Neutral Citation Number: [2019] EWHC 148 (Admin)

Case No: CO/2251/2018

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

Bristol Civil Justice and Family Centre
Bristol, BS1 6NP

Date: 31/01/2019

Before:

MR JUSTICE GARNHAM

- -

Between:

The Queen (on the application of (1) O and (2) H)	**Claimants**
- and -	
The Secretary of State for the Home Department	**Defendant**

- -
- -

Natalie Lieven QC, Shu Shin Luh and Gemma Loughran (instructed by **Deighton Pierce Glynn Solicitors**) for the **Claimants**
Lisa Giovannetti QC, Gwion Lewis (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 22 & 23 November 2018

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Approved Judgment

Mr Justice Garnham:

Introduction

1. The principal issue raised by this case is as follows: have delays by the Home Office in the process of making "Conclusive Grounds" decisions in respect of potential victims of human trafficking become so significant and so widespread as to be unlawful?

2. "Conclusive Grounds" decisions are made by "Competent Authorities" under an arrangement established by the Secretary of State for the Home Department ("the Secretary of State"), for the purpose of identifying victims of trafficking and modern slavery, an arrangement called "The National Referral Mechanism" ("NRM"). There are two competent authorities, the UK Human Trafficking Centre, operated by the National Crime Agency, and the Home Office. This claim relates only to the systems operated by the Home Office

3. There was a delay of 34 months between the date when Ms O, the First Claimant, received what is called a positive "Reasonable Grounds" decision, in August 2015, and the date in June 2018 when she received a negative Conclusive Grounds decision. There was a delay of more than 19 months between the positive Reasonable Grounds decision and the negative Conclusive Grounds decision in the case of Ms H, the Second Claimant. A third claimant, P waited 19 months between the two decisions. She thereafter discontinued her claim.

4. The two Claimants allege unlawful delay in their own cases. But they also allege that their cases are illustrative of a much wider and more profound deficiency in the NRM arrangements operated by the Home Office. They point to what they describe as sustained criticism of the arrangements contained in reports by Mr Jeremy Oppenheim for the Home Office in 2014 and by the National Audit Office in 2017, and in witness statements from a number of solicitors with experience of representing potential victims of trafficking.

5. The Secretary of State resists this claim. He argues that there is no duty to make a Conclusive Grounds decision within a particular period. He says that whilst particular individuals have been waiting regrettably long periods for a Conclusive Grounds decision to be made in their case, the evidence does not support the claim that "delays are systematically egregious". He disputes the suggestion that the delays in the two Claimants' cases were unreasonably long and points out that ultimately conclusive grounds were not established in their cases.

6. Before considering the criticisms advanced by the Claimants, it is necessary to identify first the relevant international instruments, second the domestic policies and guidance, third the relevant parts of the Claimants' own history and fourth the history and reviews of the NRM.

The International Instruments

7. There are three relevant international instruments.

8. First, the Council of Europe Convention on Action against Trafficking in Human Beings (or "ECAT"), which came into force in February 2008. The relevant articles are as follows:

> **"Article 1 - The purposes of this Convention**
>
> 1. The purposes of this Convention (include) "(b) to protect the human rights of the victims of trafficking…
>
> **Article 10 – Identification of the victims**
>
> 1 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, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.
>
> 2 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 provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.
>
> **Article 12 – 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) standards 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…

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.

Article 13 – 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...

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...

Article 14 – Residence permit

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

(a) the competent authority considers that their stay is necessary owing to their personal situation;

(b) the competent authority considers that their stay is necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings…

Article 15 – Compensation and legal redress

1 Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.

2 Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.

3 Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.

4 Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23.

Article 16 – Repatriation and return of victims

1 The Party of which a victim is a national or in which that person had the right of permanent residence at the time of entry into the territory of the receiving Party shall, with due regard for his or her rights, safety and dignity, facilitate and accept, his or her return without undue or unreasonable delay.

2 When a Party returns a victim to another State, such return shall be with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary…

Article 18 – Criminalisation of trafficking in human beings

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct contained in article 4 of this Convention, when committed intentionally…

Article 26 – Non-punishment provision

Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so."

9. Second, the 2011 EU Anti-Trafficking Directive (2011/36/EU), the recitals to which include the following:

"(7) This Directive adopts an integrated, holistic, and human rights approach to the fight against trafficking in human

beings and when implementing it, Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities and Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals should be taken into consideration. More rigorous prevention, prosecution and protection of victims' rights, are major objectives of this Directive. This Directive also adopts contextual understandings of the different forms of trafficking and aims at ensuring that each form is tackled by means of the most efficient measures…

18) It is necessary for victims of trafficking in human beings to be able to exercise their rights effectively. Therefore assistance and support should be available to them before, during and for an appropriate time after criminal proceedings. Member States should provide for resources to support victim assistance, support and protection. The assistance and support provided should include at least a minimum set of measures that are necessary to enable the victim to recover and escape from their traffickers. The practical implementation of such measures should, on the basis of an individual assessment carried out in accordance with national procedures, take into account the circumstances, cultural context and needs of the person concerned. A person should be provided with assistance and support as soon as there is a reasonable-grounds indication for believing that he or she might have been trafficked and irrespective of his or her willingness to act as a witness. In cases where the victim does not reside lawfully in the Member State concerned, assistance and support should be provided unconditionally at least during the reflection period. If, after completion of the identification process or expiry of the reflection period, the victim is not considered eligible for a residence permit or does not otherwise have lawful residence in that Member State, or if the victim has left the territory of that Member State, the Member State concerned is not obliged to continue providing assistance and support to that person on the basis of this Directive. Where necessary, assistance and support should continue for an appropriate period after the criminal proceedings have ended, for example if medical treatment is ongoing due to the severe physical or psychological consequences of the crime, or if the victim's safety is at risk due to the victim' s statements in those criminal proceedings…

(23) Particular attention should be paid to unaccompanied child victims of trafficking in human beings, as they need specific assistance and support due to their situation of particular vulnerability. From the moment an unaccompanied child victim of trafficking in human beings is identified and until a durable solution is found, Member States should apply reception measures appropriate to the needs of the child and should ensure that relevant procedural safeguards apply. The necessary measures should be taken to ensure that, where appropriate, a guardian and/or a representative are appointed in order to safeguard the minor's best interests. A decision on the future of each unaccompanied child victim should be taken within the shortest possible period of time with a view to finding durable solutions based on an individual assessment of the best interests of the child, which should be a primary consideration. A durable solution could be return and reintegration into the country of origin or the country of return, integration into the host society, granting of international protection status or granting of other status in accordance with national law of the Member States."

10. The following articles of the Directive are said to be material:

"Article 8

Non-prosecution or non-application of penalties to the victim

Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence…

Article 11

Assistance and support for victims of trafficking in human beings

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…

4. Member States shall take the necessary measures to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations…

Article 16

Assistance, support and protection for unaccompanied child victims of trafficking in human beings.

2. Member States shall take the necessary measures with a view to finding a durable solution based on an individual assessment of the best interests of the child."

11. Third, the 2000 Charter of Fundamental Rights of the European Union (as amended from the date of entry into force of the Treaty of Lisbon). The relevant provisions provide as follows:

"**Article 5 Prohibition of slavery and forced labour**

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. Trafficking in human beings is prohibited…

Article 52 Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

12. Article 5 of the Charter is the equivalent of Article 4 of the European Convention on Human Rights, the difference being that Article 5(3) makes explicit the protection against human trafficking. (That prohibition was found to be implicit in Article 4 ECHR in *Rantsev v Cyprus v Russia* [2010] 51 EHRR 1).

Domestic law and Policy

13. The UK signed the Convention against Trafficking on 23 March 2007 and ratified it on 17 December 2008. It came into force on 1 April 2009. The obligation to identify and protect potential victims of trafficking ("PVoT") and ("VoTs") was implemented in the UK by the establishment of the National Referral Mechanism and the Home Office guidance "Victims of Modern Slavery – Competent Authority Guidance".

14. ECAT has not been incorporated into English domestic law and as a result cannot be relied upon in proceedings against the Defendant directly. However, insofar as the Secretary of State has adopted parts of ECAT as his own policy in guidance, the decision of *R (G) v SSHD* [2016] 1 WLR 4031 means that the Secretary of State must follow that guidance unless there is good reason not to do so.

15. The guidance includes the following: At page 8 it is made clear that the guidance is based on the European Convention against Trafficking and as part of implementing the Convention, the Government created the NRM in 2009. Page 19 explains that the UK's two designated Competent Authority decision makers under the NRM are the Human Trafficking Centre (UKHTC) within the National Crime Agency, and the Home Office. The Home Office has a number of Competent Authorities including UK Visa and Immigration NRM Hub.

16. Page 21 identifies as "First Responders" several designated organisations which can refer potential victims of modern slavery in the UK into the NRM. Those responders include the Home Office, the Police, the Salvation Army and "Unseen UK". Page 50 of the guidance identifies the '2 Stage National Referral Mechanism' consideration process.

> "**Part 1** The first part is the Reasonable Grounds test, which acts as an initial filter to identify potential victims.
>
> **Part 2**
>
> The second is a substantive Conclusive Grounds decision as to whether the person is in fact a victim..."

17. Page 50 also identifies "Timescales" for making a reasonable grounds decision as follows:

> "The expectation is that the Competent Authority will make a reasonable grounds decision within 5 working days of the NRM referral being received at the UK Human Trafficking Centre (UKHTC) where possible.
>
> Reasonable grounds decisions for cases in immigration detention will be considered as soon as possible".

18. The guidance continues "the reasonable grounds decision has consequences for the potential victim in terms of protection and support (and potential further stay in the UK if they are subject to immigration control)".

19. Page 64 deals with making Conclusive Grounds decisions as follows:

> "When a Competent Authority makes a positive reasonable grounds decision, at the end of the recovery and reflection period they then have to conclusively decide whether the individual is a victim of human trafficking (Scotland and Northern Ireland) or modern slavery (England and Wales).
>
> The Competent Authority is responsible for making a conclusive decision on whether, 'on the balance of probabilities' there are sufficient grounds to decide that the individual being considered is a victim of human trafficking or modern slavery. We refer to this as the Conclusive Grounds decision."

20. The timescale for Conclusive Grounds decisions is described as follows:

> "The expectation is that a conclusive grounds decision will be made as soon as possible following day 45 of the recovery and reflection period. <u>There is no target to make a conclusive grounds decision within 45 days.</u> The timescale for making a conclusive grounds decision will be based on all the circumstances of the case" (emphasis added).

21. The guidance addresses the need for evidence gathering:

> "Competent Authority staff may need to gather more information to make a conclusive grounds decision.
>
> The Competent Authority must make every effort to secure all available information that could prove useful in establishing if there are conclusive grounds.
>
> If they cannot make a conclusive grounds decision based on the evidence available, they must gather evidence or make further enquiries during the 45 day recovery and reflection period."

22. Page 80 deals with monitoring case progress during the 45 day recovery and reflection period. It provides:

> "To make sure the potential victim has sufficient time for recovery and reflection and that a conclusive grounds decision can be made as near as possible to day 45 (although that may not be possible in every case), you must set a review date for day 30 to:
>
> - Monitor progress on the case
>
> - Check it is on target for a conclusive decision…

> A potential victim's specific circumstances could mean they need more than 45 days to recover and reflect. If representations are made for more time, you must consider whether an extension is appropriate…"

23. Although not directly relevant to the present case, it is also to be noted that the Modern Slavery Act became law from 26 March 2015 and the majority of provisions in that Act have now been brought into force.

The Claimants' History

Ms O

24. Ms O who was born in February 1983, arrived in the UK on 3 April 2010 with a Mr O, a man who Ms O's parents were pressurising her to marry in exchange for financial support for their family. Ms O says she was abandoned by Mr O on arrival. She was approached by a woman calling herself Mrs Lawrence who offered accommodation and help, but instead forced her to carry out domestic work for the Lawrence family without pay. She alleges she was beaten, threatened, locked in the house, had her passport withheld and was subject the sexual advances by Mr Lawrence.

25. Later in 2010, she says she escaped the Lawrence family and slept rough for a period during which she was raped and made the victim of theft. She then met a Mr A who offered to help. He brought her to Bristol and in August 2012 they married. In June 2013, Ms O gave birth to a son.

26. In January 2014, Mr A claimed asylum. He was detained for 10 months during which period Ms O and her son were supported by social services. In August 2014, Ms O claimed asylum. That was refused in September 2014 and her claim was certified as clearly unfounded. In March 2015, the Home Office provided asylum support for the family.

27. An NRM referral was made to the Home Office by the Salvation Army. In July 2015, Ms O started receiving support from an anti-trafficking charity known as "Unseen" who had been contacted through the Salvation Army to provide support. On 4 April 2015, Ms O received a positive Reasonable Grounds decision from the NRM.

28. In August 2015, Ms O gave birth to a son. Thereafter, a number of representations were made by a number of different organisations, including Unseen, and an organisation called Migrant Legal Project (MLP), on Ms O's behalf to the Competent Authority. On 10 November 2015, an interview was conducted for the purposes of a trafficking identification process. Further clarification and representations were provided by MLP to the Competent Authority and the First Claimant underwent counselling both with an organisation called "Womankind" and an organisation called "Kinergy". Further representations were made on Ms O's behalf during 2016.

29. In August 2016, Ms O was diagnosed by her GP with anxiety and depression. Subsequently she was assessed by her GP. She was also referred to Somerset and Avon Rape and Sexual Abuse Support. Her GP reported that she had been referred for psychological treatment and for counselling and cognitive behavioural therapy. Further

representations were made by MLP to the Competent Authority on the First Claimant's behalf during 2017.

30. In September 2017, Ms O gave birth to a daughter. In October 2017, she was seen by perinatal health services in respect of various mental health difficulties. In November 2017 her GP reported on her continuing mental health condition. Yet further representations were made to the Competent Authority by MLP and Unseen. At the end of 2017, the Competent Authority acknowledged MLP's representations and requested a passport photograph of Ms O and her children. That was provided some two months later.

31. On 9 March 2018, a letter before claim was served on the NRM. Correspondence between the parties followed. On 6 June 2018, the NRM issued the negative Conclusive Grounds decision and on 8 June 2018 the claim was issued.

Ms H

32. Ms H first came to the UK on 28 April 2016, then aged 15. She reported she had been beaten and disowned by her family after they discovered that she had lost her virginity. She explains she had been forced to work as a prostitute prior to obtaining a visa for the UK.

33. She was referred to the NRM some six months after arriving in the UK and an initial contact interview shortly thereafter. One week later, Ms H received a positive Reasonable Grounds decision. Later that month her initial health assessment was conducted which identified a wide range of physical and mental problems. On 9 November 2016, a substantive trafficking and asylum interview was conducted. A request of support for Ms H was refused. On 24 November 2016, Ms H attempted suicide by taking an overdose of medication. She was taken to A&E and subsequently a report on her condition was prepared by the Cardiff Health Practice. A wide range of symptoms relating to her physical, mental and emotional health were reported.

34. On 14 December 2016, the substantive trafficking and asylum interview was conducted. Two days later, Home Office case records note that a "level 3 safeguarding flag" was registered on the Claimant's papers.

35. In June 2016, the charity Barnardo's began work with Ms H. In August 2017, Gloucester City Health Centre provided details of the Second Claimant's condition. On 29 September 2017, Ms H gave birth to a child. In December 2017, the case record sheets note concern about proposals to relocate Ms H. Also in December 2017, there was a letter from an organisation called Let's Talk", indicating the second Claimant suffered moderately severe symptoms of depression and severe symptoms of anxiety.

36. In January 2018, Barnardo's wrote to the Defendant indicating concern that Ms H's housing situation was having a detrimental impact on her and she would need cognitive behaviour therapy. A request was made for relocation to more suitable accommodation. Also, that month, there are records of email correspondence raising concerns, again, about Ms H's proposed relocation, a step that took place on 22 January 2018 when Ms H was moved to Bristol.

37. That same month, Unseen began supporting Ms H and in February 2018 Ms H instructed solicitors. There were further representations by Unseen in March 2018 and later that month a letter before claim was issued by the Claimant's then solicitor. Correspondence then followed with continued representations being made on Ms H's behalf. On 8 June 2018, this claim was issued. On 28 June, the Acknowledgment of Service and Summary Grounds of Defence was filed. The negative Conclusive Grounds decision followed on 2 July 2018.

The Evidence as to the Operation of the NRM

The evidence of delay

38. It is common ground that there have been significant delays in recent years in the processing of cases through the NRM. In her witness statement, Ms Rachel Devlin, the leading policy officer in the Home Office unit responsible for the NRM said this:

> "The Home Office accepts that exponential increases in the number of referrals to the NRM in recent years have led to the regrettable delays in some cases."

39. In a submission to the Secretary of State from the Modern Slavery Unit at the Home Office dated 8 September 2017, it is said that the "NRM is intended to be a dynamic process, providing a bridge to support to enable people to recover the exploitation they have suffered, begin to move forward and to be robust enough to avoid future exploitation…" One of the key factors that frustrates in practice is the "substantial delays in decisions, in particular for non-EEA nationals" which mean they spend "extended periods of time in limbo" in NRM support "with no indication of when a decision will be received…"

40. In the hearing before me, there was some debate about the relevant statistics as to that delay. On the second day of the hearing, at my suggestion, an agreed note summarising the effect of the statistical material available was produced. Of particular interest for present purposes are the following five points:

41. First, it is plain that the total number of referrals has risen every year from 2013 to 2017. In 2013, the total number of referrals was 1745, in 2015, 3266 and in 2017, 5145. It appears that the number of referrals has dropped in 2018; by 1 November the referrals totalled 3539 and the pro-rata projection for the end of the year is 4245.

42. Second, the number of pending decisions has increased steadily. At the end of 2015, the total number pending was 2151, made up of 19 cases from 2013, 470 from 2014 and 1662 from 2015. At the end of 2017, there were a total of 5091 cases pending, made up of 11 from 2013, 124 from 2014, 515 from 2015, 1168 from 2016 and 3273 from 2017. As at 1 November 2018, there were 5315 cases pending of which 109 were from 2015, 581 from 2016, 1882 from 2017 and 2743 from 2018.

43. Third, the average time for making a Conclusive Grounds decision has fallen somewhat. In 2015, UK Visas and Immigration took an average of 378 days from the positive Reasonable Grounds decision to make a Conclusive Grounds decision. In

2016, the figure was 370 days and in 2017 it was 327 days; (it is to be noted that the averages do not include cases from previous years).

44. Fourth, those averages need to be examined in a little more depth to identify the length of time individuals were waiting for a Conclusive Grounds decision. As at 1 November 2018, 1009 individuals had been waiting more than 18 months, 1218 had been waiting 12-18 months, 550 between 9 and 12, 692 from 6-9 months, 93 from 3-6 months and also 93 for less than 3 months.

45. Finally, the available figures for 2018 show a steady rise in number of Conclusive Grounds decisions made; 78 in January, 100 in March, 126 in May, 108 in July, 329 in September, 421 in November.

Concern about delay

46. Concern about the performance of the NRM has been expressed for some years. In November 2014, Jeremy Oppenheim, a senior civil servant in the Home Office, conducted a detailed review of the operation of the NRM. His conclusions included the following;

> "7.2.1 Stakeholders agree current timescales for the conclusive grounds decisions are a problem.
>
> 7.2.2 UK Visas and Immigration is working to bring conclusive grounds decisions within a service standard of 98% and straight forward decisions within 6 months. In 2013, the UK Human Trafficking Centre…made a conclusive grounds decision in an average of 56 days….
>
> 8.2.1 The governance of the current system is fragmented and lacking in overall performance framework. It has evolved in to the system of implementation of 2009 and, whilst improved, cannot be described as efficient or effective.
>
> 8.2.2. There is insufficient accountability for the outcomes of the process or the appropriate management for the process itself…
>
> 8.2.9 It is vital that any system is properly managed so that cases are not delayed unduly. The timeliness of decision making has been discussed at 7.2.2. Clearly any effective process needs tight performance management with agreed outcomes. We believe that the management of the National Referral Mechanism should include an escalation process which sees all cases being referred at agreed decision points if the case has not reached the expected stage."

47. In December 2017, the National Audit Office published a report on the NRM. That report includes the following:

> "2.12 Very few cases reach a conclusive grounds decision within 45 days. Of those referred in 2016-17, the Government provided a conclusive grounds decision within 45 days to only 6% of the victims who received a decision. This rises to 33% for a decision within 90 days. Of potential victims referred to the NRM in 2016, 46% did not receive a conclusive grounds decision by March 2017…
>
> 2.13 The NRM process is inefficient and potential victims are caught up in the system waiting for a decision for a long time. For two thirds of those referred in 2016-17, the Government took longer than 90 days to make a conclusive grounds decision…"

48. The Claimants adduced witness statements from a number of solicitors experienced in handling victim of trafficking cases. Their own solicitor, Ugo Hayter of Deighton Pierce Glynn Solicitors produced a table showing the time taken from the expiry of the 45 day recovery and reflection period to the receipt of the Conclusive Grounds decision. The figures ranged from two days to 33 months. Evidence from Kirsten Powrie, of Wilson Solicitors LLP, demonstrated delays of up to 40 months and showed that of the 43 cases she dealt with that had been referred, 28 individuals experienced delays of 12 months or more and 11 experienced delays in excess of 24 months.

49. I was also taken to evidence from Alice de Looy-Hyde of the Migrant Legal Project to similar effect. She also speaks of her clients receiving no information from the NRM about the progress of their claims and of her attempts to provide evidence of the sort she says the Home Office ought to be collecting herself. Ms Powrie of Wilson Solicitors LLP describes similar experiences.

50. The solicitors to whom I have referred also speak of the effect of these delays on their clients. Ms Hayter, for example, says:

> "One of the most significant and detrimental effects of substantial delays experienced by individuals awaiting conclusive grounds decisions is on victims ability to recover and "move on" from their experience of exploitation…as well as impairing recovery, the delay in the decision making process can also exacerbate clients' mental health conditions. This is the case particularly for individuals suffering from anxiety disorders and depression. The continual uncertainty about their future can in itself become debilitating. For asylum claimants, the Defendant's policy of staying negative asylum claims behind CG decisions means, in practice, that all asylum decision making is deferred pending the CG decision resulting in extreme delays to the outcome of the individual's asylum claim as well as to the determination of their trafficking victim status."

51. The Claimants also rely on expert evidence from Professor Cornelius Katona, the medical director of the Helen Bamber Foundation, a highly experienced psychiatrist. He says:

> "18. Victims of trafficking, like others who have experienced abuse and trauma, experience a profound loss of their sense of safety and security. People who do not feel safe and secure are often unable to undertake trauma-focussed work until they reach a degree of symptomatic and situational stabilisation that enables them to regain that sense of safety and security. Such stabilisation is determined by external factors; for example being away from a combat situation, having a long-term roof over one's head, having enough money to meet essential living needs, having a support network to rely on, and (in the immigration context) recognition as a victim of trafficking and consequent grant of leave to remain.
>
> 19. Without that stability it is much more difficult for patients to engage fully in and thereby benefit from trauma-focussed work. Continuing uncertainty regarding their NRM status impedes their sustained recovery. By this I mean that they may be able to achieve symptomatic improvement (i.e. the ability to function superficially on a day-to-day basis) but not sustained improvement in the form of the ability to cope with further setbacks without mental deterioration, If however they regain a sufficient sense of stability, safety and security to engage fully in trauma-focused therapy, such therapy can in turn enable to develop the ability to cope with future setbacks."

52. He goes on:

> "22. Thus the suggestion that as long as victims have access to support, they should be able to recover is an oversimplification of the complex therapeutic journey experienced by the clients with whom we work.
>
> 23. It is also significant that until people are granted leave to remain they often cannot work or resume study. It is important to see these activities not just as means to improving the survivor's economic position but as important ways to help survivors of trauma to rebuild their self-worth and self-esteem, which are important for their ability to integrate properly into society."

53. I also received evidence as to the effect of delays such as those described by the solicitors. Mirjam Thullesen is a registered psychotherapist specialising in the assessment and support of survivors of trauma, especially human trafficking. In her witness statement, she says:

> "In my experience the impact on mental health is one of the most significant problems caused by delay in CG decision making. The simple reason for this is the state of uncertainty in which potential victims remain while waiting for an outcome from the NRM identification process. The CG decision, as the outcome of the NRM identification process is a critical juncture for

> potential victims; it is life changing. A positive CG decision may entitle a person to a grant of leave to remain in the UK, for example when continued treatment for physical or mental health conditions require it or if they are assisting police with an investigation into their traffickers."

Response on the issue of delay

54. Ms Devlin, the Home Office policy officer to whom I have referred, provides a detailed response to this claim in her witness statement. She explains that Article 10 of ECAT makes clear that the gateway to the provision of assistance and support for potential victims of trafficking is the Reasonable Grounds decision. She says that the NRM complies with the victim identification process required by Article 10 and that the expectation is that such a Reasonable Grounds decision would be taken within 5 working days of the referral to the NRM. She says that once a positive Reasonable Grounds decision has been made, the individual is entitled to assistance and support as required by Article 12 of ECAT.

55. That decision also triggers the requirement under Article 13 for a recovery and reflection period during which the UK is required to authorise the individual to stay in their territory. She says that the UK allows a longer recovery and reflection period than the minimum 30 days; the UK allows 45 days. She says that the assistance and the support provided to an individual does not come to an end on the 45th day if a Conclusive Grounds decision is still awaited. Instead, it will continue until that Conclusive Grounds decision is taken "irrespective of how long it takes".

56. Ms Devlin points out that the ECAT does not prescribe a timescale for making the Conclusive Grounds decision. She acknowledges that the guidance refers to the expectation that a Conclusive Grounds decision will be made "as soon as possible" following Day 45 of the recovery and reflection period. But she says that:

> "a positive reasonable grounds decision does not in itself give rise to any further legal right to remain in immigration terms, or to any further right to assistance and support…Even those who receive a conclusive grounds decision are required to leave any accommodation provided to them by the Salvation Army within two weeks of the decision…"

57. Ms Devlin notes that Article 14 of ECAT makes provision for a renewable residence permit where the Competent Authority considers it necessary owing to their personal situation or necessary for the purpose of co-operation with the Competent Authority's investigation or criminal proceedings. But she observed that a positive Conclusive Grounds decision does not mean automatically that either of those conditions are met. The guidance explains that the subject of a Conclusive Grounds decision "may be eligible for a grant of discretionary leave outside of immigration rules". A grant of discretionary leave gives individuals the right to work in the UK but discretionary leave is not required before potential victims of trafficking can access primary and secondary health care.

58. Ms Devlin also speaks of proposed changes to the NRM following a decision announced by Home Office ministers in 2017. She says that in December 2017 a new,

additional team of decision makers, recruited in the UKVI division of the Home Office, started work on reducing the number of outstanding Conclusive Grounds decisions. The aim was to reduce the "cohort of cases that had been outstanding since before April 2017 to as close as possible to zero by December 2018." She describes other changes to the system including the commission of a new digital system to manage cases in the NRM.

The Competing Arguments

59. The Claimants advanced six grounds of challenge in their Grounds, but those arguments were substantially refined and narrowed in Ms Lieven QC's skeleton argument and oral submissions. As the case was advanced before me there were, in substance, three grounds:

60. First, Ms Lieven acknowledges that the European instruments to which I have referred do not mandate a specific time period within which the victim identification process must be completed. However, she says that those instruments cannot be construed as providing an open-ended discretion. Implicit in them is an obligation to complete the process "within a reasonable period of time". There is, she says, a "restrained timescale" for the identification of victims of trafficking.

61. Second, she says that the delays in the NRM process are systemically unlawful. She argues that the "chronic delays in completing the process and making a conclusive grounds decision" amounts to "a frustration of the rights of potential victims of trafficking to obtain practical and effective protection". She says that the delays in the NRM system breach the "base requirements set out in EU Directive, ECAT, Article 4 ECHR and Article 5 CFR for the early identification of victims". She says the delays have a significant destabilising effect on the mental health and recovery process of potential victims of torture. She contended that the "systemic delays" in the operation of the NRM demonstrated both irrationality and systemic unfairness in the operation of the arrangements.

62. Third, Ms Lieven contends that there was "individual unlawfulness and unfairness" in the two Claimants' case.

63. In response, Ms Giovannetti QC for the Secretary of State, says there was no duty to make a Conclusive Grounds decision within a particular time; that the evidence does not support the Claimants' case that delays are systematically egregious; that any delays are the result of a substantial number of referrals, not because the Secretary of State is operating an irrational system; that how the Secretary of State manages his administrative resources is a matter for him and, ultimately, parliament, and not for the courts; that even where individuals have been waiting excessive periods they still receive assistance and support as potential victims of trafficking, and the Conclusive Grounds decision is not the "gateway" to support as a victim of trafficking; that whether, and if so how, the Secretary of State should prioritise certain cases over others is a policy judgement for him, subject to a rationality test, and there is nothing irrational about the Secretary of State's approach.

64. I record here my gratitude for the clear and economically expressed submissions, both written and oral, by counsel for both parties

Discussion

Ground 1 - A restrained timescale?

65. As noted above, it is common ground that there is no express time limit for the making of a Conclusive Grounds decision in any of the European or domestic instruments to which I have referred. However, it is perfectly plain that there is no intention to give the relevant authorities unlimited time to make a final decision. Article 11(4) of the Directive requires the establishment of "mechanisms aimed at the early identification of…victims". The UK's domestic guidance refers to "an expectation" that a Conclusive Grounds decision will be made as soon as possible following day 45 of the recovery and reflection period, although it is said that there is no target to make a conclusive grounds decision within 45 days.

66. In my judgment it is impossible to argue that there was no constraint at all on the period of time the competent authority could spend deciding any individual case. Such a contention, if well-founded, would have the capacity to negate entirely the obligation assumed by the Secretary of State when adopting the guidance. It does not need reference to European instruments to make good that conclusion; the ancient writ of mandamus or its modern equivalent, a mandatory order, can be deployed to compel performance of such an obligation. Prolonged and inexcusable delay can justify the issue of a mandatory order requiring performance of a duty.

67. And it is equally straight-forward, in my view, to identify the appropriate descriptor for the time limit; decisions must be taken in a reasonable time. What is reasonable, however, will turn on the nature of the power being exercised, the effect of exercising, and failing to exercise, the power, and all the circumstances of the case. It was on the application of those considerations, both in individual cases and in the generality of cases handled by the competent authority, that the greater part of the argument in this case was focused.

68. In fact, I do not understand Ms Giovannetti to dissent from either of the propositions just set out. Certainly, in the not dissimilar circumstances of asylum applications, in *S* v *Home Secretary* [2007] EWCA Civ 546 at [51] Carnwath LJ (as he then was) said

> "The Act does not lay down specific time-limits for the handling of asylum applications. Delay may work in different ways for different groups: advantageous for some, disadvantageous for others. No doubt it is implicit in the statute that applications should be dealt with within "a reasonable time".

69. Similarly, in *H v SSHD* [2007] EWHC, highly experienced counsel acting for the Secretary of State was content to concede that there was an implicit obligation on the defendant to decide applications for leave to remain in the UK within a reasonable time. In *R(MK) (Iran) v SSHD* [2010] EWCA Civ at [34] the Court of Appeal recorded that it was not in dispute that, at least under domestic law, the Secretary of State was under a public law duty to decide asylum applications within a reasonable time.

70. The position is similar under the law of the ECtHR and in EU law. In *Rantsev v Cyprus and Russia* (2010) EHRR 1, the ECtHR found that a "requirement of promptness and

reasonable expedition is implicit" in the obligation under art 4 ECHR to investigate situations of potential trafficking. In *Italy v the Commission* [Case 14/88) the CJEU held, in the very different circumstances of a claim for the payment of aid, that:

> "16 … although it is undeniable that Article 14(1) does not expressly stipulate any period for the payment of the aid in question and that the expression "... grant ... aid ..." is not unequivocal, it is clear from the very terms of that provision that the aid in question is intended to facilitate the commencement of operations of producers' organizations whose formation is encouraged by Regulation No 1035/72, as is stated in the 10th and 11th recitals in the preamble to the regulation, in order to facilitate the attainment of the objectives of the common organization of the market in fruit and vegetables . The provision in question refers in fact to aid which may be granted by Member States to producers' organizations during the three years following the date of their formation, in order to encourage their formation and to facilitate their operation, provided that the organizations furnish adequate guarantees as regards the duration and effectiveness of their activities.
>
> 17 That objective may, however, only be attained if the aid is not only granted within a brief period but is also paid swiftly to the organizations concerned in such a way that they may in fact avail themselves of it, thus increasing the likelihood of effective action on their part. The stipulation of a short period for payment of this aid thus appears to be necessary in order to achieve the aim assigned thereto by Regulation No 1035/72."

71. In my judgment, none of this is remotely surprising or capable of serious dispute. It follows that I accept Ms Lieven's first submission that there is a restrained timescale for victim identification under the NRM and that restraint is the obligation to determine cases in a reasonable period.

72. The difficulty lies in identifying how the requirement to take decisions within reasonable periods is to be applied to a challenge such as this one. As Carnwath LJ said in *S v SSHD* in the passage immediately following that cited at paragraph 68 above, an obligation to deal with an application in a reasonable time says little in itself. Such an obligation:

> "…is a flexible concept, allowing scope for variation depending not only on the volume of applications and available resources to deal with them, but also on differences in the circumstances and needs of different groups of asylum seekers. But…in resolving such competing demands fairness and consistency are also vital considerations."

73. Ms Lieven sought at one stage to argue that the delays in the case of the two individual Claimants and the general delay described elsewhere in the evidence was "self-evidently" such as would demonstrate unlawfulness, in that the Defendant had not acted "fairly and reasonably in the operation of the NRM decision-making process". I do not

accept that there is anything self-evident about that issue. In my view, the answer to the question whether the Defendant's conduct has been unlawful turns on consideration of the next two grounds.

Ground 2 – Systemically unlawful delay and unfairness

74. Ms Lieven contends that the operation of the NRM is unlawful both because of the chronic, systemic delays to which she refers and because of what she describes as the "systemic unfairness" of the arrangement.

75. I was taken to a number of authorities which the parties argued demonstrated the correct approach to systemic delay as a ground of challenge.

76. In *R v SSHD ex parte Phansopkar [1976] QB 606,* the first claimant was from India and the second from Bangladesh. Both were resident in England, had been registered as United Kingdom citizens and thereby became patrials under the 1971 Act. Each had a wife in his country of origin and each wished his wife to join him in England. Under s2(2) Immigration Act 1971 wives of patrials had the right of abode in the United Kingdom, proof of such right being established by a certificate of patriality. As a rule of practice, the Home Office required that wives applied for and obtained such certificates in their countries of origin. Since a delay existed of some eighteen months in the determination of such applications in both India and Bangladesh, both husbands brought their wives to England without the requisite certificates, and the wives were both refused entry by immigration officers, such refusal being confirmed by the Secretary of State for the Home Department upon the grounds that it would be wrong to sanction "queue-jumping" and that the applications for certificates of patriality could most satisfactorily be dealt with in their countries of origin.

77. The Court of Appeal granted mandamus, holding that wives of patrials were entitled to enter the United Kingdom "without let or hindrance"; that good cause must be shown for delaying the exercise of that right; and that, in the circumstances of these cases, the Secretary of State for the Home Department should determine the applications.

78. At 626 B Lord Scarman said:

> "However, when the claim (as in these two cases) is that the right arises from the status of wife to a man living in this country, the delay may impose great hardship and stress upon private and family life. Delay of this order appears to me to infringe at least two human rights recognised, and therefore protected, by English law. Justice delayed is justice denied: "We will not deny or defer to any man either justice or right": Magna Carta, chapter 29. This hallowed principle of our law is now reinforced by the European Convention on Human Rights to which it is now the duty of our public authorities in administering the law, including the Immigration Act 1971, and of our courts in interpreting and applying the law, including the Act, to have regard: …"

79. That, however, was a case of an established right. The Court was not considering, as is the position in the present case, whether the claimant could establish a right to a particular status or the defendant ought to grant the relevant status; all that was

outstanding was a formal recognition of a right arising as a matter of status. The Court intervened not because of an unconscionable delay in making a decision but because the government was failing to act on an established right.

80. That decision was relied upon by Elias J in a case upon which the claimants placed considerable reliance; *R v SSHD ex parte Mersin* [2000] INLR 511. There a Turkish national who had been successful in his appeal against the Secretary of State's refusal to grant him asylum, sought a declaration that the eight-month delay between the adjudicator's decision and the actual grant of leave to enter was unlawful, and an enforcement order to remedy the defects in the administrative process, requiring the Secretary of State to report to the court at regular intervals. The court held that there had been no deliberate delay on the part of the relevant authorities but that no procedures had been adopted which enabled priority to be given to asylum applicants who had made successful appeals. The special adjudicator's decision had given the claimant a right to refugee status which the Secretary of State had been under a duty to provide within a reasonable time and the failure to fulfil that duty had been unreasonable in the *Wednesbury* sense.

81. At page 519 Elias J held:

> "In my opinion there is a clear duty on the Secretary of State to give effect to the Special Adjudicator's decision…
>
> The crucial question, therefore, is whether the delays in this case constituted a breach of that duty. I accept Mr. Catchpole's submission that there is plainly no fixed period within which the Special Adjudicator's determination has to be implemented…
>
> Mr. Drabble contends that it is nonetheless necessary for the Secretary of State to act within such period as is reasonable in all the circumstances, and that in any event the delays in this case-seven and a half months for what were in essence ministerial acts- were outside the bands of Wednesbury reasonableness.
>
> In my opinion it is necessary to bear in mind three features of this case. First the Secretary of State has not deliberately delayed in granting refugee status, for example in order to conduct further inquiries or anything of that kind; he accepts that the delays are solely the result of the administrative procedures taking their course. Second, whilst no doubt shortage of staff has in part explained the delay, a very important reason for the delay was that no distinction was made at the relevant time between those who had successfully appealed an initial refusal and those - a very much larger number - whose applications for asylum were still being considered. That was, of course, because the respondent chose to organise matters in that way, operating through a multi-functional directorate which gave no priority to the position of those in the applicant's position. Third, the respondent has accepted that the delays in this case, and other similar cases, were unacceptable. His contention is that it was not unlawful."

82. Having cited *Phansopkar*, he went on at p522:

> "In my judgment if someone has established the right to some benefit of significance, as the right to refugee status and indefinite leave surely is, and all that is required is the formal grant of that benefit (in the absence at least of a change in circumstance since the right was acquired or other exceptional circumstance), then it is incumbent upon the authority concerned to confer the benefit without unreasonable delay. The resources available to the authority will be part of the circumstances which can be taken into account when determining whether the delay is reasonable or not. However, if the authority fails to have regard to the fact that a right is in issue, it will have failed to take into account a relevant factor and will be acting unlawfully. In this case the respondent ought to have treated the applicant and those in a similar position differently to other categories of cases. The failure to do that both rendered the decision unlawful in traditional Wednesbury terms and meant that the refugee status was not granted within a reasonable period. The resources available to the authority will be part of the circumstances which can be taken into account when determining whether the delay is reasonable or not. However, if the authority fails to have regard to the fact that a right is in issue, it will have failed to take into account a relevant factor and will be acting unlawfully. In this case the respondent ought to have treated the applicant and those in a similar position differently to other categories of cases. The failure to do that both rendered the decision unlawful in traditional Wednesbury terms and meant that the refugee status was not granted within a reasonable period."

83. But that too was not this case. There is here no "established right to some benefit".

84. Ms Lieven submits that that is a false dichotomy; that all that matters is that the Claimants have a right to a *decision*, whether or not their claim is ultimately established. I reject that submission. What is sought by the Claimants before me, and in the numerous other cases to which they refer, was more than the formal grant of a benefit already established in principle. It was the recognition of a status as established victims of trafficking, as to which hitherto there had been only reasonable grounds for belief. In failing to make a decision on conclusive grounds the NRM was not failing to have regard to the fact that an established right was in issue.

85. The case of *R (FH) v SSHD* [2007] EWHC 1571 (Admin) bears closer comparison with the present case. There a number of applicants applied for an order that their applications to be allowed to remain in the United Kingdom should be considered forthwith by the respondent Secretary of State. They also sought a declaration that the delay in determining their applications was unlawful. Theirs were all "incomplete asylum cases", in that their initial applications for asylum had been rejected, and their appeals against those decisions did not succeed, but they had not been removed from the UK. Some years previously they had submitted fresh claims based on further evidence, or new circumstances, which were said to justify fresh consideration. The claims had not been considered by the Secretary of State. They submitted that the

Secretary of State had failed in his duty to decide the applications within a reasonable time and operated a system to deal with the backlog of applications which was unfair and unlawful.

86. Thus, *FH* was not a case of an established right. At paragraph 11 Collins J held:

> "Here the question is whether the delay was unlawful. It can only be regarded as unlawful if it fails the *Wednesbury* test and is shown to result from actions or inactions which can be regarded as irrational … What may be regarded as undesirable or a failure to reach the best standards is not unlawful. Resources can be taken into account in considering whether a decision has been made within a reasonable time, but (assuming the threshold has been crossed) the defendant must produce some material to show that the manner in which he has decided to deal with the relevant claims and the resources put into the exercise are reasonable. That does not mean that the court should determine for itself whether a different and perhaps better approach might have existed. That is not the court's function. But the court can and must consider whether what has produced the delay has resulted from a rational system. If unacceptable delays have resulted, they cannot be excused by a claim that sufficient resources were not available. But in deciding whether the delays are unacceptable, the court must recognise that resources are not infinite and that it is for the defendant and not for the court to determine how those resources should be applied to fund the various matters for which he is responsible."

87. In *R (Arbab) v SSHD* [2002] EWHC 1249 (Admin) the applicant was a Sudanese citizen whose appeal against a refusal of asylum had been successful. His entitlement to assistance from the National Asylum Support Service ended but he was not entitled to claim welfare benefits from the Benefits Agency because he had not yet received a status letter from the Secretary of State confirming that he had refugee status. He applied for judicial review of the Secretary of State's failure to issue him with the "status letter". He sought declarations that the Secretary of State's conduct was unlawful and requiring the Secretary of State to administer the process of issuing status letters more efficiently.

88. At [45] Jackson J said:

> "One aspect of the separation of powers is that the court will not generally involve itself in questions concerning the management of a government department or similar body: see *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617* , at 635 (per Lord Wilberforce), and at 636 and 644 (per Lord Diplock). There are at least three good reasons for this abstinence on the part of the courts:
>
> (1) How resources should be allocated between competing priorities and how government ministers should organise their

> administrative systems are political questions. Judges are not elected and it is not their function to decide such questions.
>
> (2) The courts do not have the expertise to review the performance of government departments at this level of generality.
>
> (3) Under our constitutional arrangements there are other more effective mechanisms for calling to account ministers and senior civil servants who mismanage their departments or mis-allocate resources. These mechanisms include Parliamentary questions and, more importantly, the scrutiny of select committees: see de Smith, Woolf & Jowell "Judicial Review of Administrative Action" (Fifth Edition) 1995 at pages 37–40."

89. From those cases I draw the following principles which seem to me relevant to the present case:

    i) Delay may be unlawful when the right in question arises as a matter of established status and the delay causes hardship (*Phansopkar).*

    ii) An authority acts unlawfully if it fails to have regard to the fact that what is in issue is an established right rather than the claim to a right (*Mersin*).

    iii) Delay is also unlawful if it is shown to result from actions or inactions which can be regarded as irrational. However, a failure merely to reach the best standards is not unlawful (*FH).*

    iv) The court will not generally involve itself in questions concerning the internal management of a government department (*Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* and *Arbab)*

    v) The provision of inadequate resources by Government may be relevant to a charge of systematically unlawful delay, but the Courts will be wary of deciding questions that turn on the allocation of scarce resources *(Arbab).*

90. Here, there is no established status or established right in issue. The question then is whether, giving such weight as is appropriate to the question of resources, can the delays that have undoubtedly occurred, properly be described as the result of an irrational system.

91. Ms Lieven also argues that the management of NRM led to "systemic unfairness". She refers me to the decision in *R (Q) v SSHD* [2003] EWCA Civ 364, where the Court of Appeal had to consider whether the Secretary of State had established and operated a fair system for determining whether an asylum seeker had satisfied him that he had claimed asylum as soon as reasonably practicable after his arrival. The Court held that the decision-making process was unfair, but the reasons for that conclusion related primarily to the interview process rather than the time taken to reach decisions. For example, the court pointed to the fact that the information given to the claimants before

interview was inadequate; caseworkers were not properly directed as to how human rights issues were to be addressed, caseworkers were not instructed to consider, and the Secretary of State failed to have regard to, the claimants' states of mind on arrival, and a more flexible approach to interviewing was required (see [69], [81-102], [116], [119]).

92. She also referred to the decision of the Court of Appeal in *Lord Chancellor v Detention Action* [2015] 1 WLR 5431. In that case the court dismissed an appeal against a finding that fast track rules governing asylum appeals were ultra vires. At [27] Lord Dyson accepted the formulation by counsel for the Secretary of State of the general principles that can be derived from the authorities as to determining the fairness of a system for considering appeals:

> "(i) in considering whether a system is fair, one must look at the full run of cases that go through the system; (ii) a successful challenge to a system on grounds of unfairness must show more than the possibility of aberrant decisions and unfairness in individual cases; (iii) a system will only be unlawful on grounds of unfairness if the unfairness is inherent in the system itself; (iv) the threshold of showing unfairness is a high one; (v) the core question is whether the system has the capacity to react appropriately to ensure fairness (in particular where the challenge is directed to the tightness of time limits, whether there is sufficient flexibility in the system to avoid unfairness); and (vi) whether the irreducible minimum of fairness is respected by the system and therefore lawful is ultimately a matter for the courts. "

93. The present case does not involve a judicial system for determining appeals as did *Detention Action*; the NRM is an administrative arrangement for determining a status. The *Detention Action* principles inform, but cannot entirely determine, the fairness of a system such as the NRM. Point (v), in particular, is more obviously relevant to a judicial process. In my judgment, however, points (i) to (iv) are relevant in circumstances such as the present. Accordingly, it needs to be acknowledged that the threshold of showing unfairness is a high one and that it is necessary to consider the full range of cases being determined before reaching a judgment on the system. The acid test is whether there is unfairness *inherent* in the arrangements; aberrant decisions or unfairness in individual cases will not suffice. Point (vi) serves to underline the fact that a challenge such as this is justiciable in the courts.

94. Five particular criticisms are advanced by Ms Lieven, of the NRM system:

 i) As a matter of fact, there are chronic delays;

 ii) The Defendant routinely takes no, or little action to progress the decision making;

 iii) The Defendant has no regard to the impact of delay and has no system for prioritisation of especially deserving cases;

 iv) The lack of a needs-based mechanism for expedition is discriminatory; and

v) Delays in progressing Conclusive Grounds decisions delays the examination of asylum claims.

95. I deal with each point in turn.

Chronic Delays

96. It is apparent from the evidence of Ms Devlin and the agreed statistics that there has been a very significant growth in the number of persons being referred to the NRM. It is apparent from all I have heard that the NRM has struggled to cope. The Home Office can, in my view, fairly be criticised for being slow to respond to the growing number of referrals and the consequent delays in reaching Conclusive Grounds decisions. Appreciating the extent and persistence of the growth in referrals is, of course, hugely easier in retrospect than when the problem is emerging. Nonetheless the direction of travel in numbers must have been pretty obvious from early on. If there was any doubt about that, that doubt is, in my view, entirely resolved by the Oppenheim report which made the position, and the problem, very clear.

97. In my view, there was delay in taking steps necessary to address the problem. Sensible steps are currently being taken as described by Ms Devlin, but there is no obvious reason why those changes could not have been taken earlier. Resources have now been found; I have no evidence as to why they could not have been found in earlier years if the political will was there. However, there is nothing to suggest there was either any deliberate decision to delay the decision-making process or any cynical attempts to avoid the costs associated with it. In fact, delay only added to the expense the Home Office had to bear; the facilities required for persons in respect of whom there are reasonable grounds to believe they are victims of trafficking is significantly reduced after a decision is made, whichever way that decision goes.

98. There is, however, nothing to suggest that the delay in reacting to the long-emerging problem or the delay in applying appropriate resources to the problem is the result of some irrational decision or some irrational failure to act. Delays are a function of the very substantial growth in the NRM's caseload and the Home Office's tardiness in responding. But in my judgment, it cannot be said that substantial delay is *inherent* in the arrangements. There is nothing to which my attention has been drawn, for example, which suggests there is some design fault in the system or some flaw in the arrangements which make delay inevitable. Certainly, I do not have the materials on which I can draw safe conclusions about the internal management of the relevant departments of the Home Office. It may well be that the Home Office failed in its management of the NRM to reach the highest standards of administration; it may well be that it would now be possible to devise a better system but neither of those facts means their conduct of the NRM to date has been unlawful.

99. Furthermore, it appears from the evidence and the agreed statistics that the position is now improving. The problems appear to have been identified and resources are being devoted to improving the speed at which cases are determined.

100. In my judgment the simple fact of significant delays in the processing of Conclusive Grounds decisions does not, on these facts, establish unlawfulness.

Progressing decision making

101. There is evidence in the statements from solicitors relied on by the claimants of delay and inefficiency in progressing cases through the conclusive grounds process. But there is no evidence, statistical or from witness, to substantiate the assertion that the NRM "routinely takes no action" to progress decision-making. In fact, the statistics of improving rates of decision-making points firmly towards the contrary conclusion. I accept the submissions on behalf of the Secretary of State that determining Conclusive Grounds decisions is not straightforward; the evidence has to be gathered, analysed and tested. As the Oppenheim report explains, many persons and agencies are consulted as part of a process which is evaluative rather than simply administrative. Furthermore, what matters is not just the speed but also the quality of the decision-making.

102. The Guidance advises that cases are reviewed at the 30th day of the recovery and reflection period to "monitor progress of the case" and "check it is on target for a conclusive decision", but it expressly recognises that "it may not be possible in every case" to make a decision "as near as possible to day 45".

103. The willingness to recognise, investigate and respond to the cause and effect of delays is demonstrated first by the commissioning of the Oppenheim report, second by the internal submission to the Secretary of State from the Modern Slavery Unit dated 8 September 2017, and third, the steps taken in consequence. It is apparent that these concerns have been taken into account in the management process of the NRM. The NRM cannot fairly be described as an agency (or a process) that refused to address its own deficiencies. Those responsible for it have, in recent months, devoted real effort and monies to addressing the problem of delays in making Conclusive Grounds decisions

104. I am not in a position to conduct an audit on the hundreds or thousands of cases that have passed through the NRM's hands to determine the level of competence displayed by their staff. But I cannot conclude, on the material put before me, that the criticism that the Defendant routinely takes no, or little, action to progress the decision making is made out.

Impact of delays/Prioritisation/Lack of needs-based mechanism for expedition

105. These complaints can be taken together.

106. It is clear that the delays about which I have heard have the potential to cause significant distress to those affected. It is not difficult to imagine the upset caused by waiting months, or even years, to discover whether or not it has been accepted in the NRM that the reasonable grounds for believing a person is a victim of trafficking have matured into conclusive grounds for accepting the same. And I accept the evidence of Professor Katona as to the potential consequences for the psychiatric recovery of victims of trafficking of significant delays in the process. Furthermore, Ms Lieven is right to observe that a positive Conclusive Grounds decision is a gateway for other benefits. In particular, it is a pre-requisite for the grant of discretionary leave to remain, a time-limited grant of permission to remain in the UK.

107. The Home Office does not dispute the potential effects of delay. It accepts that the delays are regrettable, and that stability is important for victims of trafficking. It has to be observed, however, that all those affected by these delays have been accepted as potential victims of trafficking and that that decision is the trigger, under the guidance and the Directive, for protection, support and accommodation. There is no criticism in these proceedings of either the process for, or timing of, the making of those decisions. The 45-day period for which the guidance provides is a minimum period for recovery and reflection, after which a Conclusive Grounds decision can be made; it is not the maximum period within which a decision must be made. Whilst I accept Ms Lieven's submissions that the process envisaged by the Directive for the recognition of victims of trafficking encompasses both the Reasonable Grounds and Conclusive Grounds stages, the former is undeniably the more important in ensuring the safety and welfare of the victim.

108. In my judgment the fact that there are some additional advantages that may flow from a positive Conclusive Grounds decision does not make the delay in the system unlawful. There is no evidence that potential victims of trafficking are, in fact, liable to prosecution after the grant of a Reasonable Grounds decision. There are advantages in the grant of discretionary leave to remain, but those advantages are less obvious when the comparator status is being a person in respect of whom a Reasonable Grounds decision has been made.

109. As to prioritisation, the Secretary of State's Safeguarding Guidance indicates that his policy is to prioritise attention and support to individuals within the NRM according to their vulnerability, rather than a policy that expedites a Conclusive Grounds decision on that basis. It is impossible to see that as irrational or demonstrably unfair.

Consequential delay to asylum process

110. The Secretary of State is right to observe in his skeleton argument that the time taken to make asylum decisions is not the subject matter of this claim. There is little evidence in support of the contention that delays in reaching a conclusive grounds decision has a consequential effect on the time taken to make an asylum decision, or on the lawfulness or unfairness of that consequence. If this was to be an issue of real substance, it would need to be addressed in detail by the parties and it has not been.

111. The same point made above about discretionary leave to remain would need to be addressed. The comparator status for determining the nature and extent of any unfairness would not be an asylum seeker *simpliciter* but an asylum seeker who had the benefit of being the subject of a Reasonable Grounds decision. That exercise was not carried out before me.

Conclusions on systemic unfairness and unlawful systemic delay

112. In those circumstances, whilst there may be significant grounds for criticising the operation of the NRM, they are not criticisms that can ground a successful judicial review. There is no unfairness *inherent* in the arrangements and there is nothing inherently irrational in the system being operated.

Ground 3 – The two claimants' individual claims

113. Ms Lieven argues that each of the criticisms made of the NRM process applies to the Claimants individually. She says that each Claimant waited an excessive period for her Conclusive Grounds decision. No good reason has been provided for the delay. No "Day 30" review or any other review appears to have been carried out in their cases. Neither of their cases was prioritised despite the mental frailty of both women. The delay has caused consequential delay in resolving their asylum claims.

114. I have rejected each of the grounds advanced in support of the general complaints about the system; they can fare no better in respect of the two individuals.

115. As Ms Giovannetti submits there is no legal time limit for resolving the Claimants' cases and the delay has not been so egregious as to be unlawful when looked at in isolation. The explanation for the delays in these two cases is the same as applies more generally; there has been a rapid increase in the NRM's caseload and the Secretary of State has been somewhat slow to address the resulting problem. But his response has not been irrational, and the problem has now been, or is being, addressed. The Secretary of State does not operate a policy of expediting Conclusive Grounds decisions but has a policy instead to prioritise attention and support to individuals according to their vulnerability. That is not irrational. The observations above about the impact on asylum claims applies equally to the Claimants' individual cases.

Conclusion

116. In those circumstances, this claim must fail.