides that any decision affecting any potential victims of trafficking should be made on the basis of the VMS guidance. That provides, that, if the potential victim is in immigration detention she will

normally need to be released on temporary admission or temporary release unless their detention can be justified on grounds of public order. As the Claimant submits, that principle was held in *R (XYL) v SSHD* [2017] EWHC 73 (Admin) to be a "statement of policy which bears on the legality of detention in the sense explained in *R (Lumba)*…"

71. The policy provides that once an individual has been identified as at risk "consideration should be given to the level of evidence" which supports that assessment. Level 1 applies to a self-declaration of being an adult at risk. Level 2 refers to professional evidence or official documentary evidence which indicates that the individual is (or may be) an adult at risk. Level 3 refers to professional evidence stating that the individual is at risk. Where a person in detention is subject to a Rule 35 report with concerns about torture that will normally amount to Level 2 evidence. Such a person should only be considered for detention if one of the following applies:

> "(i) the date of removal is fixed or can be fixed quickly, and is within a reasonable timescale and the individual has failed to comply with reasonable voluntary return opportunities, or if the individual is being detained at the border pending removal having been refused entry to the UK;
>
> (ii) they present a level of public protection concerns that would justify detention – for example, if they meet the criteria of foreign criminal as defined in the Immigration Act 2014 or there is a relevant national security or other public protection concern;
>
> (iii) there are negative indicators of non-compliance which suggest that the individual is highly likely not to be removable unless detained."

72. A person in respect of whom there is Level 3 evidence should only be considered for detention if :

> "(i) removal has been set for a date in the immediate future, there are no barriers to removal and escorts and other appropriate arrangements are in place to ensure the safe management of the individual's return or
>
> (ii) the individual presents a significant public protection concern."

It is stated to be very unlikely that compliance issues on their own would warrant detention of individual falling into this category.

Submissions and Discussion

73. The Claimant submits that her immigration detention was unlawful for five months and 6 days from soon after 24 June 2017, the day after she was taken into immigration detention whilst at HMP Bronzefield, to 30 November 2017 when she was released from Yarl's Wood IRC.

74. The Defendant concedes that her detention was "technically unlawful" between 28 June 2017 when the NRM referral was underway and 16 August 2017 because there was a failure during that period to carry out a Rule 34 examination. But, save for that period, he maintains that the detention of the Claimant throughout was lawful.

75. It is convenient to consider the justification for the Claimant's detention during the six periods identified by Ms Knights.

76. **First**, she says that once the Claimant entered immigration detention whilst at HMP Bronzefield on 23 June, the Defendant was obliged to conduct a medical assessment within 24 hours. Had they done so, that should have led to a report under Rule 21 of the Prison Rules 1999. That in turn should have led to evidence of torture and trafficking being identified which then should have led to her release in accordance with the AAR policy and the VMS guidance.

77. I reject that argument. The Claimant status at HMP Bronzefield changed on 23 June 2017 when she entered immigration detention. But her medical care continued and continued to be appropriate. She was seen by a GP on 17 June 2017 and no concerns were raised. She was seen by a nurse on 30 June 2017 and again no concerns were raised to the effect that she had been trafficked. In fact, none of the medical records from HMP Bronzefield suggest concern about trafficking or sexual abuse or violence. In those circumstances, in my judgment, it cannot be said that if a medical assessment had been conducted as required by PSO3050 it would have led to a report under Rule 21 of the Prison Rules 1999 which would have led to evidence of torture and trafficking being identified such that the Claimant would have been released in accordance with the AAR policy.

78. **Second**, on 18 July 2017, the Claimant provided the detailed handwritten statement to which I have referred. Ms Knight contends that, if her claim in respect of the period in detention since 23 June 2017 fails, then her detention became unlawful from soon after 18 July. She alleges that, in that letter, the Claimant claimed asylum and disclosed that she was a victim of trafficking. Ms Knights contends that from that date the Defendant ought, in accordance with the VMS policy, to have referred the Claimant to the NRM. She says that given the existence of an asylum claim it should then have been apparent that the deportation could not be effective in a reasonable period. Accordingly, applying *Hardial Singh* her detention became unlawful. Ms Knights contends that the 18 July 2017 Letter disclosed evidence of trafficking which should have led the Secretary of State to recognise the weakness of the public order justification for the Claimant's detention. She says that disclosure cast doubt upon the safety of the Claimant's conviction and the entire basis for the deportation. She submits that factor was not recognised in any of the detention reviews carried out by the Defendant.

79. It is right to observe that in the detention review of 21 July 2017, three days after the letter, the Defendant's staff record that "the Claimant had not at this stage lodged any representations against the deportation". In the light of the letter, it is said that that was an error and that that error led to the conclusion that "no evidence was identified to suggest detention would have a deleterious effect on the Claimant pursuant to the Adults at Risk policy".

80. In response, Mr Brown submits that the 18 July letter did not give rise to a duty to release from detention. He says that ZV had been in custody since 17 June 2017 and only advanced an argument that she had been trafficked in response to notification of the intention to deport. He said it was not apparent from the letter that ZV was making an asylum claim. He says that the existence of the letter did not mean that ZV's deportation could not take place within a reasonable period. He says there is no basis on which to assert that detention becomes unlawful as soon as a person becomes a subject of an NRM referral and that therefore logically it cannot become unlawful before such a referral is made.

81. In my judgment, properly understood, the letter of 18 July 2017 did not constitute a valid claim for asylum. But it did give an account of trafficking. However, receipt of such an account does not, of itself, make continued detention unlawful, if that detention is lawful applying *Hardial Singh*.

82. In *R (XYL) v SSHD* [2017] EWHC 773, Jonathan Swift QC, sitting as he then was as a deputy judge of the High Court, held that there is no requirement to release a person from immigration detention as soon as they became subject to the National Referral Mechanism procedure. I respectfully agree. As he observed at paragraph 19 "Potential victims of trafficking are only identified for distinct treatment, so far as concerns detention if they are the subject of a positive reasonable grounds decision". Mr Swift went on, at [25]

> "I can see nothing in the various guidance documents to the effect that immigration detention must or ought usually to, come to an end if the person concerned is the subject of an NRM referral. Moreover, there is no inherent inconsistency between lawful immigration detention – lawful in accordance with the well-known *Hardial Singh* principles – and a situation in which a person who is so detained is also the subject of an NRM referral. Put another way, the fact that there has been an NRM referral does not mean that detention ceases to be for purposes permitted under 1971 Act powers (regardless of what the position might be if at some point thereafter there is a conclusive grounds decision in respect of the person detained). Nor does the fact of a referral mean that it is inevitable that the detention will be for a period beyond that reasonably necessary. This point is underlined by the requirement that a reasonable grounds decision may be expected in a short period of time – i.e. *"as soon as possible"* in situations where the person is in immigration detention."

83. In my judgment, it cannot be said on the facts of the present case, that removal in a reasonable period was not possible on 18 July or immediately afterwards. Accordingly, the second Hardial Singh principle did not mean that release was required then. Furthermore, given that, as explained above, the asylum claim was properly declared inadmissible when the issue was addressed in September 2017, it cannot be said that its existence in July meant that it should have been apparent that the Secretary of State would not be able to effect deportation within a reasonable period. Accordingly, the third Hardial Singh principle did not operate to make

detention unlawful in July. Accordingly, I reject the claim that detention became unlawful from that time.

84. **Third**, Ms Knights says that, if she is wrong about the two previous periods, then by no later than 29 July the Claimant's detention had become unlawful. She points out that the Claimant had been transferred to Yarl's Wood IRC on 28 July 2017 and the Defendant was required to conduct a Rule 34 compliant examination within 24 hours of that transfer.

85. In response, Mr Brown contends that by 28 July 2017 an NRM referral was in train and a Rule 34 assessment would not have made any difference. The Secretary of State accepts that there was a failure to carry out a Rule 34 examination and that renders ZV's detention technically unlawful until 16 August 2017 when ZV had opportunity for Rule 35 assessment. But it is denied that a Rule 35 assessment would have led to a Rule 35 report which would have led to ZV's earlier release

86. In this regard, I reject the Defendant's argument. The Secretary of State accepts there was a failure to carry out a Rule 34 examination in the period from 29 July to 13 August 2017 and that that failure rendered the detention unlawful. In my judgment, the suggestion that damages for that period need not be more than simply nominal is unfounded. One of the reasons why no Reasonable Grounds Decision was taken during that period is said to be the 'absence of the Competent Authority on annual leave'. That must be a reference to the official within the competent Authority with responsibility for the Claimant's case. In my judgment, that cannot possibly be a good excuse. The obligation on the Defendant is to ensure the Competent Authority conducts its duties consistently and properly. Failing to have in place arrangements which mean the Competent Authority continues to perform its functions whilst individual officers are away, cannot justify such a failure.

87. Those failures by the Secretary of State, to ensure a Rule 34 examination took place and to maintain adequate staffing at the Competent Authority, rendered the Claimant's detention unlawful during that period and, in my judgment, must have delayed her eventual release. If that time had not been wasted the date of her eventual release would have been brought forward by a comparable period. The proper approach to awarding damages for that unlawful detention in my judgment is to add 15 to the total number of days of unlawful detention I conclude took place at the end of the present exercise of considering Ms Knights' six periods.

88. **Fourth**, as regards the period after 14 August 2017, Ms Knights argues that five days after her referral to the NRM, the Claimant would have received a positive reasonable grounds decision had there not been that delay.

89. The "5 working day" requirement is found in the VMS guidance. That is plainly a target at which those responsible for managing trafficking allegations should aim. But it is not rule of law non-compliance with which will necessarily entitle a claimant to relief. The document is properly described as "guidance" and is couched in terms of what 'should' be done rather than what 'must' be done. (See also in this context the judgment of Karon Monaghan QC, sitting as a deputy judge of this court, in *R (on the application of CP (Vietnam)) v Secretary of State for the Home Department* [2018] EWHC 2122 (admin) at [90]).

90. Mr Brown argues that ZV's detention did not become unlawful as a result of the time taken to secure a reasonable grounds decision. He says that the risk of absconding and re-offending constituted substantial public order grounds which justified continued detention, notwithstanding the delay in the reasonable grounds decision and after that decision had been received. I accept that argument. The passage of five days did not make continued detention unlawful.

91. **Fifth**, Ms Knight argues that, if her preceding arguments are wrong, that the Claimant's detention was unlawful soon after 19 September 2017 because she says the Rule 35 report, obtained that day, was inadequate and the response to it was inadequate. She says that the report failed adequately to assess the Claimant's mental state and whether detention was likely to affect her adversely. She says the response thereafter was flawed, in that, although it accepted that the Claimant was a victim of torture it none the less asserted there were no major concerns about her health.

92. Mr Brown responds that the Secretary of State was entitled to rely on the independent opinion of Dr Mahmood, and that doctor's mental health assessment of the Claimant does not provide a basis for concluding that continued detention was injurious to the Claimant. The doctor said that there were no major concerns about the Claimant's health. In my judgment Mr Brown is right. The attack advanced by Ms Knights on the adequacy of the doctor's examination and conclusions does not undermine the Secretary of State's entitlement to rely on it.

93. **Finally**, Ms Knight contends that detention was unlawful after the positive Reasonable Grounds Decision of 4 October 2017. She observes the Defendant then accepted a need for relief in accordance with the VMS guidance.

94. Mr Brown points out that there was no NRM reasonable grounds decision until 4 October and thereafter the Secretary of State was entitled to seek appropriate accommodation for ZV. It was not until 30 November 2017 that ZV was released.

95. In assessing the lawfulness of detention after 4 October, it is necessary to have regard to all the preceding history. I have concluded that for all but a period of 15 days, detention was justified. But, nonetheless, there had been a prolonged period of administrative detention of an individual in respect of whom, on 4 October 2017, there were found to be reasonable grounds for believing she was a victim of trafficking. Action 7 in the VMS guidance directs early release at this point "unless in the particular circumstances their detention can be justified on grounds of public order." On 12 October 2017, the detention review supported release. The following day the Claimant's release referral was approved. Yet she was still not released.

96. In the light of the history of this case, there was an obligation on the Secretary of State, in my judgment, urgently to take the steps necessary to effect her release. I can detect no such urgency. On the contrary, the impression with which I am left is of a marked reluctance to complete the necessary process. I can see no public order justification for further detention. Making the arrangements necessary to effect release should have begun as soon as the reasonable grounds decision was taken. As Ms Knights fairly points out, it is revealing that once a court ordered release, the process was completed promptly.

97. In my view, given the history, the Claimant should have been released by no later than 14 October 2017.

98. It follows that the Defendant is liable to the Claimant for 45 days unlawful detention (being 15 days from 29 July and 30 days from 14 October 2017).

Ground 4 – Failure to discharge the obligation to provide assistance and support

99. By Ground 4, the Claimant attacks what she asserts was the Secretary of State's failure to meet his obligations under Articles 11(2) and (5) of the 2011 Trafficking Directive and his published policy adopting the Trafficking Convention. She says he should have released her because that's what her medical and welfare needs required. She says that, whilst she was in detention, he did not provide her with the psychological support and mental health treatment she needed, and that he failed adequately to assess her medical and welfare needs until her release from detention on 30 November 2017.

The Directive and the Trafficking Convention

100. Article 11 of the Trafficking Directive is entitled "Assistance and support for victims of trafficking in human beings". It provides as is material:

> "1. Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings in order to enable them to exercise the rights set out in Framework Decision 2001/220/JHA, and in this Directive.
> 2. Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3…
> 5. The assistance and support measures referred to in paragraphs 1 and 2 shall be provided on a consensual and informed basis, and shall include at least standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate…" (emphasis added)

101. Article 12 of the Trafficking Convention provides for assistance to victims;

> "1. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:

> a standard of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
> b access to emergency medical treatment;
> c translation and interpretation services, when appropriate;
> d counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;
> e assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
> f access to education for children.
> 2 Each Party shall take due account of the victim's safety and protection needs.
> 3 In addition, each Party shall provide necessary medical or other assistance to victims lawfully resident within its territory who do not have adequate resources and need such help.
> …
> 7 For the implementation of the provisions set out in this article, each Party shall ensure that services are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care" (emphasis added).

102. Article 13 provides for a recovery and reflection period

> "1 Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her. This provision is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. During this period, the Parties shall authorise the persons concerned to stay in their territory.
>
> 2 During this period, the persons referred to in paragraph 1 of this Article shall be entitled to the measures contained in Article 12, paragraphs 1 and 2.
>
> 3 The Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly."

103. The provisions of the Trafficking Directive, the Trafficking Convention and the Home Office policy, which aims to implement them have been considered in three recent decisions by the courts to each of which I was referred by the parties.

104. In *R (Galdikas) v Secretary of State for the Home Department* [2016] 1 WLR 4031 Sir Stephen Silber, sitting as a deputy judge of the High Court, held that the Home Office guidance stated that the SSHD would act in accordance with Article 12 of ECAT. The policy of SSHD was that she would apply the approach in the Trafficking Convention to deal with applications for Discretionary Leave to Remain from those who had been recognised as victims of trafficking. If the competent authorities have reasonable grounds to believe a person has been a victim of trafficking, they must take various steps, including to ensure that the person receives the assistance provided for in Article 12(1) and (2) of ECAT and this must continue through the period of recovery and reflection. This is policy, he held, which the SSHD must follow unless there is good reason not to do so.

105. He concluded, at [116] that "(1) Article 11 (2) of Directive 2011/36 provides a free-standing duty of support and imposes an obligation on the UK to provide a trafficked person with assistance and support as defined in Article 11(5) of the Directive, in the post 45-day reflection and recovery period".

106. In *R (TDT) v Secretary of State for the Home Department* [2018] EWCA Civ 1395, the Court of Appeal was concerned with the case of a Vietnamese national who had been discovered in a lorry with 15 others. His solicitors challenged a finding that the claimant was over 18 and sought his temporary admission into the UK. Subsequently, they made a formal reference to the UK Human Trafficking Centre, stating that there was reason to believe the claimant was a victim of trafficking. A pre-action protocol letter was issued, seeking the claimant's release, but not before stringent safeguarding measures were in place. A week later, judicial review proceedings were issued. The claimant was released on the same day, despite email correspondence, to the Secretary of State and the Government Legal Department, stating that he should not be released without notice, to enable an emergency injunction to be sought. The claimant disappeared and had not been traced since. The claimant alleged a breach of ECHR art 4 and ECAT by failing to take reasonable steps to protect the claimant in circumstances where the Secretary of State knew, or ought to have known, that there was a credible suspicion that he was a trafficking victim.

107. The Court held that the Secretary of State had breached ECHR art.4 and ECAT by releasing the claimant from administrative detention without having put in place adequate measures to protect him from being re-trafficked. There had been sufficient evidence to give rise to a credible suspicion that he was a trafficking victim and there was a real and imminent risk of re-trafficking if released.

108. In *R (EM) v Secretary of State for the Home Department* [2018] EWCA Civ 1070 at [31], Peter Jackson LJ summarised the duty to provide support as follows:

> "….[T]he core obligation defining the support duty arises from Arts 11(2) and (5) of the Directive, which….mandate that assistance and support must be provided to PVoTs *(potential victims of torture)* on a consensual and informed basis, and shall include at least standards of living capable of

> ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate".

The Competing Arguments

109. Ms Knights contends that the trigger for the provision of support and treatment should have been the Reasonable Grounds Decision of 4 October 2017. What was then required was "an individualised assessment" of the Claimant's needs as a potential victim of torture and then treatment and support to address that need. But that, she argues, did not happen. She refers to the report of Dr Obuaya who, she says, recommended one to one counselling or cognitive behavioural treatment and advised that the Claimant needed to be released.

110. Relying on *TDT*, Ms Knights argues that Article 4 ECHR imposes a duty to protect victims of torture and to provide support, and that breach of Article 4 can justify an award of damages. Relying on *EM* she says that the medical treatment provided must respond to the victims "objectively assessed" need.

111. In her skeleton argument, Ms Knights relied extensively in support of those arguments on the report of a consultant clinical psychologist. However, no permission from the court had been obtained to rely on that report and the Defendant objected to its admission. Furthermore, I read the report *de bene esse* and there seemed to me a number of grounds of possible objection to its deployment in these proceedings. I itemised those potential difficulties to Ms Knights and she reflected on the issue overnight. On the morning of day two of the hearing, she indicated she would not be pursuing her application to be permitted to rely on the report.

112. Instead, she fell back on an earlier report, dated 23 October 2017, obtained by those instructing her, from a psychiatrist Dr Chiedu Obuaya. It was Dr Obuaya's opinion that the Claimant suffered from "Mental and Behavioural Disorders due toe Multiple Psychoactive Substance Use - Dependence Syndrome" and "Mixed Anxiety and Depressive Disorder". He said there had been a number of adverse life events that precipitated that latter episode. She said the Claimant was not suffering from PTSD but her symptoms were "in keeping with the traumatic experiences she has described".

113. As to treatment, Dr Obuaya noted that the Claimant was already in receipt of antidepressants in line with NICE recommendations. He said that "once she has had a successful detoxification" the Claimant's care plan should focus on psychosocial interventions to support her to remain abstinent of opioids. "In the longer term", after she was released from detention, she would need community based support. He recommended a course of psychotherapy such as cognitive behavioural therapy and interpersonal therapy.

114. He was not able to say whether her mental state had deteriorated during her detention. But He expressed concern that "detention could exacerbate her mental health problems". He said it was not likely that her health needs can be adequately be met in

detention; for psychological therapy to be effective she should be in a psychologically safe environment which she does not consider detention to be.

115. Relying on *EM*, Mr Brown argued that the test under the Directive was whether the mechanisms in place offered at least a subsistence standard of living through the provision of appropriate and safe accommodation, material assistance, necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services. He said the treatment offered did not need to be focused on needs arising from trafficking and that the court should look at all the support provided to date.

116. He says there is nothing in law that requires the Secretary of State to spell out in guidance how she complies with the Art. 11(2) duty in respect of those in immigration detention. The 2011 Directive only imposes an obligation as to the result to be achieved. He argued that the requirement to provide assistance and support was met in the Claimant's case.

117. Mr Brown contends that I should have regard to all the support and treatment the Claimant received throughout the relevant period, both before and after the reasonable grounds decision. He says the treatment the Claimant received was entirely appropriate. He lists the following elements of that support and treatment:

118. He says she was seen by a nurse on 28 July 2017, her need for methadone was addressed on 28 July; she was offered but did not attend a GP appointment on 31 July 2017; she attended a mental health assessment on 2 August 2017 and a triage later that day; she was invited to attend a wellbeing services Kaleidoscope following a referral from healthcare; she saw a doctor on 8 August 2017, she was offered but did not attend appointments on 14, 16 and 17 August 2018; she was offered but did not attend an appointment with the substance misuse team on 21 August 2017; she saw a GP on 24 August 2017; she was offered but did not attend an appointment on 30 August 2017; she had an appointment with the GP on 4 September 2017 ; on 5 September 2017, she was booked for CBT; on 6 September 2017, she had a psychological wellbeing assessment; on 7 September 2017, she had a mental health assessment; she saw a doctor on 21 September 2017; on 28 September 2017, she had a psychological wellbeing assessment; on 29 September 2017, she had a mental health review; she saw a GP on 5 October 2017 and 12 October 201; a primary mental health care plan was created on 16 October 2017; a psychological wellbeing assessment was carried out on 18 October 2017; she saw a GP on 19 October 2017 and 26 October 2017; and after her release, she had access to, and attended, counselling sessions. He referred me to documents supporting each of these events.

Discussion

119. In my judgment, in the light of the authorities referred to above, the Defendant's arguments on this ground are to be preferred. I say that for fourreasons:

120. **First**, it is necessary to identify the scope of the relevant obligations on the Defendant and, in particular, the duties owed at the particular stage in the process of recognising and supporting victims of trafficking with which we are concerned. *TDT* focused on the duty to protect, when the victim is first encountered and emphasised the obligation on the state to take care before releasing a potential victim of trafficking from

detention if there is a risk of re-trafficking. Here the threat to the Claimant ceased when her former partner was deported. Accordingly, *TDT* does not greatly assist the analysis in the present case.

121. *EM* focused on the duty owed to recognised victims of trafficking and, in particular, to such victims after the 45 days of reflection for which art 13 of ECAT makes provision. But the Claimant here was not, at the relevant time, a recognised victim. She was properly to be regarded as a "potential" victim of trafficking. That follows from the fact that the trigger event was the Reasonable Grounds Decision; it was not until July 2018 that the Conclusive Grounds decision was reached and the Claimant's complaint falls to be tested against her status at the time of the decision under challenge.

122. It follows that the operative provisions were Article 11 of the Directive and Article 12 of ECAT by which the Claimant was entitled to modest levels of assistance; to measures, for example, capable of ensuring her subsistence and to emergency medical support, rather than to the more sophisticated support treatment for which Ms Knights contends.

123. As Jackson LJ held in *EM* (at [65]):

> "65. The general duty on the State under Arts. 11(2) and (5) of the Directive is to provide assistance and support to a PVoT by mechanisms that at least offer a subsistence standard of living through the provision of appropriate and safe accommodation, material assistance, necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services (emphasis added).

124. **Second**, Mr Brown is right to point out that in assessing the adequacy of the treatment and support it is necessary to consider the assistance and support provided throughout the relevant period. Returning to Jackson LJ's judgment in *EM*:

> "68 I also consider that, when considering whether the support duty has been discharged, it is appropriate to look at the level of assistance and support that has been provided to the PVoT at all stages in the process, and not just at support provided during the 45-day reflection period."

125. **Third**, the support and treatment the Claimant in fact received in detention, as itemised by Mr Brown, met the minimum requirements imposed by the Directive and ECAT. That support and treatment responded to the need that had been recognised and assessed by those who had the Claimant in their care in detention. In my judgment, the support and treatment provided in detention provided more than a "subsistence standard of living" in each of those respects.

126. Jackson LJ held in *EM*:

> "66 As to that element of the duty that requires the provision of necessary medical treatment including psychological assistance,

> counselling and information, the treatment provided must respond to the welfare needs of the individual, objectively assessed in each case. The obligations arising under the Directive and Guidance, read alongside the Convention, do not extend to a requirement that the assessment or treatment must be provided by specialists in trafficking, or that it be targeted towards one aspect of an individual's needs (the consequences of trafficking) as opposed to his or her overall psychological needs. The support duty calls for the provision of support, not the accomplishment of physical, psychological or social recovery. ….
>
> 67 Nor do the Claimant's submissions gain strength from a comparison between services that are provided in the community and those provided in IRCs. The position of a PVoT who is detained is different from the position of one who is not, and it is lawful for the State to decide to provide support in different ways. A PVoT living in the community may well not have access to any of the four forms of support mentioned at paragraph 65 above, while all four will automatically be available to a detained PVoT. The way in which psychological treatment is provided may take account of the inherent uncertainty about the length of detention, and the ready availability of on-site medical care for a person who is in any case under close observation. The evidence filed on behalf of the Claimant is in my view more effective in demonstrating the way in which the support duty is satisfactorily discharged in the community than in establishing any breach of legal duty towards detained PVoTs. The fact that different, or better, provision might be made for those not in detention does not of itself equate to a breach of duty."

127. The Trafficking Directive and the Guidance do not prescribe the manner in which assistance and support are to be provided in different circumstances. The Trafficking Convention applies to all 47 states of the Council of Europe and the Directive to the 28 states of the European Union. Individual states must design systems to achieve the required result. The obligation to provide support does not translate into an obligation to secure psychological recovery and the obligation does not have to be met in identical ways inside and outside detention.

128. **Fourth**, and in any event, the expert on whom the Claimant relies, Dr Obuaya, recognised that it was necessary first to treat the Claimant's drug dependency before psychosocial treatment could be introduced effectively. That treatment continued throughout her detention.

129. In those circumstances this ground must fail.

Ground 5

130. By Ground 5, the Claimant seeks to make systemic criticism of the Defendant's arrangements for managing trafficking allegations. She focuses, first, on delays in referrals to the NRM and in the making of reasonable grounds decisions. Second, she criticises the prioritisation of removal over identifying and protecting victims of trafficking.

131. This ground attracted very little attention in the course of Ms Knight's oral submissions. She pointed to a report by Detention Action in 2007 entitled "*Trafficked into Detention: How victims of trafficking are missed in detention*" and a report of the House of Commons Public Accounts Committee called "*Reducing Modern Slavery*". But although I was shown these reports in passing, I had no detailed submissions on their methodology, sources or conclusions. Commenting on these and similar reports in *H v SSHD,* Nicol J said:

> "The role of the Court is to adjudicate on specific legal disputes. Bodies such as the Public Accounts Committee and the Anti-Slavery Commissioner have a wider remit. They can survey the performance of the Home Office more generally in discharging its anti-trafficking functions and make recommendations. That is not the function of the Court."

132. I respectfully agree. The reports I was shown raise important issues, but their focus is not that required by this court. Furthermore, reaching a conclusion on their strength, validity and relevance requires much greater analysis than they received before me.

133. I have already addressed the significance of the delays in the Claimant's case, in dealing with Ground 3. The evidence I have seen and the argument I have heard in support of Ground 5 is simply insufficient to enable me to form any overall conclusion on whether there is a wider pattern of delay which demonstrate a systematic problem.

134. Similarly, I do not have the material to address the question whether there has been an improper prioritization of one objective over another. That question will necessitate, for example, consideration of whether the Competent Authority is genuinely independent of the Home Office; I have not been shown any evidence going to that topic.

135. I understand that there are other proceeding afoot where these and related matters are raised head-on, with proper evidence and analysis in support and in response. In my view resolution of those matters, if they are suitable for resolution by a court at all, are better left to those proceedings.

Conclusions

136. In those circumstances, Grounds 1, 2, 4 and 5 must fail. Ground 3 succeeds to the extent that to hold that the Claimant was unlawfully detained for 45 days. I will hear counsel on the terms of the appropriate order.