

Case No: CO/17706/2013

Neutral Citation Number: [2015] EWHC 1725 (Admin)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 June 2015

Before :

HELEN MOUNTFIELD QC
Sitting as a Deputy High Court Judge

Between :

THE QUEEN
(on the application of HOANG Anh Minh)
- and -
THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Claimant

Defendant

Keelin McCarthy (instructed by **Lawrence Lupin Solicitors**) for the **Claimant**
Christopher Staker (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 11 February 2015

Judgmen

Helen Mountfield QC :

The issue in this case and the correct approach

1. This is a case about the proper operation of the procedures for determining whether a person may be a victim of trafficking. The Claimant is a Vietnamese man born in 1990. He was detained when entering the UK in the back of a lorry from France on 2 September 2013. The issue in this case is whether, in the series of decisions under challenge taken in the six weeks that followed that date (on 20 September, 25 September and 14 October 2013) the decision-maker erred in reaching the decision that there were “no reasonable grounds” to conclude that the Claimant was a victim of trafficking for the purposes of the Council of Europe Convention on Action against Trafficking in Human Beings, CETS No 197 (“the Trafficking Convention”).
2. The Court’s role is not to determine for itself whether there were or not such reasonable grounds, but to decide whether the decision-maker properly addressed himself to the right legal issue, and reached his decision on the basis of a rational application of the Defendant’s policy guidance as to how this issue should be approached.
3. However, as well as an ordinary public law challenge, the Claimant says that the Defendant’s failure correctly to apply her own Guidance meant that there was a breach of Article 4 of the European Convention on Human Rights (ECHR), which imposes positive obligations to take proportionate steps to investigate where there are indications that a person might have been subjected to trafficking by a third party.
4. In those circumstances, where fundamental human rights are in issue, I am required to give anxious scrutiny to the decisions which the Defendant reached, and to be satisfied that the decisions:

“show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account.”

(R(FM) v SSHD [2015] EWHC 844 (Admin) at [30], quoting R(YH) v SSHD [2010] 4 All ER 448 at 24).

The greater the likely impact of a decision on the rights of the person affected, the greater the detailed justification and explanation which will be expected.

5. Nonetheless, I remind myself that the Court’s task is one of review for error of law, not correctness, and that anxious scrutiny:

“does not mean that the court should strive by tortuous mental gymnastics to find error in the decision when in truth there has been none. The concern of the court ought to be substance not semantics.”

(FM at [32], quoting R(Sarkisian) v IAT [2001] EWHC Admin 486 at [18]).

The Competent Authority’s consideration of the trafficking claim and the parallel asylum process

6. Having been detained on entry to the UK, the Claimant immediately claimed asylum, and his claim was put into the “fast track process” on the same day.
7. Thereafter, matters moved swiftly in terms of his claim for asylum. He had a screening interview on 6 September 2013 and a substantive asylum interview on 17 September 2013. On 20 September 2013, the Defendant refused the Claimant’s claim for asylum and humanitarian protection. His appeal against that decision was brought in the First Tier Tribunal (Asylum & Immigration Chamber) (“the FTT”). On 14 October 2013, his application to remove the case from the fast track process was refused, and on 16 October 2013 Immigration Judge Rowlands dismissed his appeal. The Claimant’s application to appeal to the Upper Tribunal against the FTT asylum decision was refused. His appeal rights against the asylum decision were exhausted on 29 October 2013.

8. In a parallel with the asylum process - and indeed depending on the same interviews - the Claimant's case was also referred to the Home Office's Competent Authority under the Trafficking Convention to consider whether there were "reasonable grounds" for considering that the Claimant is a victim of trafficking. On 20 September 2013, the same day as the asylum decision, the Competent Authority also issued a decision finding that there were no reasonable grounds for concluding that the Claimant had been trafficked from Vietnam to Russia in 2009, or onward from Russia to the UK in 2013.
9. The Claimant asked for that decision to be reconsidered, but on 25 September 2013, the Competent Authority decision-maker refused to change the Defendant's position and found that there were still no reasonable grounds for concluding that the Claimant had been trafficked.
10. On 7 October 2013, the Claimant's lawyers wrote a letter under the pre-action protocol for judicial review setting out legal objections to the original "reasonable grounds" decision on 20 September 2013 and the review decision of 25 September 2013. With that letter, the Claimant's lawyers attached an undated statement from the Claimant and a report dated 3 October 2013 from Abigail Stepnitz, who is an expert in human trafficking. However, on 14 October 2013, the Defendant replied to the pre-action protocol letter contesting the claim, and – in response to the new material – the Competent Authority issued a further decision of the same date concluding that the 20 September 2013 decision should be maintained.
11. This application for judicial review was lodged on 24 December 2013, and permission was granted on the papers on 2 June 2014.

12. It is said on the Claimant's behalf that the Defendant's decision was flawed because she failed to apply relevant guidance on how a reasonable grounds decision should be made; and that – by reason of that failure – there has been a breach of a positive obligation to identify and support victims of trafficking under Article 4 European Convention of Human Rights (“ECHR”).
13. The grounds identify the decision under challenge as being that of 25 September 2013. For the purposes of this analysis, I have taken the “reasonable grounds” decisions of 20 September 2013, 25 September 2013 and 14 October 2013 together, since it appeared to be common ground that any mistakes in the earlier decisions could have been cured by the later decisions, and the 25 September and 14 October decisions were by way of reconsideration of the first decision in the light of later material. The question I have asked is whether the analysis in all three letters, read together, is a lawful one, having regard to the nature of the test to be applied and the nature of the Guidance governing the approach to it.
14. The hearing took place on 11 February 2015. In May 2015, I became aware of a recent decision of Phillip Mott QC sitting as a deputy High Court Judge in *R(FM) v SSHD* [2015] EWHC 844 (Admin), and asked counsel for further submissions in writing as to whether the analysis of the Trafficking Convention and national system for determining trafficking claims as summarized in paragraphs 12 and 13 of that judgment was accepted. I also asked for submissions on propositions derived from analogous (but not identical) processes in age determination cases (*R(FZ) v Croydon LBC* [2011] EWCA Civ 59) and in asylum cases where a decision-maker has to make a decision as to whether or not he is reasonably satisfied that asylum has been claimed at the earliest opportunity (*R(Q) v SSHD* [2004] QB 36, [2003] EWCA Civ 364).

15. I am grateful to counsel for providing these written submissions in short order. In the event, I was persuaded by the Defendant's submissions that analogies from these additional cases did not add to the analysis of the issues before me.

The facts

16. Although it appears to be accepted that the Claimant came to England via Russia, the Defendant does not accept the Claimant's account of the circumstances in which he went to Russia or the means by which he was transported either to Russia or to the factory at which he worked while he was there.
17. The first time the Claimant explained his case to the Defendant was in his initial asylum screening interview on 6 September 2013. In that interview, he was recorded as having said that he had left Vietnam in 1999 (a date which, when asked if he wanted to correct anything in the record of the interview, he later corrected to 2009). He had travelled to Russia, where he stayed until June 2013, when he travelled to the UK. In that interview, he was recorded as saying that the reason he came *to the UK* was that he was an abandoned child who had lived in a Buddhist Temple in Vietnam and had come to look for his younger sister whom he believed to be living in the UK. He said that he had no friends or relatives or means of survival in Vietnam. He does not appear to have been asked why he came to the UK via Russia.
18. In his substantive asylum interview on 17th September 2013, the Claimant's account was again that he had lived since childhood in a Buddhist Temple with a Buddhist monk whom he called "the Master". During the Phat Dang religious ceremony in 2009, authorities came and disrupted the ceremony and began to destroy things. The police arrested the Claimant and two or three others, after he had spoken out against the ruling Party. He was released by police the following evening. After he was

released, the police twice came looking for him and he hid for some weeks in the woods. The Master told the Claimant that the only way out was for him to leave Vietnam. He said that the Master made arrangements for the Claimant to travel to Russia with false papers, in a false name. The Claimant gave the false name on the papers as Hoang Van Nguyen, and said that they contained a photograph of a similar-looking person who was not him.

19. The Claimant said that the Master gave him an address in Russia to which he was told to travel by taxi upon arrival in Russia. However, when he arrived in the airport and was looking for a taxi, four or five people forced the Claimant into a red car, took his papers and took him to a factory where he was forced to work for several years without pay (except food), making table cloths and curtains. He claimed to have slept in a compound at the factory and never to have left the factory. He said he was not personally beaten at the factory, but others were, and he was threatened that if he did not work he would be beaten or denied food. Between five and fifteen other people were also forced to work in the factory.
20. However, one day, those working in the factory were released. During a check by the authorities, the person who usually brought workers food brought money, handed it over and said “now you can go wherever you want”. The Claimant said that he believed that this was because the factory was about to be raided by the police for using forced labour. The Claimant said that all those working in the factory were given US\$2,000 and told to leave and to go wherever they wanted. The Claimant said that some of his workmates were going to England, so he followed them. He and three others used some of the money to arrange to have themselves transported to the

UK by boat and then by lorry. It was during that attempted entry to the UK that they were discovered.

21. Since this claim is not concerned with the asylum decision, the remainder of this section of the judgment concerns the decisions taken under the framework of the Trafficking Guidance.

The 20 September 2013 decision

22. The Competent Authority took account of country information about Vietnam. The material the decision-maker cited noted that Vietnam was a major source of trafficking, and that the available figures did not accurately reflect its full scale and scope, in particular, International Organisation for Migration figures about the trafficking of Vietnamese boys.
23. On the basis of the material available on 20 September 2013 (and after review by another official), the Competent Authority decided that there were no reasonable grounds for considering that the Claimant was a victim of trafficking.
24. The Competent Authority's decision addressed the three aspects of the definition of trafficking for the purposes of the Trafficking Convention – the action (i.e. movement); the means by which the Claimant had been moved; and whether the purpose of the movement was for exploitation. Finally, it addressed the question of whether, even taking the Claimant's case at its highest (i.e. assuming that there were reasonable grounds to assume that he was the victim of trafficking) he continued to need the assistance or protection of the Trafficking Convention.

25. As to the action – i.e. how and why the Claimant left Vietnam, the decision-maker said the account was “riddled with anomalies”. The basis for this assessment was as follows:

- a. It was found that the Claimant had not given a credible and consistent account (20th September decision paras 23-28 and 31-33). The date 1999 had been given for the date of entry to Russia at the screening interview. Although acknowledging that this anomaly was raised by the Claimant himself as something which he wished to correct when asked if there were any errors in the account recorded in the notes of the screening interview, and described as a translation error, the Competent Authority rejected this explanation, because at the interview, the Claimant had said he understood the translator, and also “tellingly ... you did not just refer to 1999 on one occasion during your screening interview, you did so twice”. This appeared to be a finding that the translator could not have made the same mistake twice in transcribing the Claimant’s response.
- b. There were differences in the Claimant’s account of how he had obtained a false passport to travel to Russia. At the screening interview, the Claimant said that the passport had been provided by an agent he had contacted through a friend, but this was considered to be inconsistent with the account given in the substantive asylum interview, where he said that the passport was given to him by the Master without mention of an agent. It appears to have been considered that this was an inconsistency rather than an absence of detail in the substantive interview as to agency.
- c. At the screening interview the Claimant had said that he had come to the UK to look for his sister without reference to the key events (as to the route he had taken and why) which were then referred to in his substantive asylum interview. At the asylum interview, however, the Claimant said that his master had arranged for him to go to Russia because he was worried for his life in connection with religious and political activities. The Competent Authority appears to have treated these as inconsistent answers to one question (about how the Claimant ended up in the United Kingdom), rather than answers to two separate questions – how and why he left Vietnam; and how and why he ended up trying to come to the United Kingdom. It was said that to be credible, it was “reasonable to expect [him] to be able to provide at least a roughly consistent explanation of what led to such a significant event as your departure from the country in which you had lived all your life” so his failure to do so was considered damaging to his credibility.

These matters cumulatively were taken to as evidence that the Claimant had failed to give a consistent and credible account of the circumstances surrounding his departure from Vietnam. It was therefore “not considered that you were subject to an act of transportation to Russia or that you meet part ‘a’ of the definition as a result”.

26. As to the means by which the Claimant came to the UK, the Competent Authority again comprehensively rejected the Claimant's explanation and said he had failed to be given a consistent and credible account. The letter of 20 September 2013 stated that the Competent Authority did not accept that the Claimant had been coerced, abducted, deceived or defrauded into travelling either to Russia or onward to France and the United Kingdom, but found that he had done so voluntarily (para 29).
27. As to the third part of the definition of trafficking – purpose – the Competent Authority said that the Claimant's case did not suggest that he was “coerced, abducted, deceived or defrauded” either to facilitate his journey to Russia or onwards to France and the United Kingdom. He said that it was clear from the Claimant's evidence that he left Vietnam “of his own volition” either to find his sister or for fear of persecution. It did not address the possibility that the Claimant left Vietnam voluntarily on the basis of a belief that he would have a legitimate home and legitimate work in Russia, but found that he and possibly also the Master had been deceived in that respect by those who had arranged the journey on their behalf.
28. The Competent Authority found “no evidence” that the Claimant had been transported to Russia for the purpose of enforced labour. It found that the Claimant's account of having been forced into a car and taken to a factory to work suggested rather that he had been the victim of a “random encounter with a criminal group” after his arrival in Russia (para 31).
29. The Competent Authority did not accept the Claimant's account of forced labour because in his asylum interview he said that he did not know the names of any other factory workers even though he had worked with them for several years, and because it was not considered credible that the factory owners would have given the Claimant

\$2,000 on release, even though the Claimant explained the circumstances of a raid by the authorities. It was suggested that the statement that during his incarceration he was only paid in food was inconsistent with the gift of \$2,000 on release.

30. Finally, even taking the Claimant's claim at its highest, it was considered that he did not require the assistance or protection of the Convention because it was, at that time, over a month since he had had contact with his captors in Russia, and because he "had given no indication" that he wished to raise a report or complaint regarding his situation to the authorities (paras 35-44). It was not clear whether the Competent Authority considered that the Claimant had been informed of this possibility, received any advice on it or had any opportunity to do so.

The 25 September 2013 decision

31. On 24 September 2013, the Claimant's solicitors wrote to the Competent Authority requesting that the negative grounds decision be reconsidered. They attached a letter from Abigail Stepnitz in which she said that "Mr Hoang's narrative contains credible indicators of trafficking".
32. However, in a one page decision dated 25 September, Mr Hunter (the decision-maker) said that it was not disputed that the Claimant's account contained some indicators of trafficking, but that 'for reasons elucidated within the negative reasonable grounds decision ... when weighing the strength of the indicators presented, the competent authority quite justifiably deemed that they were not sufficient to reach the standard of proof of "reasonable grounds to believe", because the account "contained a number of core internal inconsistencies which it was considered significantly undermined his claim to have been a victim of trafficking'.

The 14 October 2013 decision

33. On 7 October 2013, the Claimant's solicitors wrote to the Competent Authority again, under the pre-action protocol for judicial review. They attached the record of the substantive interview on 17 September 2013, a full report from Abigail Stepnitz and a further statement from the Claimant.
34. The letter challenged some of the alleged findings of inconsistency in the 20 September decision, and that the Defendant's findings properly addressed the indices of trafficking in the Trafficking Convention. It advanced reasons why the story advanced by a trafficking victim might come out in a piecemeal or disjointed way, and drew attention to the case of *E v SSHD* [2012] EWHC 1927 (Admin) at [48]-[49] as to the circumstances in which a person should still be regarded as in need of assistance and protection under the Trafficking Convention. It asserted that the Defendant's conclusion that the Claimant did not even meet the low threshold of "reasonable grounds" was clearly unsustainable, failed to apply the relevant legal definitions correctly, failed to consider relevant evidence and applied too high a burden of proof to the Claimant. It made fresh representations and invited the Defendant to reconsider the decision.
35. The Claimant's new witness statement which accompanied this letter gave more detail about the circumstances in Russia. He said that on arrival in the factory he was told (by a telephone call from a person speaking Vietnamese) that the cost of the journey from Vietnam to Russia was \$10,000, that the Master had paid only \$2,000 US and that he would be required to repay the balance.

36. This account was taken into account in the Stepnitz Report. She recorded what she had been told about this by the Claimant, namely that no one had asked the Claimant about this in his interviews and he had not understood that it was important.
37. The Stepnitz Report noted that Vietnam is a major source country for human trafficking and set out her view that the Claimant's claim was plausible, consistent with research and objective information, and contained "credible *indicators* of trafficking".
38. It set out in some detail what the indicators of trafficking were, and set out reasons why in Ms Stepnitz's view, they were met on the account given by the Claimant, so that there were reasonable grounds for believing him to be a victim of trafficking.
39. However, in the later decision of 14 October 2013, the Competent Authority continued to conclude that there were no reasonable grounds for considering that the Claimant was a victim of trafficking, and that in any event he did not require the assistance or protection of the Convention. His further reasons were as follows:
 - a. He was not obliged to accept an "expert opinion" without question. He did not appear to accept Ms Stepnitz's claims of expertise, and he considered that the conclusions in the Stepnitz Report were inconsistent with the evidence and/or with the legal definition of trafficking (para 5-8).
 - b. He was inclined to treat the Stepnitz Report with caution because he regarded it as straying into the areas of advocacy and speculation (paras 9-19). For example, at para 5, the 14 October 2013 decision asserted that there was no evidence that the "Master" knowingly or unwittingly deceived the Claimant into travelling abroad. In those circumstances, Ms Stepnitz's assessment that the Claimant was deceived into travelling to Russia because he was led to believe that he was staying with a Buddhist family was said to be "completely at odds with the evidence and therefore completely flawed". It did not consider the possibility that the Master as well as the Claimant were victims of any deception, and if so, whether that would fall within the definition of trafficking.
 - c. He considered that the Claimant's further account introduced more inconsistencies. For example, the Claimant's account of a threatening

telephone call with a Vietnamese speaker informing him that he still owed \$8,000 towards his fare from Vietnam was considered to be inconsistent with an assertion that the Claimant had had no contact with anyone outside the factory.

- d. He said that Ms Stepnitz's conclusion that fear of persecution "somehow acted as a coercive element in making your client more willing to travel to Russia" "appears to be based on a complete misunderstanding of the concept of trafficking" which requires the victim to have been recruited/transported (action) by means of the threat or user of force or other form of coercion for the purpose of exploitation, i.e. the use of force, coercion or deception must be associated with the trafficker.
 - e. It was assumed in the letter that Ms Stepnitz assumed that the Master was party to exploitation, and said that just because the Claimant trusted the Master did not mean that he had no real or acceptable alternative to submitting to abuse (by him). This was said to be another reason to reject Ms Stepnitz's approach.
 - f. The 14 October 2013 decision also criticized what was said to be a "scattergun" approach by Ms Stepnitz, in that if it was the case that the Claimant had been deceived into leaving Vietnam, there was no need also to suggest that he might have been coerced. This was said to "highlight the weakness in her assessment".
 - g. Finally Ms Stepnitz was criticized for having formed her own views of the Claimant's credibility based on her interview with him.
40. Ms Stepnitz had addressed areas where, in the 20 September 2013 decision, the Competent Authority had formed the view that explanations given by the Claimant were incapable of belief. For example, the decision that it lacked credibility that alleged traffickers, having withheld remuneration for four years, would then have given workers \$2,000 and told them they could leave. Ms Stepnitz put forward an explanation as to why this might in fact be credible, which the Competent Authority dismissed as "entirely speculative and not based on any evidence whatsoever". This was seen as further evidence of a "propensity to stray away from the role of an expert witness and into that of advocacy".
41. In his skeleton argument, counsel for the Defendant said that it was significant that adverse credibility findings had also been made by the FTT in rejecting the

Claimant's asylum claim, and suggested that this was an indicator that the Competent Authority's credibility findings were *Wednesbury* reasonable. As I observed during the hearing, I doubted that the conclusions of the FTT, which were reached two days after the last of the decisions under challenge, were of any real assistance in this context because the FTT was considering an entirely different test, namely whether the grounds for seeking asylum were made out, and not whether there were "reasonable grounds" to consider but not be able to prove that a person was a victim of trafficking (not itself grounds for granting asylum).

42. In the Defendant's further written submissions of 1 June 2015, at para 27, it was in any event noted that the 14 October decision was taken before the FTT had reached its decision on 16 October 2013, and that given that the FTT determination post-dated the challenged decision of the Competent Authority it "cannot have had any impact upon the Competent Authority's decisions". I agree; I also consider that the findings of a different tribunal considering different evidence and applying a different test (in determining whether the Claimant could succeed in providing conclusive grounds for asylum) are irrelevant to the question before me, which is whether the Competent Authority approached the question before him on the correct legal basis and rationally.

The Applicable Legal and Policy Framework

The Council of Europe Trafficking Convention

43. According to the preambles to the Trafficking Convention, trafficking of a human being is a violation of human rights and an offence to the dignity and integrity of the human being. In recognition of the fact that the effect of trafficking in human beings may be forced labour or servitude for its victims, and to give effect to other

international legal instruments on trafficking, the Council of Europe has adopted the text of the Trafficking Convention which according to its preamble is intended to be a comprehensive international instrument focused on the human rights of victims of trafficking, and to set up a specific monitoring mechanism for it. It came into force for the United Kingdom on 1 April 2009, and is binding as a matter of international law, but it has not been incorporated into English law.

44. The purposes of the Convention are set out in Article 1 and are:
- a. to prevent and combat trafficking in human beings, while guaranteeing gender equality;
 - b. to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses while guaranteeing gender equality , *as well as to ensure effective investigation* and prosecution; and
 - c. to promote international co-operation on action against trafficking in human beings.

Article 1(2) provides that the Trafficking Convention sets up a specific monitoring mechanism to ensure effective implementation of its provisions by the parties to it.

Article 4 of the Convention provides that for the purposes of the Trafficking Convention:

“(a) ‘trafficking in human beings’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal or organs;

(b) the consent of a victim of ‘trafficking in human beings’ to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; ...”

Article 5(2) provides so far as is material that

“Each Party shall establish and/or strengthen effective policies and programmes to prevent trafficking in human beings ...”

and Article 5(3) provides that:

“Each Party shall promote a Human Rights-based approach ...”.

Article 10 of the Convention deals with identifying victims of trafficking. Article 10(1) provides:

“Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims ... and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations ...”

Article 10(2) provides that:

“Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence ... has been completed”.

This wording suggests a two-stage process for determining whether a person has been a victim of trafficking. The first stage is the “reasonable grounds” decision. If the Competent Authority decides that there are reasonable grounds to believe that a complainant has been a victim of trafficking, then it must permit the complainant to stay in the country until it has been able to reach a substantive determination of whether the person is a victim of trafficking (“the conclusive decision”). Before a conclusive decision is made, the complainant is allowed a period of at least 30 days for reflection and recovery.

Article 4 ECHR

46. Article 4 ECHR provides, so far as is material:

- “1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour ...”

Article 4 connotes not only a negative obligation upon the state to refrain from breaching the servitude and forced labour provisions itself, but also positive obligations to protect people within its jurisdiction from being subjected to such treatment by non-state actors, and to fulfill these rights (*Rantsev v Cyprus & Russia* App No 25965/04 at [284]-[289]). Those positive obligations were recognized in *CN v United Kingdom* [2013] 56 EHRR 24, in which the United Kingdom was held to

have breached Article 4 by having failed to have in place at the material time an appropriate legal framework and consequently having failed to conduct an adequate enquiry into the applicant's complaints that she had been held in domestic servitude.

The Secretary of State's policy

45. The United Kingdom government has not incorporated the Trafficking Convention directly into UK law or the Immigration Rules. However, it is espoused UK Government policy and practice to comply with its provisions, and to that end, the Defendant has issued guidance to Competent Authorities and other immigration officials for the purposes of giving effect to the UK's obligations under the Convention.
46. The "National Referral Mechanism" for putative victims of trafficking in the UK provides for a "First Responder" (such as the police or the UKBA) to refer a potential victim of trafficking to the "Competent Authority" to make an initial "reasonable grounds" decision within five days. If the Competent Authority makes a positive reasonable grounds decision, there are then 45 days for the Competent Authority to make a "Conclusive Grounds" decision, after the putative victim has had time for reflection and to take legal advice. A "reasonable grounds" decision is not an immigration decision, attracts no right of appeal, and can only be challenged by way of judicial review.
47. The Guidance in force at the relevant time as to how a Competent Authority should make a decision as to whether or not a person is a victim of trafficking was called the "Asylum Process Guidance: Guidance for Competent Authorities" (Version 1.0 13/10/2010).
48. The Guidance has been extensively quoted in the Claimant's skeleton argument. The core relevant elements of the Guidance may be summarized as follows:

- a. The first stage is to identify victims and to make a reasonable grounds decision. If there are such reasonable grounds, the individual is granted a 45 day reflection/recovery period to “provide the conditions for a fuller evaluation to decide if the person was a victim at the date of the reasonable grounds decision” (though this time period can be extended or curtailed) (emphasis added).
- b. The aims of the Trafficking Convention – to offer protection for victims’ rights, to combat trafficking and to promote international co-operation – should all be taken into consideration when considering victim status.
- c. The “reasonable grounds” decision has a low threshold. The test that should be applied is whether the statement “I suspect but cannot prove” would be true and whether a reasonable person would be of the opinion that, having regard to the information in the mind of the decision-maker, there were reasonable grounds to believe that the individual concerned had been trafficked” (emphasis in the original). Reasonable suspicion cannot be supported on the basis of personal factors alone, like appearance, without “reliable supporting intelligence or information or some specific behaviour by the person concerned. It should normally be connected to precise and up to date intelligence/information”. However, it is not necessary to prove that an offence has taken place for there to be an ongoing investigation and every effort should be made by the Competent Authority to secure all available information from the First Responder. Competent Authorities should be mindful of any possible subsequent interviews in safe places such as in police stations, and future information which may be provided in such a context.
- d. “Due weight” should be given to the reports and views of the organization supporting an individual who may have spent most time with the potential victim and established a degree of trust.
- e. As to credibility, decision-makers should apply the definition at the start of the Guidance (“I suspect but I cannot prove”) to the set of facts as presented by the First Responder and make a decision as to whether the individual matches the definition.
- f. Competent Authorities should use published and recognized reports which address the propensity of trafficking in the home country.
- g. The decision-maker should then move on to deciding whether those facts are credible. If they fit the definition and the account is credible to the required standard of proof (reasonable grounds) the individual should be recognized as being a victim of trafficking.
- h. The nature of trafficking and the trauma it can cause should lead decision-makers to be “cautious in discounting potential victims due to lack of co-operation or initial reluctance to disclose the full facts of their case. Moreover as a result of trauma, victims in some cases might not be able to recall concrete dates and facts and in some cases their initial account might

contradict their later statement. This is often connected to their traumatic experience”.

- i. The Guidance observes that the need to be sensitive does not remove the need to assess all information critically and objectively. However, this is about assessment of credibility of material (i.e. serious and significant) facts about past and present events that go to the core of the decision that an individual is a victim of trafficking. The Guidance says that it is “unnecessary and sometimes counterproductive for the decision-maker to focus upon minor or peripheral facts that are not material to the claim”.
- j. The Guidance recognizes that such decisions can be subjective and that “unfounded assumptions based not on objective information but on the individual’s own beliefs” can undermine the balance and fairness of the assessment. It is to counter this potential problem that a second caseworker not directly involved in the case’s asylum decision should review the decision.
- k. Ultimately, it is for the decision-maker to assess how well the evidence fits together and whether or not it contradicts itself. Where the evidence is lacking in key details without valid reason the Competent Authority is entitled to question whether the reasonable grounds threshold is met (emphasis added).
- l. Subject to mitigating circumstances, where an assessment of credibility undermines an individual’s account to the point that the reasonable grounds standard can no longer be met, the decision-maker should conclude that the subject is not a victim of trafficking. Indicators can include lack of expressive detail or inability to remain consistent on “central elements” of the account. The decision-maker may refer back to others for clarification if there are any inconsistencies in the account.
- m. Decision-makers should be aware of mitigating circumstances in relation to failure to provide details of material claimed facts. These may include mental, psychological or emotional trauma, inability to articulate, mistrust of authorities or feelings of shame, or (a key symptom of post-traumatic stress) avoidance of trauma triggers. Because of these symptoms a person may be unable to fully explain their experience until a minimum of psychological stability has been achieved. Later disclosure should therefore not be seen as necessarily manipulative or untrue, but in many cases is the result of an effective recovery period and the establishment of trust with the person to whom they are disclosing.
- n. A gap in time between the trafficking situation and referral should be seen as normal and not itself a reason to conclude that an individual should not be treated as a victim, though there may be circumstances in which it can still be concluded that at the time of the assessment the person no longer meets Convention criteria or needs the protection or assistance they can afford.
- o. When trafficking is removed through location (i.e. a migrant who claims to have been exploited overseas but travelled independently of any alleged trafficker to the UK over a period of time passing through a number of other

countries), the migrant is very unlikely to benefit from being considered under the Convention, but it is entirely possible that a person who has fled to escape a current trafficking situation will still be traumatised, and subject to Dublin II arrangements (on refoulement of asylum seekers) will need to be afforded the help and protection in the UK that is offered under the Convention. Issues consider include whether the person requires time to recover from the trafficking ordeal.

49. It is trite law that a failure by a public authority to follow its own published policy can be an error of law (*Lumba v SSHD* [2011] UKSC 12, [2012] 1 AC 245).

The Relevance of the Trafficking Convention to the issues in this case

50. As noted above, the Trafficking Convention is binding on the United Kingdom in international law but has not been incorporated into national law.
51. It is not suggested in this case that breach of the Trafficking Convention would be directly justiciable in English law. A limited concession was made in *R(Atamewan) v SSHD* [2013] EWHC 2727 (Admin) at [55] that it would amount to a justiciable error if national guidance purported to, but did not, give effect to the Convention. That concession was not made in the present case. Had it proved necessary to determine it, this would have been a difficult and contested point of law, contrasting the observations of Lord Hope in *R v SSHD ex parte Launder* [1997] 1 WLR 839 p at 867F with the observations of the majority in the Supreme Court in the recent case of *R(SG) v Secretary of State for Work & Pensions* [2015] UKSC 16. In fact, the point did not arise for determination, because it was not suggested that there was any divergence between the Convention and the domestic guidance which is said to give effect to it.
52. There are two bases upon which it is said that the Trafficking Convention is potentially relevant to this claim, neither of which I understood to be controversial as matters of principle. The first was that failure to comply with the assistance

provisions in the Convention was something which it was said I could take into account in considering whether there was a breach of the positive obligations under Article 4 ECHR. As both parties noted, in *Rantsev v Cyprus & Russia* [2010] 51 EHRR 1, the European Court of Human Rights found that trafficking as defined in Article 4(a) of the Trafficking Protocol falls within the scope of Article 4 ECHR and (at [288]) that Article 4 ECHR entails a procedural obligation to investigate situations of potential trafficking. If the procedures undertaken by the Secretary of State did not match up to the demands of the Trafficking Directive, that might be persuasive evidence that there had been a breach of the positive investigative obligation under Article 4 ECHR.

53. The second was that the requirements of the Trafficking Convention should inform the approach which the Competent Authority takes in performing its investigation. Since the UK Government has announced that its policy is to give effect to its obligations under the Trafficking Convention, that has consequences in domestic administrative law. Failure to apply the provisions of the Convention may give rise to a successful claim for judicial review: not because the treaty has any direct effect (because it does not), but because the Government has then failed to apply its own published policy (see *R(Y) v SSHD* [2012] EWHC 1075 (Admin) at [40]). Thus, the Competent Authority should be taken to have intended to protect the victim's rights, combat trafficking and promote international co-operation (the objectives identified in the Convention) and to promote a human rights based approach.
54. Had it proved necessary in interpreting what the Defendant's policy meant, I would have been prepared to interpret it on the basis of an assumption that the UK intends to comply wherever possible with its international commitments (see, for example the

observations of Lord Justice Carnwath as he then was in *AH v West London Mental Health Tribunal* [2011] UKUT AAC at 15-16), adopted by Maurice Kay LJ in the Court of Appeal in *Burnip v Secretary of State for Work & Pensions* [2012] EWCA Civ 629 at [19]-[22]).

55. There was no need for me to adopt this interpretative approach, however, because it appeared to be common ground that it would have been an error of law for the Competent Authority to depart from the provision in the Guidance (no reasons for having done so having been advanced). The claim was based upon alleged failures by the Competent Authority acting as decision-maker on the Defendant's behalf to follow the Guidance, and the issue before me was whether the decision-maker had in fact departed from its requirements.

Grounds

56. The Claimant advanced five bases for submitting that the decision-maker had failed to apply the relevant Guidance when making the reasonable grounds decision. These are the five components of Ground 1.
57. First, it was said that he set the evidential threshold too high. The proper threshold is "I suspect but I cannot prove"; whereas it is said that the Competent Authority approached the matter on whether or not he believed the Claimant's account, having formed a concluded view (presumably on the balance of probabilities) ("Ground 1(a)").
58. Secondly, it was said that the Competent Authority failed to consider relevant evidence on the prevalence of trafficking from Vietnam to Russia and from Vietnam to the UK via Russia. The Guidance specifically required Competent Authorities to

use published and recognized reports which address the propensity of trafficking in the home country before moving on to consider whether the facts are credible to the required standard of proof (i.e. reasonable grounds). The US State Department Trafficking in Persons Report of June 2013 identified Vietnam as a country which does not fully comply with the US Trafficked Victims Protection Act minimum standards, and noted in particular that Vietnam is a source country for precisely the types of labour exploitation described by the Claimant. The Defendant was criticized for failure to consider these sources (“Ground 1(b)”).

59. Thirdly, it was said that the decision-maker had failed to apply the Defendant’s Guidance on assessing credibility properly and had unfairly found inconsistencies where none would have been found on a fair approach to the evidence. The Claimant says that the Competent Authority should have focused on whether he had detailed his past experiences in a “broadly consistent manner” and not focused on contradictions and inconsistencies based on peripheral parts of his account (“Ground 1(c)”).
60. Fourthly, it is said that the Competent Authority failed properly to apply the Guidance on the definition of the components of trafficking in the way that it approached the issue of “means” of trafficking, and failed properly to consider evidence of the Claimant’s vulnerability (“Ground 1(d)”).
61. Finally, it was said that the decision failed properly to apply the Defendant’s Guidance on the components of trafficking in considering whether there were reasonable grounds for believing that the experiences that the Claimant recounted from Russia amounted to exploitation (“Ground 1(e)”).

62. A second ground is that these matters, taken compendiously, amount to a violation of the positive obligation to take reasonable steps to protect a victim of trafficking as required by Article 4 ECHR (“Ground 2”).
63. Counsel for the Claimant did not seek to analyse Ground 2 separately, and nor have I. If the decision-maker has not properly and fairly applied the Secretary of State’s Guidance intended to protect the human rights of putative victims of trafficking, then it will follow that there has been a breach of the positive obligations under Article 4. No other basis for suggesting a breach of Article 4 has been advanced, so if there is no failure properly and fairly to apply the Guidance, then there has been no violation of Article 4.

Discussion

Preliminary observations

64. Before turning to the bases upon which the “reasonable grounds” decisions of 20 and 25 September and 14 October 2013 are challenged, I make some observations on the approach a Competent Authority should take in reaching such a decision under the National Referral Mechanism for victims of trafficking.
65. Findings of fact are for the decision-maker: the role of the Court is only to determine whether the decision-maker has not properly understood the nature of the decision which he was called upon to make; or if the findings made have been tainted by an improper approach to the fact-finding process; or if the findings are such as to be irrational – either in the sense of being perverse, or because a relevant consideration has not been properly taken into account or something irrelevant has been taken into account.

66. However, in approaching the legality of a decision as to whether ‘reasonable grounds’ exist for believing a person to be a victim of trafficking, it is important to appreciate both the need properly to identify the question the Competent Authority was called upon to consider, and the context of the decision.

What is the question for the decision-maker at the reasonable grounds stage?

67. First, the shorthand of “reasonable grounds” or “I suspect but I cannot prove” should not distract from the actual question the decision-maker is called upon to answer: does the Competent Authority have reasonable grounds to believe that the person in question is a victim of trafficking?
68. This is an objective question: the question is whether the evidence provides grounds upon which a reasonable observer could believe that this person is a trafficking victim, applying the low threshold of suspicion but not proof, and bearing in mind the non-exhaustive list in the Guidance of possible reasons for absence of detail or inconsistency.
69. The question for the Competent Authority at this stage is not, “is there evidence which a reasonable observer could consider proves that this person is a trafficking victim?”; still less is it, “on what I know now, do I believe that this person is a trafficking victim”?
70. It is worth noting that at this preliminary stage of enquiry, there could be both reasonable grounds upon which a reasonable person could believe that a person could be a victim of trafficking and reasonable grounds for believe that they might not be. (That may particularly be so in circumstances where there are inconsistencies or gaps in the evidence, but also features of the account which suggest possibly plausible psychological or other reasons to explain those lacunae.) In such circumstances, the

question of whether there are “reasonable grounds” for suspecting that a person is a victim of trafficking must be answered in the affirmative. Provided there are reasonable grounds for belief, then the question of whether there are also reasonable grounds for disbelief is irrelevant. The further question of whether the grounds for disbelief outweigh the grounds for belief is not one for determination at that stage: it is a matter which will fall for determination by a decision-maker making a Conclusive Grounds decision at a later date (after the reflection/recovery period and if necessary after extra enquiries).

71. Secondly, the language of “I suspect but I cannot prove” should not mislead the decision-maker to treat their task at the reasonable grounds stage as being to form a subjective view of what the putative *victim* has been able to prove to the decision-maker’s satisfaction.
72. The test in the Guidance is whether the decision-maker considers (at that stage) that there are reasonable grounds – on all the evidence as it stands - for a belief that the person may have been trafficked. That evidence does not have to come from the complainant: it may arise from knowledge about the plausibility of the putative victim’s account of his circumstances from another source, or evidence from specialist organisations which suggests that assertions made by the putative victim’s account appear consistent with known trafficking patterns. The question is not whether the putative victim has provided sufficient proof that they have been trafficked. Still less is it whether the decision-maker can make a reasonable case for believing that the person has not been trafficked.

73. A rigorous approach to the question which the decision-maker must ask is important in the light of the short timescale within which, and the purpose for which, a reasonable grounds decision is to be made.

The importance of context

74. The “reasonable grounds” decision is intended to be made within five days of referral to the decision-maker. It is intended to do no more than to act as an initial filter to a fuller more conclusive decision. If, based on the information before the decision-maker, there is simply no basis on which a reasonable person could be of the opinion that there were reasonable grounds to believe that the individual concerned had been trafficked, they should be filtered out of the process at that stage to avoid diversion of resources into further enquiry. But if, based on that information, some reasonable grounds are established (which may or may not stand up to more detailed scrutiny, or prove well founded on a more detailed analysis) then a positive reasonable grounds decision should be made, to allow enough time and support for a proper conclusive grounds decision to be made. The initial filter should not be elevated to a detailed summary determination of the ultimate credibility of the case advanced.
75. That is because, at this early stage in the process, and before a putative victim has had an opportunity to recover or to access support and advice, the possible reasons for an incomplete or inconsistent account are far more likely to be present. As the Guidance identifies, there may not have been time for the decision-maker to undertake adequate enquiry from social services, other support agencies or other police forces or other enquiries undertaken in a safe location. If there is the possibility of misunderstanding (for example, as to whether there could have been mistranslation) there will have been no opportunity to double-check this with the person concerned in translating.

Potential police enquiries may not have started. The putative victim may not have had an interview with person in whom they can establish trust. All or any of: fear of authorities, post-traumatic stress, shame, desire to protect others or the trauma of being so recently picked up entering the country illegally (or indeed other factors) may lead to inability to recall concrete facts accurately. As the Guidance notes, these may mean that

“a person may be unable to fully explain their experience until a minimum of psychological stability has been achieved” so “later disclosure should not be seen as necessarily manipulative or untrue, but in many cases the result of an effective recovery period and the establishment of trust with the person to whom they are disclosing”.

It is for these reasons that the Guidance cautions against being too quick to assume that an account which has some holes or inconsistencies in it is therefore not credible, at the initial “reasonable grounds” stage.

76. The consequence of a negative reasonable grounds decision is very serious for a putative victim: it is akin to the decision by a judge at the permission stage of an application for judicial review that a claim is “totally without merit”, in that it brings the process for testing the strength of a person’s claim for rights protection to a halt on a summary basis. It means that the other protections which might arise before a conclusive decision is reached – i.e. a 45 day period of reflection, recovery and support and in which to take legal advice taken – are removed. A negative “reasonable grounds” decision means that the putative victim’s account is dismissed as so incredible that even this degree of preliminary procedural protection to enable a short time and “safe space” to gather more evidence is removed. It means that such a person is treated as ineligible even for the interim support which may enable them to obtain the type of psychological, practical and legal advice which could enable them

to participate more fairly in a full credibility assessment before a Conclusive Grounds decision is reached.

77. Yet these are the very protections which might provide the “safe space” in which (as the Guidance recognizes) the victim may be psychologically more likely to provide a full account of his or her treatment. (An example of a case where the necessity of the need for such space was emphasized is *FM* [2015] EWHC 844 (Admin)). Moreover, the possibility of the person engaging with the police in investigative work which may lead to a prosecution has gone. As the Guidance notes, decision-makers must be alert not only to the impact that the decision may have upon the victim but also on any potential prosecution of the trafficker (i.e. combatting trafficking, including potentially by international co-operation).
78. By contrast, the burdens imposed by a positive “reasonable grounds” decision on the state, in terms of expenditure of resources and the (obviously important) goal of firm immigration control, are relatively slight. All that is given is a period of some 45 days (or even less if it becomes clear that less is required) in which the putative victim is given the opportunity for recovery and reflection before a Conclusive Decision is taken on whether, in the view of the Defendant, he or she is a victim of trafficking. Thereafter, if, on the balance of probabilities, it is not established that a person is indeed a victim of trafficking, the state’s obligations under Article 4 ECHR to protect them are at an end.
79. Thus, the taking of a reasonable grounds decision has nothing like the same ramifications in terms of the state’s resources as reaching a decision that a person has established grounds for claiming asylum. Nor does it require the formation of a

concluded view of what facts are more likely than not to be true; only a view of whether reasonable grounds exist for further enquiry.

80. Although credibility is relevant to the existence or otherwise of “reasonable grounds”, a decision-maker does not have to (and may be unable to) form a concluded view on credibility at the “reasonable grounds” stage of the decision-making process under the National Referral Mechanism. In the reasonable grounds context, the decision for the Competent Authority is not whether the grounds for claiming to be a victim of trafficking are necessarily true, but only whether they and all the information available to the Competent Authority are sufficient to constitute reasonable grounds to trigger a requirement of further enquiry before the state can be rationally satisfied that it does not have any protective obligations towards a putative victim of trafficking.

A purposive approach to the Guidance

81. The Guidance must be applied in the context of:
- a. its protective purpose;
 - b. the fact that it opens the door only to short-term procedural protection and not to any long-term benefit;
 - c. the short timescale within which a decision is intended to be taken.
82. That means that the decision-maker must give particular attention to those aspects of the Guidance which focus on:
- a. The low threshold for the reasonable grounds test. The threshold is that the reasonable decision-maker “suspects but I cannot prove” the existence of reasonable grounds: the question is whether there are reasonable grounds to believe, not whether there are (also) reasonable grounds not to do so.
 - b. The nature of trafficking and the trauma which it can cause, and that these are matters which should lead to decision-makers being cautious in discounting potential victims for reluctance or inability to disclose fully at first.

- c. The fact that there are a number of good reasons why a victim of trafficking may not immediately be able to advance a coherent, consistent and detailed account of what has happened, so inconsistencies or delay in coming forward with detail are not necessarily reasons for finding lack of credibility, and later disclosure of more detail to a trusted person should not be seen as necessarily manipulative or untrue, because it can be the result of an effective recovery period and/or the establishment of trust.
83. Moreover, as noted above, the positive obligations on the state under Article 4 ECHR justify “anxious scrutiny” of whether the decision-maker has properly applied these principles.
84. I consider the grounds for judicial review against that background. Ground 1(a) is predicated on success on the other grounds, and so I have considered the other limbs of ground 1 first, before returning to it.

Ground 1(b) - Failure to consider relevant evidence on prevalence of trafficking from Vietnam to Russia and from Vietnam to the UK via Russia

85. The Claimant says – and it is not in dispute – that the Guidance expressly requires decision-makers to consider up to date reports on the prevalence of trafficking from the home country of the potential victim of trafficking.
86. The Claimant cites a US State Department Report on Trafficking in Persons from June 2013 as just such a report. The US State Department Report identifies Vietnam as a prevalent source of trafficking, and gives an example of typical exploitation in which Vietnamese men and women migrate through informal labour recruitment companies but subsequently face conditions of forced labour, including in the manufacturing sector, primarily in one of a number of named countries which include Russia. These examples reflect experiences which are extremely similar to those recounted by the Claimant in his screening and asylum interviews.

87. The Claimant also refers to statistics which show that in the first quarter of 2013, Vietnam was the fifth highest source country for referrals to the National Referral Mechanism.
88. It is said that the decision-maker did not take these sources of evidence into account in assessing the plausibility of the Claimant's account.
89. The Defendant rebuts this by saying that the decision-maker did indeed take into account background country evidence which recognized that Vietnam is a significant source country for victims of trafficking. Indeed, the 20 September 2013 decision cited the very report upon which the Claimant places reliance (see paragraph 22 of the 20 September 2013 decision) and accepted that human trafficking does take place into and out of Vietnam; and the 25 September 2013 decision expressly recognized that the Claimant's account did contain "some indicators of trafficking". As the Defendant observes, the mere fact that a person comes from a country in which trafficking is prevalent does not mean that every person claiming to be from that country claiming to be a victim of trafficking must be deemed credible.
90. However, the point that the Claimant is making is actually more nuanced. The circumstances he said he had experienced - as a Vietnamese man (having never previously travelled abroad) he went to Russia by plane, was subjected to bonded labour in the manufacturing sector there, and from there came in a lorry to England via France - are consistent with a recognized *pattern* of trafficking from Vietnam to Russia and the United Kingdom.
91. The US State Department Report goes further than simply recognizing that Vietnam is significant source of trafficking. Rather, it confirms the plausibility of the very route which the Claimant says he took; and for precisely the type of labour exploitation

described by the Claimant, in the place where he says it occurred. Thus it was evidence, available to the Defendant; which the Claimant says gives verisimilitude to his account; and which the decision-maker should have considered as an aspect of whether there were reasonable grounds to suspect that he was a trafficking victim. The existence of the US State Department Report on patterns of trafficking from Vietnam to Russia and thence to England does not mean that the Claimant must be “deemed credible”; but it does provide at least one reasonable ground for suspecting that he may be.

92. There is nothing in the decision letters to suggest that the similarity in circumstances between the Claimant’s account and those in the very recent US State Department Report had been recognized; or even that those relevant parts of the country information were taken into account.
93. It does not matter that the decision-maker did not quote directly from the relevant passages of the US State Department Report. But it does matter that he dismissed the Claimant’s case on what happened to him in Russia as being intrinsically incredible and/or the result of a chance encounter with a gang of criminals, without recognizing that the circumstances the Claimant described were consistent with established and recognized patterns of trafficking activity.
94. This would have rendered the decision irrational for failure to take into account a relevant consideration, even on the basis of an ordinary *Wednesbury* test. Applying the anxious scrutiny appropriate to a question which engages Article 4 ECHR, I cannot be satisfied that the decisions

“show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account.”

(R(FM) v SSHD [2015] EWHC 844 (Admin) at [30], quoting R(YH) v SSHD [2010] 4 All ER 448 at 24). This failure therefore also constitutes a breach of the Article 4 duty of enquiry.

95. This failure may not have been enough to quash this decision on its own, if the decision-maker's approach to the questions before him and the evidence had otherwise been an adequate one. However, in my view, the error identified in Ground 1(b) is indicative of a wider problem with the approach taken by the decision-maker in this case.

Ground 1(c) – failure to apply Guidance on assessing credibility

96. The decision-maker is entitled to form a view on credibility. But the emphasis must be on whether doubts as to credibility mean that there are no reasonable grounds to suspect that a person is a victim of trafficking. Mere untruths or inconsistencies are not enough to justify a negative 'reasonable grounds' decision on their own. The decision-maker must not conclude that a person's account is so untrue as to mean that there are no reasonable grounds simply because there are gaps or inconsistencies.
97. As noted above, the Guidance says that decision-makers should recognize potential reasons for initial reluctance to disclose the full facts of a case; the possible effect of trauma on ability to remember concrete dates and facts; and on contradiction. There is an injunction to act sensitively, albeit that the decision-maker must also assess all information critically and objectively.
98. However, the 20 September 2013 letter does not apply this approach. Nowhere in the letter is there any consideration of the possible traumatic effects of the experiences described or their potential impact on the Claimant's ability to remember details such as names. There is no analysis of the possibility of post-traumatic stress, or fear of authority (despite very recent arrest), or a desire to protect the innocent (other workers

in the factory whom he was unable or unwilling to name), or the reputation of a man (the Master) who the Claimant admired.

99. Nor does the letter display an attempt to assess critically whether reasonable grounds exist for suspecting that the Claimant is a victim of trafficking. Rather, it is a list of reasons why it is asserted that “[he] do[es] not meet all three constituent parts of the definition of trafficking”, leading to a conclusion that “Therefore there are no reasonable grounds to consider that [he] is a victim of trafficking from Vietnam to the UK”.
100. The letter says that the Claimant’s account is “riddled with anomalies” (paragraph 24), but either fails to consider the possibility of plausible reasons for these or dismisses them in an unreasonable way.
101. For example, the decision-maker notes that in the screening interview “[the Claimant] stated that [he] left Vietnam and went to Russia in 1999”, but says that this is inconsistent with the screening interview which says he left in 2009. Although he notes (paragraph 25) that the Claimant raised this issue of his own accord when asked if there were any amendments he wished to make to “[his] screening interview”, the decision-maker reaches an unjustifiable conclusion that this can only reasonably be treated as a change of account on the Claimant’s part, rather than considering the possibility that he was correcting an error in the note of the interview attributable to a translation error. The decision implies that it cannot have been a translation error because at the start of the screening interview, the Claimant said that he understood the translator and that “tellingly” “you did not just refer to 1999 on one occasion ... but twice”. The decision-maker apparently does not consider the possibility that the translator/transcriber wrongly recorded the date incorrectly twice. In other words, he

rejects (seemingly on the balance of probabilities) the possibility that the Claimant is telling the truth when he said he left Russia in September 2009.

102. Similarly, the decision-maker describes as “contradictory accounts” the descriptions in the two interviews as to the manner in which the Claimant’s journey from Vietnam to Russia was facilitated; whereas it is by no means obvious that these two accounts are contradictory. (“Contacting an agent through a friend and meeting them at a roadside café” is not necessarily inconsistent with the friend (i.e. the Master) handing him the documents, if the Master also went to meet the agent at the café).
103. Nor is there necessarily a contradiction between describing reasons for leaving Vietnam for Russia and different reasons for seeking to come to the UK. Again, the decision-maker finds a major contradiction in the explanation of “such a significant event as [the Claimant’s] departure from the country in which [he] had lived all [his] life” without considering the question of whether the Claimant was in fact answering two separate questions.
104. The decision-maker did not decide that there were no “reasonable grounds” upon which a reasonable person could suspect that the Claimant was transported from Vietnam to Russia at all (even though that was a recognized pattern of trafficking and even though the Claimant did end up in Russia). Rather, he simply picked holes in inconsistencies or perceived implausibilities in the Claimant’s account of why and how this came to pass. Nor did he make a finding that there were no plausible mitigating circumstances which might justify such anomalies (that was simply not a matter the decision-letter considered). He did not consider whether a reasonable person could nonetheless suspect that the Claimant was a victim of trafficking: that is not the question he purported to address. Rather, at paragraph 28, he made a firm

factual finding that anomalies in the Claimant's account led him "not to consider that you were subject to an act of transportation to Russia or that you meet part 'a' of the definition [of trafficking] of the definition as a result".

105. Another example is the Claimant's inability to remember the names of people he worked with in the factory. This is perhaps a surprising inability to supply detail (especially given the Claimant's ability to remember other matters of detail such as the name on his false passport and the colour of the vehicle which took him to the factory in Russia). But before relying on this lacuna as evidence of lack of credibility, the decision-maker was required by the Guidance to give sympathetic consideration to potential reasons for it.
106. The decision-letter shows that the decision-maker did not consider – even to discount – possible explanations for not giving these names, such as PTSD or fear of reprisals.
107. In my judgment, the Defendant's failure properly to address the potential relevance or irrelevance of anomalies; and absence of any consideration of what the Guidance called "mitigating circumstances" – i.e. possible justifications for gaps or inconsistencies – constitutes a clear failure to follow the Guidance as to the approach to fact-finding. That is an error of law. Ground 1(c) is made out.

Grounds 1(d) and (e) – Failure to apply Guidance on the components of trafficking as to "means" of abuse of a position of vulnerability and "exploitation"

108. As noted above, the Defendant's policy is to follow the definition of trafficking in the Convention.
109. The Claimant says that the decision-maker failed properly to apply the Guidance on "means" of trafficking, because he failed to consider factors which are acknowledged

to contribute a position of vulnerability, including inherent environmental and contextual factors and failed to consider the evidence of his vulnerability. As to “exploitation”, the Claimant says that the Defendant erred in failing to accept that there were reasonable grounds for believing that the experience the Claimant recounted amounted to exploitation.

110. The Defendant’s answer to these points is that the decision-maker did not misdirect himself as to what was capable of amounting to exploitation: he simply did not accept the Claimant’s factual account of what had happened to him.

111. As I have indicated in my discussion of ground 1 (c) above, the decision-maker’s approach in the letter of 20 September 2013 to assessing credibility was flawed. I do see an argument that the decision-maker failed properly to consider whether (even if as he found the Claimant was more likely to have been the victim of a random encounter with a criminal group in Russia) the criminal group’s action in taking him to a factory where he was subjected to forced labour was capable of constituting exploitation of vulnerability to enforce servitude. The assumption that the Claimant could not have been exploited because he consented to travelling to Russia is irrelevant if the means by which he was taken there amounted to such exploitation. But as I read the decision-letter, it does not suggest that the decision-maker failed to understand factors such as poverty, absence of family or friends and inability to speak the language which were capable of making a person vulnerable to “exploitation”: he simply found (on an erroneous approach to assessing credibility) that these factors were not present in this case.

112. Had the Defendant approached the issue of enquiry by addressing the right question (whether reasonable grounds for suspicion existed, not whether facts alleged were

made out); and in the light of all relevant considerations as identified by the Guidance, I would not have found for the Claimant on grounds (d) or (e).

Ground 1 (a) – evidential threshold set too high

113. This brings me back to first ground for judicial review, which is the allegation that the Defendant failed properly to apply the Guidance on the low threshold to be applied at the “reasonable grounds” stage, and that in practice, the decision-maker set the evidential threshold far too high.
114. The Defendant’s short answer is that it is common ground that the evidential threshold at the “reasonable grounds” stage is not high; but an adverse decision on credibility was one which the decision-maker was entitled to reach on the basis of his analysis of the Claimant’s answers to questions in interview; and that adverse finding on credibility justified his conclusion that there were no reasonable grounds for suspecting that the Claimant was a victim of trafficking even in application of the low evidential threshold.
115. The test *cited* in the decision letters is the right one; however, the question of whether the right test was applied is one substance not semantics, and looking at the language of the decision letters and the analysis they contain as a whole, I am not satisfied that the right test was applied. Firstly, as noted, the decision-maker did not address the relationship between gaps in evidence, credibility and reasonable grounds on the correct basis as identified in the Guidance.
116. Secondly, in my judgment, the decision-maker in this case approached the reasonable grounds decision from the wrong end of the telescope. The way the decision of 20 September 2013 is constructed is not to identify evidence and matters which might

constitute reasonable grounds for suspecting that the Claimant was a victim of trafficking and then to examine the evidence critically to decide if those grounds did in fact they exist (bearing in mind possible explanations for credibility problems or evidential gaps). Rather, the approach seemed to be to identify all indicators which could cast doubt on the accuracy or completeness of the Claimant's account or could lead to inference that he was not trafficked; on the basis of those to reach concluded adverse credibility findings; on the basis of those adverse credibility findings and inferences to reach decisions as to what the decision-maker actually believed the facts to be (not what a reasonable person might suspect the facts might be); and finally to work backwards from those findings of fact to a conclusion that the grounds for disbelieving the Claimant meant that there were no reasonable grounds to suspect that the Claimant could be a victim of trafficking.

117. In substance, I therefore accept that the Defendant's decision-maker applied the wrong evidential standard. In practice, he asked himself the wrong question – i.e. whether the Claimant had plausibly proved his case that he was a victim of trafficking - and not the right one. The right question was whether on the evidence available, and giving due weight to possible explanations for lacunae or inconsistency, there were grounds which would cause a reasonable person to suspect that the Claimant was a victim of trafficking, so as to trigger a 45 day period of reflection and recovery before a Conclusive Decision was reached.

Were the errors in the 20 September 2013 decision cured by the 25 September or 14 October decisions?

118. I have already noted that the decision-maker reconsidered his negative reasonable grounds decision twice in the light of representations made by the Claimant's solicitor and Ms Stepnitz.
119. However, in my view neither of these decisions cured the errors in the 20 September decision.
120. The letter of 25 September accepted that the Claimant's account contained "some indicators" of trafficking, but it relied on "the reasons elucidated within the negative reasonable grounds decision" for the competent authority "quite justifiably deem[ing] that they were not sufficient to reach the standard of proof of reasonable grounds to believe", because "a number of core internal inconsistencies" existed which it was considered significantly undermined his claim. Essentially that did no more than repeat the decision-maker's view that the Claimant was not credible. But it did not cure the defects in the 20 September decision, which have been identified above – namely, the failure to identify the particular country expert indicators were indicators that the Claimant's account of what happened to him was typical of a recognized trafficking journey; and the failure to follow the Guidance for considering credibility issues in the light of potential reasons for confusion or inconsistency or gaps in evidence.
121. The 14 October 2013 decision was a response to further evidence lodged by the Claimant following his interview with Ms Stepnitz, and Ms Stepnitz's report sent under cover of a pre-action protocol letter.

122. Ms Stepnitz had set out the basis for her assertion of expertise in the Appendix to her report (and indeed it is extensive, and she has advised Competent Authorities among others). However, the 14 October 2013 decision criticized the approach which Ms Stepnitz had taken in her report as assuming a role as advocate and said (at paragraph 19) that for that reason limited weight was attached to it.
123. Ms Stepnitz had interviewed the Claimant and reported her views and understanding of what he had said, and what she considered to be misunderstandings by the decision-maker of what had been said in the asylum and screening interviews. She also set out at some length why she considered the decision-maker has misapplied the test of “means” and exploitation of a position of vulnerability, and pointed out the recognized expert views (reflected in the Guidance) on reasons why there may be gaps or inconsistencies in the accounts of a genuine trafficking victim.
124. There may be some force in the decision-maker’s view that Ms Stepnitz’s report was more in the nature of an explanation of what the Claimant had said to her in “safe” circumstances and observations in his support, rather than being in the nature of a purely expert report.
125. However, nothing in the 14 October 2013 decisions corrects the errors of approach in the 20 September 2013 decision identified above.
126. In particular, the decision-maker said in paragraph 30 of that decision that “the burden of proof” remained on the Claimant: in fact the Competent Authority’s task on a referral from the National Referral Mechanism is inquisitorial. If an initial referral contains insufficient evidence, the Competent Authority should “proactively seek out” information that could prove useful in establishing that there are reasonable grounds.

127. Moreover, the decision-maker used further details which emerged from the Claimant's interview with Ms Stepnitz as casting still further doubt on his credibility because they had not been raised at an earlier stage. However despite Ms Stepnitz specifically drawing attention to the question of why a victim's account may alter over time, the 14 October 2013 decision to continue to reject the Claimant's credibility was reached without any consideration of the list of "mitigating circumstances" which the Guidance showed might have explained earlier inability to fully explain the Claimant's experience until a minimum of psychological stability had been achieved by access to support. Nor did the 14 October 2013 decision make any reference to the observation in the Guidance that late disclosure is not "necessarily manipulative or untrue", since it is only when a putative victim gains a degree of stability or talks to a person they trust that they may start to open up.
128. In other words, I consider the 14 October 2013 decision exacerbated the errors of approach of the earlier two decisions which were identified in grounds 1(a), (b) and (c) above.

Relief

129. For these reasons, I find that the reasonable grounds decisions taken by the Competent Authority in this case were flawed by failures to address the right question; to apply the right burden of proof; and failures to apply the sympathetic and inquisitorial approach to credibility advocated in the Defendant's Guidance.
130. In the circumstances, the decision-maker breached the positive obligation of reasonable investigation in Article 4 ECHR, contrary to section 6(1) Human Rights Act 1998.

131. The relief sought is that the reasonable grounds decision be quashed and remitted for reconsideration, and that there be a declaration of the breach of Article 4. No discretionary grounds for refusing that relief were advanced by the Defendant in either the summary of detailed grounds of resistance, the skeleton argument or oral argument.

132. Accordingly I will grant the relief sought. Both parties submitted at the hearing that costs should follow the event. Subject to any submissions to the contrary, I will order that the Defendant should pay the Claimant's costs to be assessed if not agreed, and that there be a detailed assessment of the Claimant's costs for the purposes of public funding. Any consequential applications can be dealt with in writing.