Neutral Citation Number: [2012] EWHC 1927 (Admin)

Case No: CO/2158/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 17th July 2012

Before :

PHILIP MOTT QC
Sitting as a Deputy High Court Judge

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Between:

THE QUEEN **(on the application of "E")**	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Christopher Buttler (instructed by **Maxwell Gillott**) for the **Claimant**
Tom Poole (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing dates: 17th May 2012

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Judgment

Philip Mott QC:

Introduction

1. This is a challenge to the decision of the Defendant dated 13th January 2012 that the Claimant was not a victim of trafficking. Coupled with this, though legally distinct, is a claim that the Defendant is out of time to return the Claimant to Norway under the terms of the Dublin II Regulation.

2. Interim relief was granted by Sales J on 29th February 2012, prohibiting the removal of the Claimant from the UK. That was extended by consent to the conclusion of the judicial review proceedings. Permission to apply for judicial review was granted by me on 21st March 2012.

Factual Background

3. The Claimant is from Eritrea. Her birthdate has been assessed by Croydon Social Services as 8th June 1987, which makes her now 24 years old.

4. According to the Claimant's account her mother died and her father disappeared when she was 11 years old and she began working as a child prostitute shortly afterwards. When she was about 12 she was taken in by a middle aged customer, Mr ET, a businessman from Sweden. He took her to Sweden on forged documents, telling her that she was to become his wife. Once in Sweden he was verbally abusive, prevented her from leaving his flat, and made her cook and clean, threatening her with return to Eritrea if she refused.

5. The Claimant escaped and fled to Norway, where she claimed asylum on 22nd December 2007. By a final decision in Norway dated 26th March 2010 her asylum claim was dismissed. At about this time ET located her in Norway and threatened to come and collect her.

6. The Claimant left Norway and travelled to the UK, where she claimed asylum on 2nd August 2010. She said she had travelled from Ethiopia and had not claimed asylum elsewhere. Her fingerprints led to the discovery of her asylum claim in Norway, and on 17th September 2010 Norway accepted responsibility for dealing with the Claimant's asylum claim under the terms of the Dublin II Regulation. As a result, on 25th November 2010 the Claimant's asylum claim in the UK was refused on third country grounds.

7. It will be apparent from this summary that the Claimant's initial account to the UK authorities involved extensive fabrication. For reasons which will become apparent in this judgment, no conclusive assessment has been made of the truth of the remainder of the Claimant's account.

8. On 2nd February 2011 the Defendant detained the Claimant. On 4th February 2011 the Defendant decided that there were not reasonable grounds to believe that the Claimant was a victim of human trafficking. That was challenged by way of judicial review proceedings, in which Cranston J ordered the Claimant's release after a concession on behalf of the Defendant that she had in fact been trafficked.

9. On 24th October 2011 the Claimant's solicitors sent to the Defendant submissions in support of the trafficking claim, together with expert reports. On 26th October 2011 the Defendant issued a decision letter which concluded that there were reasonable grounds to believe that the Claimant had been trafficked. Accordingly, pursuant to the Defendant's policy on victims of trafficking, the Claimant was granted a period of 45 days temporary admission to the UK to help her recover from her trafficking experience. At the end of that period, the decision letter continued:

> "… the Competent Authority will make a 'conclusive' decision as to whether you are a victim of trafficking. Following this decision the UK Border Agency (UKBA) will consider whether a residence permit is appropriate and you will be notified of the decision on your case"

10. On 13th January 2012 the Defendant issued a 'conclusive decision', which is the decision subject to the present challenge. I shall return to the details of this decision letter in due course. In summary, it concluded that on the balance of probabilities the Claimant had not been trafficked to the UK. By inference, therefore, the Claimant was not entitled to special protection in the UK as a victim of trafficking, and would be returned to Norway under the Dublin II Regulation.

11. That decision was challenged on behalf of the Claimant in a pre-action protocol letter dated 20th January 2012, and on 27th January 2012 the Claimant's solicitors provided further material dealing with the effect of returning the Claimant to Norway. The Defendant responded by letter of 31st January 2012. In that letter it was accepted that the Claimant "does appear to have been trafficked for the purpose of exploitation to Sweden", but it concluded that there would be no breach of her rights under Article 3 or 8 of the European Convention on Human Rights if she were removed to Norway under the terms of Dublin II.

The Decision of 13th January 2012

12. The letter starts with a summary of its conclusion in the following terms:

> "Your case has been carefully considered by a Competent Authority following the decision that there were reasonable grounds to believe that you could be a victim of human trafficking. However, after further consideration of your case it has been concluded that while you may have been trafficked to Sweden your [*sic*] were not further trafficked to the United Kingdom. The Competent Authority has concluded that on the balance of probabilities you have not been trafficked to the United Kingdom."

13. It then sets out reasons for this conclusion which I do not need to go into as it is not suggested that the Claimant was trafficked into the UK. It also deals with the investigation of the Claimant's age, and the events since her arrival in the UK. The letter continues in paragraph 6 as follows:

> "In concluding that you are not a victim of trafficking to the United Kingdom account has been taken of the fact that you have said that you escaped from you [*sic*] trafficker in Sweden and then travelled to Norway and then on to the United Kingdom. From your own account you had disclosed to your social working [*sic*] in Norway of the threats you received and they in turn placed you in foster care, and we have no reason to believe that the Norwegian authorities would [*sc.*"*not*"] have been able to safe guard your care while there nor that they had failed in their duties of care in deciding to return you to Ethiopia. There is no evidence that any form of deception or coercion was used to persuade you to come to the United Kingdom. Further more there is no evidence that your alleged trafficker has attempted to contact you in the United Kingdom."

14. Thus far the letter is saying that the protection afforded in the UK for victims of trafficking only applies to those who have been trafficked into the UK, and the Claimant clearly had not been. The Claimant attacks this reasoning as being contrary to the Council of Europe Convention on Action against Trafficking in Human Beings (the "Trafficking Convention") and contrary to the Defendant's published policy on such protection. The Defendant defends the decision as being in line with the published policy, arguing that this court cannot go behind the policy to look at the terms of an international treaty not incorporated into domestic law.

15. The decision letter then continues in the following terms:

> "Account has been taken of the UK Border Agency guidance on considering claims of trafficking, specifically the section regarding cases where the potential victim has travelled independently of the alleged trafficker, which is quoted below:
>
> **7. "When trafficking is removed through location**
>
> 8. A migrant who claims to have been exploited overseas but travelled independently of any alleged trafficker to the UK over a period of time passing through a number of other countries is likely to be far removed from their trafficking situation and therefore very unlikely to benefit from being considered under the Convention."
>
> 9. However, it is entirely possible that someone who has fled to the UK to escape a current trafficking situation will still be traumatised by their experience and, **unless the case meets Dublin II arrangements**, will need to be afforded the help and protection in the UK that is offered under the Convention (emphasis added).
>
> 10. Your case is subject to the Dublin Regulation and as such the responsibility for considering your allegation to have been trafficked will be for them to consider along with any asylum application that you may wish to make. Arrangements will be made shortly for you [*sic*] return to Norway under the terms of the Dublin Regulation. You will be given 5 days notice of any directions for your removal."

16. It should be noted that the paragraphs numbered 7, 8 and 9 in the above quotation from the decision letter are themselves quotations from the Defendant's published policy. I set them out in detail here because Mr Poole on behalf of the Defendant expressly submitted, in accordance with the Detailed Grounds of Defence, that this passage of the published policy does not apply to the Claimant's situation, and was irrelevant to the decision. If the reasons set out in the first six paragraphs of the letter could not be supported, nothing in the remainder of the letter would serve to justify this decision.

17. This argument is surprising, in view of the terms of the decision letter and the response to the pre-action protocol letter, but it is the considered stance of the Defendant in these proceedings and I accept it.

The Trafficking Convention

18. This was signed by the UK on 23rd March 2007, and ratified on 17th December 2008. It came into force as an international treaty in the UK on 1st April 2009. However, it was never incorporated directly into domestic law.

19. For the purposes of this case I need only refer in detail to Articles 4 and 10 of the Convention. Article 4 provides as follows:

> "For the purposes of this Convention:
>
> a "Trafficking in human beings" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
>
> b The consent of a victim of "trafficking in human beings" to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
>
> c The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in human beings" even if this does not involve any of the means set forth in subparagraph (a) of this article;
>
> d "Child" shall mean any person under eighteen years of age;
>
> e "Victim" shall mean any natural person who is subject to trafficking in human beings as defined in this article."

20. Thus, under the Convention, there must be the coincidence of the trilogy of action, means and purpose for the activity to amount to human trafficking, although in the case of a child all that is needed is action and purpose, not means.

21. Article 10 of the Convention is headed "Identification of the victims" and paragraph 2 provides:

> "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."

22. Thus the Convention envisages a two-stage process of identification. The first involves a "reasonable grounds" test. The second involves the "identification process as victim of an offence provided for in Article 18", which requires parties to the Convention to establish as criminal offences the conduct contained in Article 4 when committed intentionally. Until that second stage is complete the person should not be removed from the country, and likewise until that second stage is complete the person should receive the assistance provided for in Article 12.

23. Article 12 deals with assistance to victims in their physical, psychological and social recovery. Article 13 requires a recovery and reflection period of at least 30 days after the "reasonable grounds" stage. Article 14 requires the issue of a renewable residence permit to victims where their stay is necessary owing to their personal situation, or for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.

The Defendant's Published Policy

24. Principally, this consists of the Guidance for Competent Authorities. There are also Enforcement Instructions and Guidance, but they add nothing material on the present point.

25. The Guidance starts with an Introduction section which refers to the Convention, and quotes verbatim the definition of trafficking from Article 4(a). That is expanded in the next section, "Trafficking definition", which provides a direct internet link to the Convention itself. It says that:

> "The Convention is relevant to UKBA because human trafficking frequently overlaps with existing areas of responsibility such as asylum and human rights and their associated processes".

26. The section headed "Reasonable grounds consideration" starts by setting out the two stage process, as follows:

> "The Council of Europe Convention on trafficking has a two stage process for identifying victims of trafficking in which the 'reasonable grounds' test acts as an initial filter to a fuller more conclusive decision. Once a positive 'reasonable grounds' decision is made; the individual is granted a 45 day

> reflection/recovery period. This temporary status provides the conditions for a fuller evaluation to decide if the person was a victim at the date of reasonable grounds decision."

27. Under the sub-heading "Standard of proof" the section points out that the 'reasonable grounds' test has a low threshold:

> "The test that should be applied is whether the statement "I suspect but cannot prove" would be true and whether a reasonable person would be of the opinion that, having regard to the information in the mind of the decision maker, there were reasonable grounds to believe the individual concerned had been trafficked."

28. Later in that section there is a sub-heading "When trafficking is distant in time/historic claims". It makes a number of important points, at least in relation to the 'reasonable grounds' decision, and should be set out extensively:

> "Very few trafficked persons are still in a trafficking situation at the time of referral into the NRM [National Referral Mechanism] because in order to be referred they must have escaped or been rescued from the trafficking environment. Many victims will continue to suffer the effects of their ordeal long after they have left it. A gap between the trafficking situation and referral should therefore be seen as normal and is not in itself reason to conclude that an individual should not be treated as a victim.
>
> But there may be instances where a Competent Authority believes someone may have been a victim of trafficking, but at the time their case is referred, concludes on the facts of the case that the person is no longer in need of the protection or assistance offered under the Convention because the individual's circumstances have changed so much since the trafficking occurred. A negative decision in such cases would not be denying that someone may have been a victim of trafficking in the past, simply that at the time of assessment they did not meet the Convention criteria or need the protection or assistance that it can afford.
>
> There are a number of factors that may be relevant to consider when deciding whether a person can be considered to be a victim for the purposes of the Convention at the point that the case was referred to the Competent Authority for a decision. The Convention and explanatory report are vague as to the application of timeframes of the constituent elements of trafficking when considering eligibility. However, it is usual policy and practice for the provision of services for victims of crime to be based on an assessment of individual need. Therefore as one of the aims of the Convention is to offer protection to victims it is appropriate to consider if the person

> needs protection or assistance under the Convention at the time that the referral is made.
>
> Based on an assessment of the individual circumstances of the case it may be reasonable to conclude that where a person has been free from their traffickers for a long period of time and has recovered and moved on with their life, then they no longer require the protection afforded by the Convention. Support for this approach is provided by considering the rationale for the provision of a recovery and reflection period for victims as set out in Article 13 of the Convention and as expanded upon in the explanatory report to the Convention.
>
> It is relevant to consider whether:
>
> i. the person was under the influence (either directly or indirectly) of traffickers at the point at which they came to your attention;
>
> ii. the person requires a period to recover from the influence of traffickers;
>
> iii. the person has suffered physical or emotional wounds from the trafficking experience and requires time to recover;
>
> iv. the person requires a period of time in which to decide whether to co-operate with the authorities in respect of a trafficking related criminal investigation.
>
> This is intended to be an illustrative list of factors. It is not exhaustive and it will be necessary to consider all of the person's circumstances in the context of the general spirit of the Convention at the time a case is referred into the NRM. It may be the case that if only one of these factors is present the person will need the protection of the Convention and that should be reflected in the decision.
>
> In cases where there is police or support provider involvement, the Competent Authority will need to consult with these parties to get a full picture of the person's circumstances."

29. The section then sets out two example scenarios, after which the following appears:

> "This policy is intended to assist case owners in determining whether there are reasonable grounds to believe someone *is* a victim in need of the Convention's protection. <u>It is only likely to be relevant in cases where significant time has elapsed since the trafficking offence occurred and the circumstances of the individual have changed considerably.</u> [original emphasis and underlining]

> In high harm cases Competent Authorities need to carefully consider the victim's longer term physiological and health impacts. If the individual has not been free from their traffickers for a significant period of time and has not fully recovered/moved on with their life, then victim status should not be denied on this basis of the claim being historic.
>
> This policy is principally for application at the reasonable ground stage. It should only be applied at the conclusive grounds stage if further evidence has come to light to suggest that at the time of referral the person had moved on/been free from their traffickers for longer than originally thought, or where in light of further evidence it is acknowledged that Convention obligations should not have been triggered at the reasonable grounds stage. This could be because for example the individual has since acknowledged in an interview that they are not a victim of trafficking."

30. Finally, still in the section headed "Reasonable grounds consideration", there is a sub-heading "When trafficking is removed through location", which reads:

> "A migrant who claims to have been exploited overseas but travelled independently of any alleged trafficker to the UK over a period of time passing through a number of other countries is likely to be far removed from their trafficking situation and therefore very unlikely to benefit from being considered under the Convention.
>
> However, it is entirely possible that someone who has fled to the UK to escape a current trafficking situation will still be traumatised by their experience and, unless the case meets Dublin II arrangements, will need to be afforded the help and protection in the UK that is offered under the Convention.
>
> In such cases Competent Authorities will also need to ensure that our obligations under Article 27 are met by passing any details of the alleged crime to the Party in the territory in which the offence was committed.
>
> An example scenario
>
> An individual may have travelled from a country where one or more of the three constituent elements of trafficking took place. To reach the UK the individual escaped their situation and fled. The individual travelled through a number of countries before arriving in the UK. When first identified by a first responder it was reported that the individual travelled to the UK of their own free will and had not experienced exploitation in the UK.
>
> Consider

- Is the person still under the influence of the trafficker?
- Does the person require time to recover from their trafficking ordeal?
- Has the person got support and health needs as a result of the exploitation?

It should be noted that a person presenting themselves as a victim must be physically present in the United Kingdom in order to be capable of receiving protection and assistance from a Competent Authority in the UK under the Convention."

31. I have set out much of this section at length because it is perfectly clear, and accepted by the Defendant, that at this stage the question is whether the person has at any time been subject to trafficking as defined by Article 4 of the Convention and, if so, whether she is still in need of the protection and assistance of the Convention. The Claimant asserts that she does need such protection and assistance. The Defendant has not considered the evidence provided on this because of the conclusion that the Claimant was not a victim of trafficking to the UK.

32. There is a separate section in the Guidance headed "Conclusive Decision consideration". Under the sub-heading "Standard of proof" it states:

> "At the conclusive decision stage, CAs should consider whether, on the balance of probability, there is sufficient information to conclude that the individual is a victim of trafficking.
>
> Balance of probabilities essentially means trafficking as defined by the Convention is more likely than not to have happened. Decision makers should be satisfied that on the evidence available the event is more likely to have happened than not. This standard of proof does not require the decision maker to be certain that the event did occur.
>
> Decision makers should weigh up the probability of trafficking as defined by the Convention having taken place. They will need to consider the entire trafficking process, which comprises of a number of interrelated actions rather than whether a single act has taken place at a given time. Weighing the strength of indicators or evidence presented is a matter of common sense and logic based on the particular circumstances of each case."

33. The next section is headed "Conclusive Decision Outcomes", and includes a sub-section about "Victims who are not assisting with Police enquiries and are not eligible for a grant of leave". This provides that:

> "Individuals who are conclusively found to be victims trafficking [*sic*], but who are not assisting with Police enquiries and are not eligible for a grant of leave [due to their personal

circumstances], must still be issued with a positive conclusive grounds decision.

The Parties' submissions

34. Mr Buttler, for the Claimant, makes five submissions on the substance of the decision.

i) Under Article 4 of the Convention, whether a person is a victim of trafficking depends only upon the objective question of whether she has in fact been trafficked. That submission was varied in argument to base it on the published policy, without asserting that the court was entitled to look directly at the Convention. He submitted that the construction of the policy must accord with the overarching intention of the policy, which was to implement the letter of the Convention. Where the wording of the policy conflicts with that overarching intention, the policy is internally inconsistent and irrational. Either the court must read it down so as to be consistent with the overarching intention, and evaluate the Decision Letter on that basis, or (if that is not possible) the Decision Letter must be struck down as irrational because it is based on an irrational policy.

ii) Alternatively, if victim status depends not only on whether the person has been trafficked but also on whether she still requires the protection and assistance of the Convention, the decision maker failed to ask herself the right question or to address the material in the expert reports which was material to it.

iii) In any event, the Defendant was wrong to treat the fact that the Claimant was not trafficked to the UK as determinative of whether she was a victim of trafficking entitled to the protection and assistance of the Convention in the UK.

iv) The Defendant wrongly treated the fact that the Claimant was caught by the Dublin II Regulation as determinative of whether the UK owed her a duty to protect her under the Trafficking Convention. As noted above, the Defendant expressly rejected this as a basis for the decision, and therefore did not seek to defend it on that ground.

v) The passage in the Guidance which appears to make an exception for Dublin II cases is unlawful.

35. Mr Poole, for the Defendant, submitted that where the provisions of an international treaty have not been incorporated into national law, not only does the treaty itself confer no rights or obligations enforceable by the courts, but issues of interpretation of the treaty are not justiciable in the courts. Mr Buttler did not seek to argue against this, instead reformulating his first submission as noted above. Mr Poole submitted that where the UK Government announces that its policy is to give effect to the UK's obligations under a treaty, that does not make the treaty directly enforceable, but might give rise to a judicial review claim on the basis that the Government had failed to apply its own published policy. Mr Buttler accepted that formulation of the law, and sought to argue that there had been such a failure in this case. On the other hand, Mr Poole submitted, if the Government did not expressly adopt the treaty but simply set out a policy based on its own interpretation of the treaty, it is not for the courts to

consider whether this interpretation is correct as a matter of international law. For the purposes of this judgment, given the way Mr Buttler reformulated his first submission, I am content to accept that proposition without needing to examine the substantial list of authorities cited in support.

36. Mr Poole then submitted that Article 4(e) of the Convention, which he accepted had been expressly incorporated into the UK Guidance, clearly indicates that a person is only a victim whilst he/she is being trafficked. He accepted that this interpretation would make the question to be decided at the conclusive decision stage different from that at the reasonable grounds stage. At the reasonable grounds stage he accepted that the question is whether the person had been trafficked. At the conclusive decision stage he submitted that the question is whether the person is being trafficked. This is a fundamental difference, not just a different standard of proof for the same question.

37. As a result, Mr Poole submits, the decision maker did ask herself the right question, came to the only possible answer, and was not required to go on to consider the evidence of the Claimant's current needs.

Existing authorities

38. In *AA (Iraq) v SSHD* [2012] EWCA Civ 23, there was a challenge to a reasonable grounds decision that the Claimant/Appellant was not a victim of trafficking. Since the decision in issue was one at the reasonable grounds stage, there was no dispute that the question was whether the Claimant had been trafficked. The appeal failed because the competent authority had concluded that the Claimant was not credible, and was entitled to do so. But the court went on to consider whether, even on the Claimant's account, she was trafficked into the UK, concluding that she was not. The Claimant did not put her case on the basis that she had been a victim of trafficking at an earlier stage, whilst in France, but the court looked at that as well, concluding that she had not. If Mr Poole's submission were correct, there was no need for the Court of Appeal to consider what had happened in France having concluded that she had not been trafficked into the UK.

39. The only other direct authority on trafficking and the Convention is a decision of mine in *Y v SSHD* [2012] EWHC 1075 (Admin). I held that the part of a reasonable grounds decision which concluded that the Claimant was not subject to trafficking at any time was irrational, but that the decision maker was entitled at that stage (the 45 day recovery period having long since elapsed) to consider whether she needed the protection and assistance of the Convention. I also concluded that on the particular facts there was only one answer, that the Claimant did not need such protection and assistance, as the decision maker had concluded. It was not necessary for that decision to consider whether trafficking outside the UK, or distant in time, was sufficient to make the Claimant a victim, nor did that case involve a conclusive decision letter.

Discussion

40. If Mr Poole's submission is correct, and the conclusive decision is intended to look at a current state of affairs rather than whether trafficking has ever occurred, there must be a relevant date at which the state of affairs must exist for the Claimant to be a victim of trafficking. In the course of argument various possibilities were canvassed.

41. Initially Mr Poole submitted that it was the state of affairs at the date of the conclusive decision. However, since this will always follow a period of recovery in safe surroundings after the reasonable grounds decision, no one could ever be found to be currently subject to the three hallmarks of trafficking at the time of that decision.

42. At the beginning of the section in the Guidance on the reasonable grounds consideration it is explained that "This temporary status provides the conditions for a fuller evaluation to decide if the person was a victim at the date of reasonable grounds decision" [my underlining]. This suggests that the relevant date is the date of the reasonable grounds decision, but also implies that the question to be answered is the same one, with the only difference being the standard of proof.

43. However, the Guidance is not consistent about this date. A little further on it says "it is appropriate to consider if the person needs protection or assistance under the Convention at the time that the referral is made". Later still it says "it will be necessary to consider all of the person's circumstances in the context of the general spirit of the Convention at the time a case is referred into the NRM" [my underlining in each case]. This date will be some time before the reasonable grounds decision. Moreover, as the Guidance goes on to note, "Very few trafficked persons are still in a trafficking situation at the time of referral into the NRM", so the same objection applies to this as a relevant date if the question is the one proposed by Mr Poole.

44. Faced with this problem, Mr Poole suggested that it was the date of entry into the UK. That accords with the test which appears to have been applied by the decision maker, but is not in accordance with the Guidance. There is nothing in the Guidance or the Convention to support the proposition that a person ceases to be a victim of trafficking by independently crossing a national border.

45. The section in the Guidance dealing with the standard of proof to be applied on a conclusive decision makes it clear that the decision maker is looking back in time to see whether trafficking as defined by the Convention "is more likely than not to have happened", whether "the event is more likely to have happened than not", and has to weigh up the probability of trafficking "having taken place" [my underlining].

46. The Guidance expressly refers to the two stage process, which Mr Poole accepts is a reference to Article 10. That Article describes the conclusive decision as "the identification process as victim of an offence provided for in Article 18". If the question is whether the person is currently the victim of an offence, that inevitably means considering whether that person has been a victim of trafficking at some time in the past. The Convention places no territorial restrictions on such offences. On the contrary, as noted expressly in the Guidance, Article 27 imposes a duty on each Party to the Convention to ensure that victims of an offence in the territory of another Party may make a complaint before the competent authorities of their State of residence. It is for that competent authority to transmit the complaint to the competent authority of the Party in the territory in which the offence was committed.

47. None of this, in my judgment, involves directly construing the Convention. It is simply using Articles expressly or impliedly referred to in the Guidance to shed light on the meaning of the Guidance. If I am wrong about this, I would hold (as I did in *Y v SSHD*) that the Defendant has adopted the Convention to such an extent that it is expressly incorporated in her published policy.

Conclusion on the substantive decision

48. For these reasons I conclude that the question to be answered in the conclusive decision is the same as in the reasonable grounds decision, namely whether the person has been a victim of trafficking (and thus is the victim of a trafficking offence).

49. As at the reasonable grounds stage, this is not the end of the matter. The decision maker must go on to consider whether the person needs protection and assistance, either because she is helping police with their inquiries, or because of her personal circumstances. This decision as to whether the person should be "treated as a victim", "considered as a victim", or given "victim status" is a purposive one, bearing in mind the aims of the Convention.

50. In this case it is clear from my conclusion that the decision maker did not ask herself the right initial question. As a result, the decision that the Claimant was not a victim of trafficking because she had not been trafficked into the UK cannot be supported and must be quashed.

51. I have been asked to make a declaration that the Claimant is a victim of trafficking. I decline to do so. Her initial account to the UK authorities involved extensive fabrication. Although it has been conceded that on the reasonable grounds test she should be treated as a victim of trafficking, there has been no decision based on the standard of proof applicable to the conclusive decision stage. It is for the Defendant to reach such a decision, not for this court to make findings of primary fact.

52. There also may be cases in which a person has been a victim of trafficking but no longer needs the protection and assistance of the Convention. *Y v SSHD* was one of those cases, at the reasonable grounds stage. Here there has been no consideration by the Defendant of the material which has been submitted on behalf of the Claimant to show that she is still in need of protection and assistance under the Convention. The Defendant is entitled to review whether to seek independent expert evidence as to the Claimant's psychological state, and to reach a decision on all the evidence.

53. In saying this I bear in mind that, in relation to the conclusive decision, the Guidance states that:

> "Individuals who are conclusively found to be victims [of] trafficking, but who are not assisting with Police enquiries and are not eligible for a grant of leave [due to their personal circumstances], must still be issued with a positive conclusive grounds decision."

However, the question of whether the Claimant is in need of any, and if so what, protection and assistance is all part of the conclusive decision stage. There is no prejudice to the Claimant from any delay, as she cannot lawfully be removed from the UK until a valid conclusive decision has been reached.

The effect of Dublin II

54. Since the Defendant does not rely on paragraph 9 of the decision letter, which appears to say that no decision is required on the Claimant's current needs because this is a

Dublin II case, I do not need to make any findings about the validity of the section in the Guidance which suggests that this is so. I say only that I would need a lot of persuading that Dublin II could relieve the Defendant of the self-imposed obligations arising from her policy of implementing the Trafficking Convention. Certainly Article 40(1) of the Convention seems to be against this reading, and in any event the right to return under Dublin II is not absolute. It may be that the Defendant will wish to reconsider the wording of this part of the Guidance. However, I leave any further observations to a case in which it is relied upon, if such a case ever arises.

The Dublin II time limit

55. The Dublin II agreement provides for a six month time limit for the return of asylum seekers to the state which has accepted responsibility to decide the claim. Since Norway accepted responsibility on 17th September 2010, that six month period would have expired in March 2011. By then, however, the Claimant had instituted judicial review proceedings, and on 4th February 2011 the Defendant notified the Norwegian authorities that the transfer of the Claimant could not be effected because "The applicant has taken suspensive judicial action against the decision".

56. The Claimant challenges this as there was no order in the judicial review proceedings preventing removal. Mr Buttler accepts that the provisions of Dublin II do not confer individually enforceable rights. This is clear from a line of authorities, including *J v SSHD* [2009] EWHC 1182 (Admin) and *YZ v SSHD* [2011] EWHC 205 (Admin).

57. Mr Buttler bases his challenge on the Defendant's own policy, as contained in the Enforcement Instructions and Guidance, paragraph 28.2. This says that the six month period for removal "can only be extended in limited circumstances", one of which is "within 6 months of the decision of an appeal or review where there is suspensive effect". Since the review in February 2011 did not have suspensive effect, he argues, the extension of time is in breach of the Defendant's published policy. That is a proper ground of challenge, as in *Kambadzi v SSHD* [2011] 1 WLR 1299.

58. The issues were very fully considered by Beatson J in *YZ v SSHD* and I accept and follow his analysis and conclusions. He considered whether the Defendant is a "competent body" to suspend time and, if so, whether she could suspend time by a policy of doing so whenever an application for judicial review is made. He concluded that she is, and she can.

59. In the end Mr Buttler's complaint was a semantic one. It was wrong for the Defendant to tell the Norwegian authorities that "The applicant [i.e. the Claimant] has taken suspensive judicial action against the decision" because the Claimant had not sought an injunction. The suspensive action was taken by the Defendant under her policy. Thus the reason given to Norway was an incorrect reason.

60. In my judgment this argument does not assist the Claimant. It is entirely unreal to rely on a document passing between two states, which the Claimant did not see until these proceedings were under way. The point was also considered by Beatson J in *YZ v SSHD* when he said at [90]:

> "Finally, as to whether "suspensive judicial action" is misleading, it is shorthand and has the potential disadvantages

> of shorthand. But since the Secretary of State is, in my judgment, one of the bodies competent to suspend time for implementing a transfer, I do not consider that the shorthand phrase used in what is often a *pro forma* document is materially misleading."

61. Accordingly the Claimant's challenge fails on this ground.