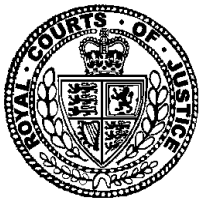

Neutral Citation Number: [2021] EWCA Civ 1196

Case No: C4/2019/0210

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM:
THE QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
MR JUSTICE GARNHAM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE MOYLAN
and
LORD JUSTICE DINGEMANS

- -

Between :

ZV (LITHUANIA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Ms Samantha Knights QC and **Ms Zoe McCallum** (instructed by **Duncan Lewis**) for the **Appellant**
Mr Tom Brown (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date: 4th March 2021

- -

Approved Judgment

Lord Justice Underhill :

INTRODUCTION

1. In order to explain the issues on this appeal it is necessary first that I summarise the factual and procedural history, but it is not necessary that I do so in any detail.

2. The Appellant is a Lithuanian national born on 8 July 1984. She is an established victim of trafficking[1]. She was trafficked to this country in late 2009 by a man with whom she had been living to whom I will refer as DE. Over the next six or so years she was under his close control and was forced to act as a prostitute. She was frequently beaten by him and he encouraged her addiction to heroin. At his instigation she regularly engaged in shoplifting: she was convicted on nine occasions and had short terms of imprisonment. In 2012 she briefly escaped to Lithuania while DE was in prison, but she was found by his associates and after being abducted and raped she was brought back by them to this country.

3. In early 2017 DE was deported to Lithuania and the Appellant became free from his direct control. However, in April of that year she was convicted of possession of cannabis and a previous two-month sentence of imprisonment was activated, which she served at HMP Bronzefield. On 20 June 2017 she was served with notice of deportation on the basis that she was a persistent offender; and on the expiry of her sentence on 23 June she was detained under Immigration Act powers. At first she remained at Bronzefield but on 28 July she was transferred to Yarl's Wood.

4. Also on 28 July 2017 the Secretary of State made a deportation order. The Appellant has appealed against that decision, but the hearing of the appeal has been deferred pending the outcome of the present proceedings.

5. On the basis of disclosures made while the Appellant was in detention, on 8 August 2017 her case was referred under the National Referral Mechanism ("the NRM"), which is the UK machinery for identifying and supporting victims of modern slavery. On 4 October a unit within the Home Office acting as the "Competent Authority" decided that there were reasonable grounds to believe that she was a victim of trafficking, and thus that she was, in the jargon, a "potential" victim of trafficking. The effect of that decision was that she became entitled under the NRM to a 45-day "recovery and reflection period". During that period she could not be removed from the UK, and she was also entitled to various forms of support. The reasonable grounds decision should have led to her early release from detention, but that did not occur.

6. In the meantime, the Appellant had made an application for asylum on the basis that if she were returned to Lithuania she would be at risk of persecution by DE. By letter dated 26 September 2017 the Home Office informed her that her asylum claim was "inadmissible" under paragraphs 326E and 326F of the Immigration Rules and would not be substantively considered, because as a member state of the EU Lithuania was regarded as a safe country of return. I will refer to that as "the inadmissibility decision".

---

[1] The rather dismissive shorthands "VoT" and "PVoT" (for "*potential* victim of trafficking") are often used. I will avoid them as far as possible

7. On 30 October 2017 the Appellant commenced judicial review proceedings against the Secretary of State seeking relief under a number of heads. At this stage it is sufficient to say that among other things she claimed (a) that her continuing detention was unlawful; (b) that she was being denied proper support as a potential victim of trafficking; and (c) that the inadmissibility decision was unlawful. On 27 November Yip J granted her permission to apply for judicial review and ordered that she be released within three days and provided with a package of support. She was duly released on 30 November.

8. The Appellant's claim was heard by Garnham J in Birmingham on 2 and 3 July 2018. Only a few days before the hearing the Competent Authority made a "conclusive grounds" decision accepting that she is a victim of trafficking. Partly for that reason, and partly also because of developments in the case-law which required further submissions, Garnham J did not hand down judgment until 18 October. He had to consider five grounds of challenge, but we are only concerned with two aspects of his decision, which I can summarise as follows:

    (1) He rejected the Appellant's challenge to the inadmissibility decision.

    (2) He rejected her claim that the provision of appropriate support had been both unlawfully delayed and inadequate.

    I should, however, note that he held that the Appellant had been unlawfully detained for a period of 45 days, including the period between 23 October and 30 November 2017.

9. The Appellant sought permission to appeal on four grounds. On 6 November 2019 Irwin LJ refused permission on grounds 2 and 3 but granted it as regards the dismissal of her challenge to the inadmissibility decision (ground 1). As for ground 4, which challenged the decision that there had been no breach of the support duty during the period that she was detained, he ordered that the application for permission be adjourned to the hearing of the appeal, on the basis that if permission were granted it would be determined at the same hearing.

10. The Appellant was represented by Ms Samantha Knights QC and Ms Zoe McCallum, and the Secretary of State by Mr Tom Brown of counsel. The case was well argued on both sides.

11. The Appellant is entitled to anonymity pursuant to section 1 of the Sexual Offences (Amendment) Act 1992.

GROUND 1: THE INADMISSIBILITY DECISION

12. I should emphasise by way of preliminary that the Appellant's challenge is concerned specifically and only with the refusal of the Secretary of State to admit her asylum claim, and the issues which it raises are limited to the lawfulness of that decision. The Secretary of State accepts that even if the appeal is dismissed that will not be determinative of the Appellant's appeal against the deportation order or of her right to seek discretionary leave to remain as a victim of trafficking; and in either context she will be entitled to raise issues about humanitarian protection, including under article 3 of the European Convention on Human Rights ("the ECHR").

THE BACKGROUND LAW

The Refugee Convention

13. The starting-point must be the Refugee Convention 1951. The Convention takes effect in domestic law by more than one route, but for present purposes I need only note that section 2 of the Asylum and Immigration Appeals Act 1993 (which is headed "Primacy of Convention") reads:

> "Nothing in the immigration rules … shall lay down any practice which would be contrary to the Convention."

Likewise, in *M v Ministervo Vnitra* C-391/16 the Grand Chamber of the Court of Justice of the European Union ("the CJEU") confirmed that the provisions of the Convention constitute primary EU law. The Refugee Convention also underlies *Directive 2011/95/EU*, the so-called "Qualification Directive", which prescribes how member states must decide applications for asylum. (I refer to the Directive for completeness, but it does not in fact apply to the present case, because it only applies to claims for asylum by non-EU nationals.)

14. I need not set out the detailed provisions of the Refugee Convention. It is sufficient to say that it prohibits the return of a person to a country where they have a well-founded fear of persecution. A country where there is no risk of persecution is referred to in the jurisprudence as a safe country of origin.

15. It is established as a matter of both domestic and EU law that the concept of "persecution" covers not only persecution by the state from which the putative refugee has fled but also persecution by non-state actors where the state authorities are unable or unwilling to provide protection against the ill-treatment which they fear: see *Horvath v Secretary of State for the Home Department* [2000] UKHL 37, [2001] 1 AC 489, (and article 6 (head (c)) of the Qualification Directive). The effect of that test is explained in the majority opinion of Lord Hope in *Horvath.* One of the issues before the House was, as he puts it at p. 494 G-H:

> "What is the test for determining whether there is sufficient protection against persecution in the person's country of origin—is it sufficient, to meet the standard required by the Convention, that there is in that country a system of criminal law which makes violent attacks by the persecutors punishable and a reasonable willingness to enforce that law on the part of the law enforcement agencies? Or must the protection by the state be such that it cannot be said that the person has a well-founded fear?"

As to that, he says at p. 500 F-H:

> "[T]he answer … is to be found in the principle of surrogacy. The primary duty to provide the protection lies with the home state. It is its duty to establish and to operate a system of protection against the persecution of its own nationals. If that system is lacking the protection of the international community is available as a substitute. But the application of the surrogacy principle rests upon the assumption that,

> just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard, which takes proper account of the duty which the state owes to all its own nationals."

I will refer to that as the *Horvath* standard.

16. Further guidance about sufficiency of protection appears in the judgment of this Court in *R (Bagdanavicius) v Secretary of State for the Home Department* [2003] EWCA Civ 1605, [2004] 1 WLR 1207. At para. 55 (2)-(6) of his judgment, with which Lord Woolf CJ and Arden LJ agreed, Auld LJ summarised the applicable principles as follows:

> "(2) An asylum seeker who claims to be in fear of persecution is entitled to asylum if he can show a well-founded fear of persecution for a Refugee Convention reason *and* that there would be insufficiency of state protection to meet it; *Horvath.*
>
> (3) Fear of persecution is well-founded if there is a 'reasonable degree of likelihood' that it will materialise; *R v. SSHD, ex p. Sivakumaran* [1988] AC 956, per Lord Goff at 1000F-G;
>
> (4) Sufficiency of state protection, whether from state agents or non-state actors, means a willingness *and* ability on the part of the receiving state to provide through its legal system a reasonable level of protection from ill-treatment of which the claimant for asylum has a well-founded fear; *Osman* [*Osman v United Kingdom* (1998) 29 EHRR 245], *Horvath*, *Dhima* [*R (Dhima) v Immigration Appeal Tribunal* [2002] EWHC 80 (Admin)].
>
> (5) The effectiveness of the system provided is to be judged normally by its systemic ability to deter and/or to prevent the form of persecution of which there is a risk, not just punishment of it after the event; *Horvath*; *Banomova* [*Banomova v Secretary of State for the Home Department* [2001] EWCA Civ 175], *McPherson* [*McPherson v Secretary of State for the Home Department* [2001] EWCA Civ 1955] and *Kinuthia* [*Kinuthia v Secretary of State for the Home Department* [2001] EWCA Civ 2100].
>
> (6) Notwithstanding systemic sufficiency of state protection in the receiving state, a claimant may still have a well-founded fear of persecution if he can show that its authorities know or ought to know of circumstances particular to his case giving rise to his fear, but are unlikely to provide the additional protection his particular circumstances reasonably require; *Osman.*"

17. Ms Knights drew our attention to a point made at para. 23 of the Guidelines published by the United Nations High Commissioner for Refugees ("UNHCR") in April 2006 on the application of the Refugee Convention to victims of trafficking ("the UNHCR VoT

Guidelines") to the effect that if administrative mechanisms are in place to provide protection to victims, but a particular victim is unable to gain access to those mechanisms, it may be right to treat the state in question for Convention purposes as unable to provide the necessary protection. Although UNHCR Guidelines are not binding, they should be accorded considerable weight in interpreting the extent of Convention obligations (see para. 36 of the judgment of Lady Hale and Lord Dyson MR in *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54, [2013] 1 AC 745), and I have no difficulty with the general proposition advanced by the UNHCR.

18. Finally, I should note, because it is relevant to a submission made by Ms Knights, that article 3 of the Convention reads:

> "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."

Protocol 24 to the Treaty on European Union ("the Spanish Protocol")

19. Protocol 24 to (what is now) the Treaty on European Union ("the TEU"), introduced in 1997 by the Treaty of Amsterdam, provides (in summary) that member states should be treated as "safe countries of origin" and accordingly their nationals should not, subject to its detailed provisions, be granted asylum by other member states. I should set it out in full (adding numbers to the recitals for ease of reference):

> "THE HIGH CONTRACTING PARTIES,
>
> [1] WHEREAS, in accordance with Article 6(1) of the Treaty on European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights,
>
> [2] WHEREAS pursuant to Article 6(3) of the Treaty on European Union, fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, constitute part of the Union's law as general principles,
>
> [3] WHEREAS the Court of Justice of the European Union has jurisdiction to ensure that in the interpretation and application of Article 6, paragraphs (1) and (3) of the Treaty on European Union the law is observed by the European Union,
>
> [4] WHEREAS pursuant to Article 49 of the Treaty on European Union any European State, when applying to become a Member of the Union, must respect the values set out in Article 2 of the Treaty on European Union,
>
> [5] BEARING IN MIND that Article 7 of the Treaty on European Union establishes a mechanism for the suspension of certain rights in the event of a serious and persistent breach by a Member State of those values,

[6] RECALLING that each national of a Member State, as a citizen of the Union, enjoys a special status and protection which shall be guaranteed by the Member States in accordance with the provisions of Part Two of the Treaty on the Functioning of the European Union,

[7] BEARING IN MIND that the Treaties establish an area without internal frontiers and grant every citizen of the Union the right to move and reside freely within the territory of the Member States,

[8] WISHING to prevent the institution of asylum being resorted to for purposes alien to those for which it is intended,

[9] WHEREAS this Protocol respects the finality and the objectives of the Geneva Convention of 28 July 1951 relating to the status of refugees,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Sole Article

Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in the following cases:

(a) if the Member State of which the applicant is a national proceeds after the entry into force of the Treaty of Amsterdam, availing itself of the provisions of Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to take measures derogating in its territory from its obligations under that Convention;

(b) if the procedure referred to Article 7(1) of the Treaty on European Union has been initiated and until the Council, or, where appropriate, the European Council, takes a decision in respect thereof with regard to the Member State of which the applicant is a national;

(c) if the Council has adopted a decision in accordance with Article 7(1) of the Treaty on European Union in respect of the Member State of which the applicant is a national or if the European Council has adopted a decision in accordance with Article 7(2) of that Treaty in respect of the Member State of which the applicant is a national;

> (d) if a Member State should so decide unilaterally in respect of the application of a national of another Member State; in that case the Council shall be immediately informed; the application shall be dealt with on the basis of the presumption that it is manifestly unfounded without affecting in any way, whatever the cases [*sic*] may be, the decision-making power of the Member State."

20. I need to elucidate the references in conditions (b) and (c) to article 7 of the TEU. Paragraphs (1) and (2) of article 7 read (so far as material):

> "1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.
>
> ...
>
> 2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations."

Paragraph (3) goes on to provide for the imposition of sanctions on a member state which is the subject of a determination under paragraph (2). The criterion common to both paragraph (1) and (2) is "a serious breach by a Member State of the values referred to in Article 2": in the case of paragraph (1) there must be found to be a "clear risk" of such a breach, and in the case of paragraph (2) such a breach must be found actually to exist and to be "persistent". Article 2 reads:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

21. Protocol 24 is generally referred to as "the Spanish Protocol" because it was added to the TEU at the instance of the Kingdom of Spain, which was aggrieved at the French and Belgian authorities having granted asylum to members of ETA. It is clear both from that context and from the opening words of the sole article that its overall purpose is to require member states to decline to entertain applications for asylum from nationals of other member states ("EU nationals"), on the basis that all EU states are necessarily safe countries of origin in view of the level of protection of fundamental rights which they are obliged to observe. However, the Protocol recognises that that rule cannot trump the obligations of member states under the Refugee Convention and accordingly cannot be absolute. It thus permits applications by EU nationals to be entertained where

one of the four conditions specified at (a)-(d) is satisfied. Conditions (a)-(c) concern situations where there has been a formal acknowledgment or finding about the observance of fundamental rights in the country in question. Condition (d), which is what we are concerned with in this case, is rather different in character, and I will return to it in due course.

22. We were also referred to Declaration 48 of the Conference which adopted the Treaty of Amsterdam. This provides that Protocol 24 "does not prejudice the right of each Member State to take the organisational measures it deems necessary to fulfil its obligations under [the Refugee Convention]". I am not sure what the phrase "organisational measures" refers to. On the face of it, it would not appear to relate to the substantive obligations imposed by the Protocol. But it is unnecessary to reach a concluded view, since even if it is intended to confirm the primacy of member states' obligations under the Convention that adds nothing to what is in any event clear from the Protocol itself.

23. The Conference also "took note" of a declaration by the Kingdom of Belgium that:

> "In approving [Protocol 24] … in accordance with its obligations under the 1951 Geneva Convention and the 1967 New York Protocol, it shall, in accordance with the provision set out in point (d) of the sole Article of that Protocol, carry out an individual examination of any asylum request made by a national of another Member State."

Domestic Law

24. The Spanish Protocol was at the dates with which we are concerned directly applicable in this country as primary EU law. But its terms are also reflected in paragraphs 326E and 326F of the Immigration Rules, which form part of Part 11 ("Asylum") and are headed "Inadmissibility of EU asylum applications". They read:

> "326E. An EU asylum application will be declared inadmissible and will not be considered unless the requirement in paragraph 326F is met.
>
> 326F. An EU asylum application will only be admissible if the applicant satisfies the Secretary of State that there are exceptional circumstances which require the application to be admitted for full consideration. Exceptional circumstances may include in particular:
>
> (a) the Member State of which the applicant is a national has derogated from the European Convention on Human Rights in accordance with Article 15 of that Convention;
>
> (b) the procedure detailed in Article 7(1) of the Treaty on European Union has been initiated, and the Council or, where appropriate, the European Council, has yet to make a decision as required in respect of the Member State of which the applicant is a national; or
>
> (c) the Council has adopted a decision in accordance with Article 7(1) of the Treaty on European Union in respect of the Member

> State of which the applicant is a national, or the European Council has adopted a decision in accordance with Article 7(2) of that Treaty in respect of the Member State of which the applicant is a national.

Paragraph 326C defines "EU asylum application" as an application by

> "… a national of a Member State of the European Union who either;
>
> (a) makes a request to be recognised a refugee under the Refugee Convention on the basis that it would be contrary to the United Kingdom's obligations under the Refugee Convention for them to be removed from or required to leave the United Kingdom, or
>
> (b) otherwise makes a request for international protection."

25. It will be noted that there is no equivalent in paragraphs 326E-326F to condition (d) under the Spanish Protocol, but that is no doubt intended to be covered by the general reference to "exceptional circumstances" in the first sentence of paragraph 326F. The terminology of "exceptional circumstances" in paragraph 326F is not very illuminating, but plainly the rule must be read so as to give effect to the Protocol.

26. We were referred to section 5 of the Home Office *Asylum Policy Instruction: EU/EEA Asylum Claims* ("the API"), which is headed "Declaring Asylum Claims Inadmissible". Since the API cannot trump paragraphs 326E-326F of the Immigration Rules, and still less the Spanish Protocol, I see no value in summarising it in any detail. Section 5.1 says that a screening interview is not required in the case of an inadmissible claim. Section 5.2 says that "the claim should be declared inadmissible as soon as it is made", but it is made clear that caseworkers must first consider whether any written information provided discloses "exceptional circumstances" within the meaning of paragraph 326F. Section 5.5 explains what constitute "exceptional circumstances", paraphrasing the provisions of the Protocol in detail: it observes that such circumstances are expected to apply in very few cases. Section 5.4 makes the point that asylum claims from victims of trafficking who are EU nationals equally fall under those provisions. The API is not in every respect perfectly worded, but no point is taken on its drafting as part of this appeal.[2]

THE SECRETARY OF STATE'S DECISION

27. On 18 July 2017, while she was in detention, the Appellant wrote a lengthy statement (referred to before us as "the 18 July letter") which was evidently intended for consideration by the authorities in connection with her threatened deportation and/or her claim to be a victim of trafficking, though it is not clear to whom it was initially

---

[2] Two criticisms mentioned before us were, first, that the introductory paragraph tends to suggest that paragraph 326F sets out the criteria for exceptional circumstances exhaustively, whereas in fact it does not do so (and in particular does not cover condition (d) – see para. 25 above); and, second, that para. 5.4 says that victims of trafficking can seek "redress" from the authorities in their country of origin, whereas the reference should surely be to "protection".

given. Most of it is devoted to explaining how she had been treated by DE and how she had suffered. But it includes statements that

> "I'm really scared to be deported and to come back to the same place where I was for 10 years";

and

> "I'm really scared now again to come back to same life, because I couldn't take this again anymore. I don't have no one to help me, or support, or to go to live within my country. And he is there, I know he is waiting for me. That's what he does. That's what he was doing to me for nearly 10 years. ... Please don't give me into his hands again."

The letter also recounted the episode in 2012 when she was re-trafficked from Lithuania (see para. 2 above).

28. The letter of 18 July was not initially understood by the authorities to be intended as a claim for asylum. But on 21 September 2017 the Appellant's solicitors, Duncan Lewis, wrote to the Home Office requiring that it be treated as such.

29. On 26 September 2017, i.e. less than a week later, the Home Office replied to the effect that the Appellant's claim for asylum was inadmissible under paragraph 326E. I need not quote the letter in full. It sets out the three heads of "exceptional circumstances" under paragraph 326F and notes that none of them applies. Para. 4 reads:

> "The information you have provided has been reviewed. However, it does not establish that you would be at real risk of persecution or harm. Your national authorities are able and willing to provide a sufficiency of protection and there are appropriate avenues of redress within the State institutions in your country."

It is clear from that that the decision-maker had appreciated from the letter of 18 July that the application was based on the Appellant's fear that if she were returned to Lithuania DE would attempt to resume his control over her; but he or she proceeded on the basis, applying the API and in accordance with the Spanish Protocol, that the Lithuanian authorities would be able and willing to afford her sufficient protection against that happening.

THE APPELLANT'S CASE

30. Garnham J held that the Secretary of State was right in law to treat the Appellant's asylum claim as inadmissible on the basis of the Spanish Protocol (as reflected in paragraphs 326E and 326F of the Rules). Ms Knights formulated her challenge to that conclusion under four heads. Three of them depend directly on an issue as to meaning and effect of the Protocol, as it affects the present case, and I propose to consider that first, addressing Ms Knights' particular submissions in that context. I will return at the end to the fourth point, which is based on a passage in the Home Office's *Victims of Modern Slavery – Competent Authority Guidance* published in March 2016 ("the VMS Guidance").

THE CORRECT APPROACH TO CONDITION (d)

31. I note by way of preliminary that the Protocol proceeds on the basis that there will be two stages to the treatment of an application for asylum made by an EU national, as follows:

    (1) The first stage is the decision whether to "take [the application] into consideration" or "declare [it] admissible for processing" (the two phrases evidently mean the same thing): that admissibility threshold is only passed if one of conditions (a)-(d) is satisfied.

    (2) The second stage is the substantive consideration of the application if admitted. In the case of condition (d) (though not conditions (a)-(c)) the Protocol prescribes what should happen at that stage, namely (i) that the member state in question should notify the Council [sc. of its decision to admit the claim] and (ii) that the application should be "dealt with on the basis of the presumption that it is manifestly unfounded". At the risk of spelling out the obvious, the presumption referred to is evidently rebuttable.

32. The present case concerns the first stage: the Secretary of State's decision was that the Appellant's claim did not meet the admissibility threshold. Since conditions (a)-(c) are not in play, that means that her decision must be justified by reference to condition (d). I consider first what is required for condition (d) to be satisfied.

33. Condition (d) is expressed as applying where the state to which the application is made "so decide[s] unilaterally". If that phrase is read in isolation it could be construed as meaning that a member state has an absolute discretion to admit an application by an EU national, with the result that the only constraint imposed by the Protocol is the adverse presumption required at the second stage (and the requirement to notify the Council). But that would be inconsistent with both the language and the evident purpose of the Protocol as a whole. The second sentence of the sole article, which contains the principal operative words, bites at the first stage: it prevents applications by EU nationals being "taken into consideration", or "admitted for processing", unless one of the four conditions is satisfied. It would make no sense if one of those conditions recognised an unconstrained right in a member state to admit such applications after all. Accordingly, there must be some threshold test that the member state has to find to be satisfied before it admits a claim by an EU national.

34. The nature of that threshold needs to reflect the intended overall effect of the Protocol as identified at para. 21 above. That in my view necessarily means that a member state should not admit an asylum claim by an EU national in reliance on condition (d) unless there are compelling reasons to believe that there is a clear risk that they will be liable to persecution in the country of origin notwithstanding the level of protection of fundamental rights and freedoms to be expected in an EU member state. Any lower threshold would mean that the primary purpose of the Protocol would be undermined.

35. That that is the right approach is in my view confirmed by reading condition (d) in the context of conditions (a)-(c), and more particularly conditions (b) and (c). Those conditions are concerned, to paraphrase, with situations where a formal process has raised a "clear risk" that the country of origin may disregard fundamental rights: I take that phrase from condition (b), which is of its nature more easily satisfied than condition

(c)[3]. Given the formal nature of that process, plainly cogent evidence (typically of some systemic default[4]) will be required to justify its initiation. I believe that the threshold for a decision under condition (d) must be of the same character. That may in fact be implicit in the phrase "*so* decide", but the word "unilaterally" gives a less oblique indication: its force must be that the member state is doing by itself what would otherwise be done by the relevant EU institutions. The express requirement that the member state must inform the Council of its decision points in the same direction: it suggests that the decision is of a similar character to a proposal under article 7 (1).

36. The test which I have articulated may not seem essentially different from that which would apply at the second stage if the claim were admitted: see para. 31 (2) above. But I do not regard that as an anomaly. It is unsurprising that the drafters of the Protocol wanted to spell out the height of the threshold that still had to be satisfied where, exceptionally, a claim is admitted for consideration, but there will obviously be some difference between the two stages. Evidence presented at the first stage which appears to show a clear risk of the claimant being persecuted if returned to their country of origin may prove less cogent when subjected to detailed consideration at the second stage.

37. In a case of the present kind, where what the claimant fears is persecution by non-state actors, the effect of condition (d), as expounded above, is that there will have to be compelling reasons to believe that there is a clear risk that the member state in question will be unable or unwilling to afford him or her the level of protection required by the Refugee Convention, applying the *Horvath* standard.

38. Those conclusions essentially correspond to the reasoning of Garnham J at paras. 56-59 of his judgment. Ms Knights submitted that his reasoning was wrong. Her essential submission was that the effect of the opening words of condition (d) was to recognise that a member state has "a broad discretion" to admit an application by an EU national, and that in order to exercise that discretion properly it is obliged to carry out at least an initial inquiry into the validity of their claim, albeit one that might short of the full consideration that would be required at the second stage. She submitted that that approach was necessary in order to comply with the Refugee Convention, since it is well established that ordinarily asylum claims require anxious scrutiny and individualised consideration: in that connection she referred us both to well-established domestic case-law (*Bugdaycay v Secretary of State for the Home Department* [1986] UKHL 3, [1987] AC 514, and *Avci v Secretary of State for the Home Department*

---

[3] Condition (b) requires only that the process under article 7 (1) has been "initiated" – i.e., as I understand it, that the Parliament, the Commission or one-third of the member states have made a reasoned proposal for a determination that a clear risk of a serious breach of fundamental rights exists. Condition (c) requires a final determination of actual breach.

[4] I have said "typically" rather than "necessarily" because Ms Knights referred us to *R (EM (Eritrea)) v Secretary of State for the Home Department* [2014] UKSC 12, [2014] 1 AC 1321. In that case the Supreme Court held (glossing the decision of the CJEU in *NS (Afghanistan)*, referred to at para. 38 below) that it was not necessary that any risk to asylum-seekers of a breach of their article 3 rights on return to another EU country should be shown to be the result of a "systemic" breakdown in the arrangements for their reception; and she submitted that the same must be true in this context. I am prepared to accept that, but it is nevertheless unlikely that a case will meet the *Horvath* standard unless the default is in some sense systemic, and I note that that term is used more than once in *Bagdanavicius* (see para. 16 above).

[2002] EWCA Civ 977) and to the UNHCR VoT Guidelines at paras. 14 and 45. She pointed out that in the context of returns under the Dublin regime the Grand Chamber of the CJEU had held in *R (NS (Afghanistan) v Secretary of State for the Home Department* (C-411/10), [2013] QB 102, that there could be no conclusive presumption that member states would in all circumstances observe fundamental rights and that the return of refugees to another member state under that regime would be contrary to EU law where there were "substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment …" (para. 86)[5].

39. Subject to the point made in the next paragraph, I do not accept those submissions. There is nothing contrary to the Convention, or the case-law or guidance relating to it, in the application of a rebuttable presumption that a particular country of origin is safe; and the presumption is plainly a reasonable one in the case of a member state of the EU, for the reasons given in the Protocol. Where such a presumption applies and is not rebutted there is no need for a consideration of the particulars of the claim. The Convention is concerned with substance, not process: if the country of origin can properly be presumed to be safe any substantive consideration would be futile. Of course, as I have made clear above, the presumption required by the Protocol – whether (implicitly) at the first stage or (explicitly) at the second stage if a claim is admitted – is rebuttable. The decision of the CJEU in *NS* in fact supports my understanding of the effect of the Spanish Protocol in so far as its formulation of the condition necessary to disapply the requirements of the Dublin regime is broadly in line with my own formulation.

40. One of the points made by Ms Knights in this connection was that in an insufficiency of protection case – as asylum claims by victims of trafficking will inevitably be – it is unrealistic and unfair to expect claimants themselves to be able to provide cogent evidence about the effectiveness of protection systems in their country of origin. She submitted that it was incumbent on the state to which an application is made by a victim of trafficking from an EU state to consult the information available to it about the effectiveness of those systems, as it would in an ordinary asylum claim involving a non-EU state. I do not think there can be any general rule about this. If such inquiries were necessary in every case it would undermine the presumption of safety which is the basis of the Spanish Protocol. But it is fair to observe that a sufficiency of protection case is rather different from one based on fear of persecution by the state itself, where the victim can be expected to be in a position to provide cogent evidence based on their own experience. On ordinary public law principles the Secretary of State will be expected to take into account information of which she is aware which casts doubt on the sufficiency of protection in an EU state before making a decision whether to admit an asylum claim by a national of that country.

41. Ms Knights also submitted that the approach to the Protocol which I have identified would infringe article 3 of the Refugee Convention (see para. 18 above). There is nothing in this. The application of a proper presumption that a particular country of origin is safe cannot be regarded as discriminatory against nationals of that country:

---

5 NB that although the Court refers to "systemic flaws" that must be interpreted in line with the decision of the Supreme Court in *EM (Eritrea)*: see n. 4 above.

their treatment is based not on their nationality but on the objective characteristics of the country concerned.

APPLICATION TO THE PRESENT CASE

42. The only material put before the Home Office consisted of the letter of 18 July 2017. Although Duncan Lewis clarified that that letter was intended as an asylum claim they did not themselves add any further submissions. The letter clearly expresses a fear of an attempt by DE to resume his control of the Appellant on return. The primary question for us, however, is whether it presented compelling reasons to believe that there was a clear risk that Lithuania might be unable or unwilling to afford her protection, to the *Horvath* standard, against any such attempt. It plainly did not. Ms Knights submitted that the Appellant's account of having been re-trafficked in 2012 showed that the Lithuanian authorities were unwilling or unable to protect victims of trafficking. I cannot accept that. Shocking though that episode was, it does not justify any general conclusion of that kind. There is no suggestion in the Appellant's account that she had made herself known to the authorities on her return or alerted them to any concerns about further ill-treatment by DE, who was still in the UK: on the contrary, she says that she went back thinking that "everything had finished". I do not blame her for that belief, but the only question for the Court is whether what happened to her required, or indeed could have justified, a conclusion by the Secretary of State that this was an exceptional case where an EU member state was unable or unwilling to offer proper protection to its nationals.

43. There remains the question whether the Secretary of State should have appreciated that there was such a risk even in the absence of any evidence directed to that question provided to her by the Appellant or her representatives. In her skeleton argument the Appellant made brief reference to a report published in March 2019 by the Council of Europe's Group of Experts on Action against Trafficking in Human Beings ("GRETA") on the implementation of ECAT in Lithuania, from which it could be inferred that an earlier report had contained some criticisms of the Lithuanian system. On the eve of the hearing the Appellant sought to have an extract from the 2019 report included in the bundle before the Court. Mr Brown objected to the admission of this document, which had not been relied on before Garnham J, and in response Ms Knights made it clear that she placed no reliance on it and did not intend to refer to it. In those circumstances we need say no more about it. In the absence of material of this character, however, it was impossible for Garnham J, and would be impossible for us, to find that the Secretary of State must or should have been aware of the risk of serious failures by Lithuania to provide sufficient protection to victims of trafficking such that condition (d) might be satisfied.

44. Ms Knights also referred us to para. 16 of the UNHCR Guidelines, which appears to suggest that, exceptionally, the Refugee Convention may require the grant of asylum, even in the absence of any risk of renewed ill-treatment on return, if "the persecution suffered during the trafficking experience … was particularly atrocious and the individual is experiencing ongoing traumatic psychological effects which would render return to the country of origin intolerable". Mr Brown did not accept that such a case would be caught by the terms of the Convention, and I am bound to say that I see force in that submission: there are more appropriate humanitarian routes for accommodating sufficiently exceptional cases of that character. But we did not hear substantial argument on the point, and it is sufficient for present purposes to say that the letter of

18 July did not raise a case that would have justified the Secretary of State entertaining the Appellant's application notwithstanding the strong presumption that Lithuania was a safe country of origin.

THE VMS GUIDANCE

45. The VMS Guidance sets out at p. 71 the steps which the Home Office, if it is the Competent Authority, should take in "live immigration cases following a positive Conclusive Grounds decision". The passage says, among other things:

> "The Home Office should not make [a] negative decision on an asylum claim whilst a person is being considered under the NRM process. Once a conclusive grounds decision has been taken, any outstanding claim for asylum should be decided."

In this case the inadmissibility decision was made in the interval between her referral into the NRM and the eventual conclusive grounds decision. Ms Knights submits that that is a plain breach of the Secretary of State's published policy and accordingly unlawful.

46. I do not accept that submission. In my view it is reasonably clear, as Garnham J held at para. 61 of his judgment, that the policy stated in the Guidance refers to admissible claims, which will require substantive consideration. As Mr Brown submitted, a claim for asylum cannot naturally be described as "outstanding" if the Secretary of State is debarred from properly considering it. The thinking behind the policy which I have quoted is not entirely clear to me, and was not elucidated during the hearing; but it is plainly derived in one way or another from the fact that deciding whether a person is a victim of trafficking and whether they are entitled to asylum under the Convention are likely to involve overlapping inquiries. But where the asylum claim is inadmissible in the first place no such inquiry will occur.

47. Ms Knights drew our attention to another case in which Duncan Lewis acted for a Latvian asylum claimant (referred to as "DK"). They argued in pre-action correspondence that her claim had been declared inadmissible while she was still in the NRM process, and the Secretary of State agreed (in August 2019) to withdraw the decision apparently on that basis. She submitted that that was inconsistent with the stance being taken by the Secretary of State in these proceedings. Mr Brown was not able to suggest any real difference between the two cases and in the end simply submitted that the concession made in DK's case was wrong. In my view that is indeed the case. I can well understand why Ms Knights seeks to rely on this episode, and it must be galling for Duncan Lewis, having once had the point accepted, now to find the Secretary of State changing her position. But an error made in one case (in pre-action correspondence) cannot commit her to take the same stance in other cases.

GROUND 4: BREACH OF THE SUPPORT DUTY

THE CLAIM

48. Ground 4 in the Appellant's Grounds of Claim reads as follows:

> "The Defendant unlawfully failed to discharge his obligation to provide the Claimant with assistance and support on receipt of a Reasonable Grounds decision under Articles 11(2) and (5) Directive 2011/36/EU and his published policy. That is so because (a) the Claimant's medical and welfare needs *required* her release from detention and yet Defendant unlawfully failed to discharge her, (b) the psychological support the Claimant required was not provided to her in detention; (c) the Defendant made no adequate assessment of the Claimant's medical and welfare needs until her release from detention on 30 November 2017; and (d) the Claimant did not receive adequate mental health treatment whilst in detention."

It will be seen that the Appellant relies on two sources of the alleged duty to provide her with "assistance and support". I take them in turn.

49. As for the EU Directive referred to, this is the so-called "Anti-Trafficking Directive" (which of course had direct effect in the UK at the date with which we are concerned). The effect of the Directive is discussed in some detail at paras. 54-69 of the judgment of the Court in *MN v Secretary of State for the Home Department* [2020] EWCA Civ 1746, [2021] 1 WLR 1956. For present purposes we are concerned only with article 11, which is headed "Assistance and Support for Victims of Trafficking in Human Beings". The paragraphs relied on by the Appellant read:

> "(2) Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3.
>
> …
>
> (5) The assistance and support measures referred to in paragraphs 1 and 2 shall be provided on a consensual and informed basis, and shall include at least *standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information*, and translation and interpretation services where appropriate [emphasis supplied]."

The effect of the reference in paragraph (2) to a person having been "subjected to any of the offences referred to in Articles 2 and 3" is to their being victims of trafficking. (Paragraph (1), referred to in paragraph (5), is concerned with a cognate obligation to provide support to victims of trafficking who are co-operating in the investigation of offences committed by their traffickers.)

50. As for the Secretary of State's "published policy", that is a reference to the documents setting out the NRM, being the "VMS Guidance" to which I have already referred. The avowed intention of the NRM, which is described in the Guidance as "a victim identification and support process", is to give effect to the relevant parts of the UK's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings ("ECAT"). The Guidance says, at p. 25:

> "Potential victims of human trafficking (ie those with a positive reasonable grounds decision) are entitled to 45 days supported recovery and reflection period. First responders and Competent Authority staff must ensure that this support is provided following a positive reasonable grounds decision. This provision is extended to all potential victims of modern slavery in England and Wales with a positive reasonable grounds decision."

The Home Office has entered into a contract with the Salvation Army to provide support in accordance with that policy (in England and Wales).

51. The VMS Guidance itself does not specify the nature of the required support, but since the NRM is avowedly intended to give effect to the UK's obligations under ECAT it is appropriate to refer to article 12 ("Assistance to Victims"). This reads (so far as material) as follows:

> "(1) Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:
>
> (a) standard of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
>
> (b) access to emergency medical treatment;
>
> (c) translation and interpretation services, when appropriate;
>
> (d) counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;
>
> (e) assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
>
> (f) access to education for children.
>
> (2) Each Party shall take due account of the victim's safety and protection needs.
>
> (3) In addition, each Party shall provide necessary medical or other assistance to victims lawfully resident within its territory who do not have adequate resources and need such help.

> (4) Each Party shall adopt the rules [*sic*, but I think 'the' must be a slip] under which victims lawfully resident within its territory shall be authorised to have access to the labour market, to vocational training and education.
>
> (5)-(6) …
>
> (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."

That does not distinguish between potential and established victims, but it must be read with article 13, which provides for the "recovery and reflection period", which will typically (as it did here) occur before a conclusive grounds decision is made. Article 13 (2) reads:

> "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."

Accordingly paragraphs (3) and (4) of article 12 do not apply to potential victims of trafficking such as the Appellant.

52. It will be seen that there is a broad correspondence between the requirements of the Directive and of ECAT as regards potential victims of trafficking, but, as noted in *MN* (see para. 56), they are not identical.

53. As appears from the pleading, the respects in which the Secretary of State is said to have breached the support duty relate to the treatment that she received in relation to her mental health. I will return to the details of her case later.

THE DECISION OF THIS COURT IN *EM*

54. In *R (EM) v Secretary of State for the Home Department* [2018] EWCA Civ 1070, [2018] 1 WLR 4386, this Court considered the extent of the duty of the Secretary of State under paragraphs (2) and (5) of article 11 of the Trafficking Directive. The claimant was a Nigerian potential victim of trafficking who, like the Appellant in this case, claimed that she had not received sufficient support while in immigration detention. The only substantive judgment was given by Peter Jackson LJ, with whom Arden and Sharp LJJ agreed.

55. At paras. 18-30 of his judgment Peter Jackson LJ reviews the provisions of ECAT, the Directive and the VMS Guidance establishing the support duty as regards potential victims of trafficking, essentially as I have done above. At para. 31 he says:

> "Synthesising these sources, the core obligation defining the support duty arises from Arts. 11(2) and (5) of the Directive, which (emphasising words directly relevant to the present claim) mandate that **assistance and support** must be provided to PVoTs on a

> consensual and informed basis, and **shall include** at least standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as **necessary medical treatment including psychological assistance, counselling and information,** and translation and interpretation services where appropriate."

He observes that the real issue in the case is the true meaning of the emphasised words.

56. That question is addressed at paras. 65-68 of Peter Jackson LJ's judgment, under the heading "What is the nature and scope of the support duty?". These read:

> "65. The general duty on the State under Arts. 11(2) and (5) of the Directive is to provide assistance and support to a PVoT by mechanisms that at least offer a subsistence standard of living through the provision of
>
> - appropriate and safe accommodation
> - material assistance
> - necessary medical treatment including psychological assistance, counselling and information, and
> - translation and interpretation services.
>
> 66. As to that element of the duty that requires the provision of necessary medical treatment including psychological assistance, counselling and information, the treatment provided must respond to the welfare needs of the individual, objectively assessed in each case. The obligations arising under the Directive and Guidance, read alongside the Convention, do not extend to a requirement that the assessment or treatment must be provided by specialists in trafficking, or that it be targeted towards one aspect of an individual's needs (the consequences of trafficking) as opposed to his or her overall psychological needs. The support duty calls for the provision of support, not the accomplishment of physical, psychological or social recovery. There is nothing in the Convention, Directive, or Guidance to warrant the extended interpretation of the duty argued for by the Claimant. That interpretation would require significant additions to the texts to prescribe specific obligations that would undoubtedly have been spelt out, had they been intended.
>
> 67. Nor do the Claimant's submissions gain strength from a comparison between services that are provided in the community and those provided in IRCs. The position of a PVoT who is detained is different from the position of one who is not, and it is lawful for the State to decide to provide support in different ways. A PVoT living in the community may well not have access to any of the four forms of support mentioned at paragraph 65 above, while all four will automatically be available to a detained PVoT. The way in which psychological treatment is provided

> may take account of the inherent uncertainty about the length of detention, and the ready availability of on-site medical care for a person who is in any case under close observation. The evidence filed on behalf of the Claimant is in my view more effective in demonstrating the way in which the support duty is satisfactorily discharged in the community than in establishing any breach of legal duty towards detained PVoTs. The fact that different, or better, provision might be made for those not in detention does not of itself equate to a breach of duty.
>
> 68. I also consider that, when considering whether the support duty has been discharged, it is appropriate to look at the level of assistance and support that has been provided to the PVoT at all stages in the process, and not just at support provided during the 45-day reflection period."

GARNHAM J's REASONING

57. At paras. 119-128 of his judgment Garnham J rejects the Appellant's case that she had not received sufficient support during her detention for what he identifies as four reasons.

58. First, he holds that, as a potential victim of trafficking, the Appellant was only entitled to what he described at para. 122 of his judgment as the "modest levels of assistance" required by article 11 of the Directive and article 12 of ECAT – "measures, for example, capable of ensuring her subsistence and to *emergency medical support* [emphasis supplied], rather than to the more sophisticated support treatment for which Ms Knights contends". At para. 123 he quotes para. 65 of Peter Jackson LJ's judgment in *EM*, underlining the phrase "subsistence standard of living". At para. 121 he says that the position in *EM* was in fact different because the claimant in that case was an established victim of trafficking. That was a slip on his part because in *EM* too the claimant was only a *potential* victim of trafficking: I return to this below.

59. Second, at para. 124 he holds, following para. 68 of Peter Jackson LJ's judgment in *EM*, that "it is necessary to consider the assistance and support provided throughout the relevant period" and not just in the 45-day recovery and reflection period.

60. Third, at para. 125, he finds that

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

The reference to "support and treatment … as itemised by Mr Brown" is to a list compiled by Mr Brown from the Appellant's records while in detention, until 29 July 2017 at Bronzefield and thereafter at Yarl's Wood: the records were before Garnham J (and also before us). He summarised what they showed at para. 118 of his judgment:

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

The reference in that summary to "substance misuse" refers to the fact that the Appellant, as already noted, had a heroin addiction: this was being treated by prescriptions of methadone. Although that summary ends on 26 October the records which we have seen show that the Appellant continued to have both appointments with a nurse and with a GP up to very shortly before her release. The notes show that there was a focus on reducing the levels of methadone that she was taking.

61. At para. 126 he quotes paras. 66-67 from the judgment of Peter Jackson LJ in *EM*, continuing, at para. 127:

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

62. Fourth, at para. 128 he says:

> "The expert on whom the Claimant relies, Dr Obuaya, recognised that it was necessary first to treat the Claimant's drug dependency before psychosocial treatment could be introduced effectively. That treatment continued throughout her detention."

THE APPEAL

63. Ground 4 reads:

> "In dismissing ground 4 of the Claimant's claim and holding that the Defendant had discharged his duty to provide the Claimant with assistance and support as a potential victim of trafficking, the Court erred in (a) interpreting the duty imposed by article 11 of the Directive and article 12 ECAT as restricted to 'emergency medical support' and (b) incorrectly applying the decision of the Court of Appeal in [*EM*]".

That ground is developed in short supporting submissions but I need not reproduce them.

64. As already noted, Irwin LJ did not himself give permission on this ground. That was because it was anticipated that the issues which it raised would be considered in a pending appeal to this Court from the decision in *H v Secretary of State for the Home Department* [2018] EWHC 2191 (Admin). In the event that appeal was compromised. In those circumstances I would grant permission.

65. In the Appellant's skeleton argument ground 4 is developed under four heads. I will take the first two in turn but the third and fourth together.

(1) The error about the facts of *EM*

66. The first head depends on Garnham J's error about the claimant in *EM* being an established victim of trafficking: see para. 58 above. It is impossible now to establish how the error occurred, but I am satisfied that it is a mere slip which did not affect his approach to the actual issues. So far from distinguishing *EM*, he went on in the following paragraphs to quote passages from Peter Jackson LJ's judgment and apply his reasoning.

(2) "Emergency medical support"

67. Ms Knights' second head of challenge is directed at Garnham J's description of the support to which the Appellant was entitled as "emergency medical support": see at para. 122 of his judgment quoted above. She points out that the phrase in article 11 (5) of the Directive specifying the required level of medical support as "necessary medical treatment". It may be that Garnham J had in mind the phrase "emergency medical treatment" in article 12 (1) (b) of ECAT (although he used the word "support" rather than "treatment"), but it is the Directive which was binding on the Secretary of State; and at para. 31 of his judgment in *EM* Peter Jackson LJ correctly used its language. Ms Knights submits that the concept of "necessary medical treatment" is wider than what would normally be understood as "emergency medical support". She referred us to *R (K) v Secretary of State for the Home Department* [2018] EWHC 2951 (Admin), [2019] 4 WLR 92. That was a case about financial rather than medical support, but she relied on para. 30 of Mostyn J's judgment, where he expressly disagrees with Garnham J's overall characterisation of the levels of support required by the Directive as "modest": the passage in question is the same as where he uses the phrase "emergency medical support".

68. I agree that it would have been better if Garnham J had not used the phrase "emergency medical support". I am not in fact convinced that there is any substantive difference between the requirements of article 12 (1) (b) of ECAT (if that is indeed what he had in mind) and of article 15 (2) of the Directive if both are read purposively and in context. But it can be dangerous to depart from the language of the relevant legislation, and I accept that the phrase "emergency medical support/treatment" could be taken to be rather narrower in scope than "necessary medical treatment".

69. It does not, however, follow that Garnham J misdirected himself in substance. As Mr Brown pointed out, he quotes at least three passages from *EM* using the terminology of "necessary medical treatment", without any suggestion that he regards these as having any different effect from his own summary at para. 122. And it was common ground before him (as before us) that the Appellant was entitled to psychological or psychiatric treatment to help her cope with her mental health problems (whether attributable to her experiences as a victim of trafficking or otherwise), without imposing any requirement that that treatment be characterised as "emergency" in character. The Secretary of State has always acknowledged that potential victims of trafficking are entitled to support/treatment of that kind, and it can be seen from the summary quoted at para. 60 above that various forms of mental health support and treatment were extended to the Appellant during her detention. She contends that these were inadequate in certain specific respects which are the subjects of the other heads of challenge. I consider her criticisms below, but I see no sign that Garnham J's rejection of them was influenced by some perceived distinction between "emergency" and "necessary" treatment.

(3)/(4) Inadequacy of medical support

70. As we have seen, Garnham J considered the full records of the medical and psychological support available to the Appellant in detention: see para. 118 of his judgment quoted above. In the Appellant's skeleton argument Ms Knights submitted that the records "provide clear evidence that there had been no provision of adequate support or assistance other than some anti-depressants"; but only three specific respects in which the support given is said to have been inadequate are identified. These were:

    (a) that no adequate "individualised assessment" of her needs as a victim of trafficking was carried out;

    (b) that no "rule 34 examination" was carried out when she arrived at Yarl's Wood; and

    (c) that she had not received (because it was inappropriate while she remained in detention) the kind of psychological therapy which had been recommended by a psychiatrist, Dr Obuaya, who had written a report on her case dated 23 October 2017.

    When asked in the course of her oral submissions whether she had any other specific criticisms, Ms Knights added that although the Appellant had, as Garnham J notes, been booked in early September 2017 for cognitive behavioural therapy there is no record of her having received it.

71. The starting-point must be that Garnham J's decision on the adequacy of the medical and/or psychological support afforded to the Appellant is a decision of fact, with which

we should only interfere if we are satisfied that it was wrong. I do not believe that it was. I take Ms Knights' criticisms in turn.

72. As regards (a) – absence of individualised assessment – as Peter Jackson LJ says in *EM* (see para. 66 of his judgment), "the provision of necessary medical treatment including psychological assistance, counselling and information, … must respond to the welfare needs of the individual, objectively assessed in each case". Typically when a reasonable grounds decision is made the potential victim will be referred to the Salvation Army, and they will complete an "Initial Needs Based Assessment Form", which involves a full individualised assessment. That did not occur in the Appellant's case because she was being held in immigration detention. Many of her immediate needs, such as accommodation and subsistence, were of course catered for as long as she remained in detention. As regards her medical and psychological needs, Garnham J was entitled to take the view that a distinct formal assessment was not required in circumstances where she was already under the care of the professional staff, first at Bronzefield and then at Yarl's Wood. In *EM* (see para. 53) counsel for the claimant conceded that there was nothing in ECAT that required there to be an "individualised assessment" (by which I take him to have meant such a distinct formal assessment) and the Court evidently regarded that concession as correctly made: see para. 67, as quoted above. What matters is the substance of the support provided rather than matters of formal process. I note that Sir Stephen Silber makes essentially the same point, albeit in a slightly different context, in *R (Galdikas) v Secretary of State for the Home Department* [2016] EWHC 942 (Admin), [2016] 1 WLR 4031, at paras. 99-103.

73. As regards (b), rule 34 (1) of the Detention Centre Rules 2001 provides:

> **"**Every detained person shall be given a physical and mental examination by the medical practitioner (or another registered medical practitioner in accordance with rules 33(7) or (10)) within 24 hours of his admission to the detention centre."

It was accepted before Garnham J that no such examination took place when the Appellant was transferred to Yarl's Wood on 28 July 2017. However, the point made in the previous paragraph applies equally here: what matters is the substance of the support that the Appellant in fact received. I would add that at that date there was no indication that she was a victim of trafficking (still less any reasonable grounds decision), and at para. 77 of his judgment Garnham J found that if a rule 34 examination had occurred at that time there was no reason to suppose that evidence that that was the case would have emerged.

74. As regards (c), the point based on Dr Obuaya's report was expressly addressed by Garnham J at para. 128 of his judgment (see para. 62 above). What he says there fairly reflects Dr Obuaya's recommendation.

75. Finally, it does not appear that it was suggested before Garnham J that the Appellant did not receive the CBT for which the notes show that she was referred, and there are no findings on the point. It is hard in any event to see that any delay in affording her this treatment, even if culpable, would be likely to be a sufficient basis for a finding of a breach of the duty to provide necessary medical treatment or psychological support.

ARTICLE 4 OF THE ECHR

76. In both the skeleton argument and her oral submissions Ms Knights argued that the obligation to provide proper medical support which she said had been broken arose not only under the Directive and the Secretary of State's policy embodied in the VMS Guidance (giving effect to ECAT) but also under article 4 of the ECHR. The European Court of Human Rights ("the ECtHR") has in a series of decisions following *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 held that the very general language of article 4 must be construed as imposing certain positive duties on member states in the field of trafficking. The history is summarised at paras. 14-17 of my judgment in *R (TDT) v Secretary of State for the Home Department* [2018] EWCA Civ 1395, [2018] 1 WLR 4922. At para. 17 I summarise the effect of those authorities as identifying positive duties of three kinds:

> "(a) a general duty to implement measures to combat trafficking – 'the systems duty';
>
> (b) a duty to take steps to protect individual victims of trafficking – 'the protection duty' (sometimes called 'the operational duty');
>
> (c) a duty to investigate situations of potential trafficking – 'the investigation duty' (sometimes called 'the procedural duty')".

It was Ms Knights' contention that the protection duty included an obligation to support victims of trafficking corresponding to the duty under article 12 of ECAT: she referred us to the recent decision of the ECtHR in *V.C.L. v United Kingdom* (77587/12), where at para. 154 the Court says:

> "Protection measures include facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery (see [*Chowdury v Greece* (21884/150) [2017] ECHR 300], §110)."

The significance of the point for the Appellant in this case is that breach of an obligation under the ECHR would found a claim for damages under section 8 of the Human Rights Act 1998; but it may also be important in cases arising following "IP completion date", i.e. 31 December 2020, when the Directive no longer has any application in the UK, so that entitlement to support for victims of trafficking would otherwise depend on ministerial policy.

77. Mr Brown challenged that submission. He reminded us that not all the provisions of ECAT automatically read across into positive obligations under article 4 of the ECHR: see *TDT* at paras. 30-31, citing *Secretary of State for the Home Department v Hoang Minh* [2016] EWCA Civ 565. He submitted that neither *V.C.L.* nor *Chowdury* was concerned with the provision of support of the kind with which we are concerned in this case.

78. Since, for the reasons given above, Garnham J was entitled to find that there was no breach in this case of the duty to give adequate medical and/or psychological support to the Appellant, it is unnecessary for us to decide whether that duty arose under article 4 of the ECHR as well as under the Directive and the Guidance, and I prefer not to do

so. The question was not considered by Garnham J and does not appear to have been argued before him. Nor indeed is any claim under the 1998 Act, relying on article 4, within the terms of ground 4 as pleaded, and although it is fair to say that Mr Brown did not object to its being raised it was not at the forefront of the argument before us. In my view it would be better for the issue to be determined in the context of a case where it is determinative; and that would have the advantage that the Court would have the benefit of any further decisions of the ECtHR in this developing area.

DISPOSAL

79. I would grant permission to appeal on ground 4 but dismiss the appeal on both grounds.

Moylan LJ:

80. I agree.

Dingemans LJ:

81. I also agree.

C4/2019/0210

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

The Honourable Mr Justice Garnham

B E T W E E N:

THE QUEEN
(on the application of)

ZV

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DRAFT ORDER

UPON the decision of Garnham J dated 18 October 2018 **("the Judgment")**

UPON the Order of Irwin LJ dated 6 November 2019 granting permission to appeal against the Judgment on Ground 1, refusing permission on two other grounds and directing that the question of permission to appeal on Ground 4 may be determined at a rolled-up hearing

AND UPON reading the written submissions and evidence of both parties on the Court file

AND UPON hearing counsel for the Appellant and Respondent on 4 March 2021

AND UPON the handing down of judgment on [ ]

IT IS ORDERED THAT

1. The appeal on Ground 1 is dismissed.

2. The Appellant is granted permission to appeal to the Court of Appeal on Ground 4.

3. The appeal on Ground 4 is dismissed.

4. By 4pm on Friday 6 August 2021 the Appellant may seek permission from the Court of Appeal to appeal to the Supreme Court. The Respondent need not file submissions in response unless the Court asks her to do so.

5. The Appellant shall pay the Respondent's reasonable costs of the appeal, subject to detailed assessment if not agreed, and not to be enforced save by order of the Court pursuant to section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and regulations 15 and 16 of the Civil Legal Aid (Costs) Regulations 2013.

6. There shall be a detailed assessment of the Appellant's publicly funded costs.