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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR342
FOR JUDICIAL REVIEW

AND IN THE MATTER OF "MODERN SLAVERY: STATUTORY GUIDANCE FOR ENGLAND AND WALES (UNDER s49 OF THE MODERN SLAVERY ACT 2015) AND NON-STATUTORY GUIDANCE FOR SCOTLAND AND NORTHERN IRELAND"

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Mr McQuitty KC with Mr Richard McLean (instructed by Brentnall Legal) for the Applicant
Mr Henry KC with Mr Joseph Kennedy (instructed by the Crown Solicitor's Office) for the Respondent

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McALINDEN J

Introduction

[1] The applicant, who has been given the cypher JR342, is a 29 year old female Eritrean national, from an Eritrean Orthodox Tewahedo background, who is claiming asylum in the United Kingdom. She alleges that she was subjected to a very harsh regime including harsh punishments as part of her compulsory military service, during which time she was also exposed to the risk of sexual assault from male soldiers, without any protections being put in place by the state. During the time when she was engaged in compulsory military service, her father died and her mother wrote to the applicant's military unit requesting that the applicant be informed of her father's death and that the applicant be allowed home on leave. The applicant was not informed about her father's death for a number of months and it was only then that she was allowed a period of leave to be with her mother and sisters. As a result of the harsh, indeed, unbearable conditions she experienced during her compulsory military service, she attempted to escape on a number of

occasions from her compulsory military service, only to be caught and subjected to beatings and other punishments.

[2] She eventually escaped Eritrea on foot, travelling to Sudan where she was captured by traffickers. She was taken to Libya where she was held against her will with others in a warehouse and was only taken out of the warehouse to engage in forced labour as a cleaner and to do other menial jobs without pay. Whilst in Libya, she had to pretend to be of the Muslim faith to avoid punishment or persecution for her religious beliefs. Her captors subjected her to sexual assaults. Living conditions in the warehouse were terrible with one meal a day and limited access to drinking water. Her family had to pay $6,000 to secure her release and following her release, she was kidnapped by another band of traffickers and held captive in a different warehouse in Tripoli, where she was detained in conditions that were even worse than those she had previously experienced. On this occasion, the applicant's family had to pay $2,000 for her release. She was then trafficked from Libya to Italy and from Italy to France, Belgium, the Netherlands, Belgium, Ireland and finally the United Kingdom. She is highly critical of the Eritrean government for its treatment of female citizens forced to engage in military service. She fears that reprisals would be taken by the state against members of her family who remain in Eritrea if the government of that country should discover the identity of the person making the complaints detailed in the applicant's claim for asylum. On the basis of the above account, it is appropriate and, indeed, necessary to grant the applicant anonymity in these proceedings in order to protect her family who remain in Eritrea from state reprisals.

[3] In addition to claiming asylum in the United Kingdom, the applicant also claims that she was a victim of modern slavery and it is as a result of how the National Referral Mechanism process operated in her case that she has brought this application for judicial review.

[4] Following her arrival in the UK, the applicant was initially interviewed by an immigration officer on 8 November 2023 and the pro forma Initial Contact and Asylum Registration Questionnaire was completed on that date and a copy was provided to the applicant. During this initial interview, applicants are only asked for a brief outline of why they are claiming asylum. A subsequent in-depth video-recorded asylum interview usually takes place and it is during this subsequent interview that applicants are expected to give full details of their experiences and fears. In relation to activation of the National Referral Mechanism, the initial interviewing officer takes on the role of first responder and, in the case of an adult, with the applicant's consent, makes a referral to the Single Competent Authority and the Single Competent Authority then takes up the task of investigating the applicant's claim to be a victim of modern slavery.

[5] In the case of the immigration service, once the Initial Contact and Asylum Registration Questionnaire is completed, the activation of the National Referral Mechanism is achieved by completing the proforma NRM Referral Form. This form

was completed in this case on 9 November 2023. Applicants normally do not receive a copy of the NRM Referral Form that is completed in their case and it would appear that in the case of immigration officers acting as first responders, the immigration officers do not take applicants through this form and complete it in their presence or with their help but instead subsequently complete the form from memory with the aid of the completed Initial Contact and Asylum Registration Questionnaire. It would also appear that in the case of immigration officers asking as first responders, the Initial Contact and Asylum Registration Questionnaire is sent along with the NRM Referral Form to the Single Competent Authority. In the NRM Referral Form the immigration officer raised questions about the applicant's credibility on two occasions. The applicant was not made aware of these issues at the time and the entries in the Initial Contact and Asylum Registration Questionnaire do not contain any comments which would lead the reader to conclude that the officer in question was harbouring doubts about the credibility of the applicant.

[6] In this case, following receipt of the NRM Referral Form, the Single Competent Authority considered the NRM Referral Form and notified the applicant by e-mail on 9 November 2023, informing her that her case was being considered and that they would contact her if they needed any further information. The applicant replied to this e-mail on 14 November 2023, giving the Single Competent Authority her mobile telephone number. The Single Competent Authority did not contact the applicant again prior to issuing the negative Reasonable Grounds Decision on 26 January 2024. However, prior to issuing this decision, they decided to contact the first responder, who in this case was the immigration service, by e-mail on 29 December 2023, seeking further information. The relevant immigration officer was on holiday leave at that time and did not respond. The immigration officer did not activate an "out of office" automated reply prior to going on holiday so the Single Competent Authority were not alerted to the fact that the request for further information had not been picked up. A reminder was sent on 8 January 2024 but this again went un-answered as the immigration officer was still on leave. It should be noted that the referral form includes a space to insert the details of a second point of contact in the first responder's office, but this section of the form was not completed in this case. The respondent asserts that steps have now been taken to guard against this happening again.

[7] In mid-January 2024, the applicant, having heard nothing from the Single Competent Authority, contacted a solicitor and met with Mr Karl McKenna of Brentnall Legal, 184 Ormeau Road, Belfast, BT7 2ED, on 17 January 2024. Mr McKenna then informed the immigration service and the Single Competent Authority that he was acting for the applicant on 23 January 2024 and enquired whether a Reasonable Grounds Decision had been made in her case. On 25 January 2024, having received an acknowledgement from the Single Competent Authority confirming that no Reasonable Grounds Decision had been made and that a timescale for making one could not be given, Mr McKenna e-mailed the Single Competent Authority and informed them that he was meeting the applicant again

on 7 February 2024 and, thereafter, he hoped to provide them with a detailed statement from the applicant.

[8] It would appear that this e-mail was not delivered to the individual in the Single Competent Authority who was dealing with the applicant's case prior to the negative Reasonable Grounds Decision being issued on 26 January 2024. Due to administrative shortcomings, Mr McKenna's correspondence was not brought to the attention of the actual decision maker before a negative Reasonable Grounds Decision was made in this case. In the negative Reasonable Grounds Decision there is a specific reference to:

> "the poor level of detail being provided – you claim to have been with the smugglers for around 8 months. Given that length of time it is considered reasonable to expect a higher degree of detail than has been submitted. Therefore, it is considered to expect further information in relation to your case."

It should be noted that although the decision referred to a poor level of detail, there was no criticism of the applicant's credibility and indeed the letter specifically stated:

> "it is recognised that you have been broadly consistent in your account and there are not considered to be any significant credibility concerns with your account."

[9] The applicant's solicitor then requested a reconsideration of the negative Reasonable Grounds Decision on 12 February 2024 and enclosed a copy of the applicant's statement. At the same time the applicant's solicitor sent a PAP letter to the Single Competent Authority making the case that in order to comply with the requirements of procedural fairness, the guidance document used by the Single Competent Authority should explicitly mandate that the Single Competent Authority approach the applicant or the applicant's legal representatives for further information if the Single Competent Authority considered that there was a paucity of information or a dearth of detail because the Initial Contact and Asylum Registration Questionnaire used by the immigration service was not designed or intended to elicit anything like enough detail to allow the NRF Referral Form to be comprehensively completed.

[10] On 6 March 2024, a positive Reasonable Grounds Decision issued from the Single Competent Authority and on 31 January 2025, a positive Conclusive Grounds Decision was made in which it was stated that it was accepted that the applicant had been subjected to forced labour (Eritrean military service) in Eritrea between February 2014 and January 2016 and forced labour (sexual exploitation) in Sudan and Libya between January 2016 and September 2016. Two of the three challenges set out in the Amended Order 53 statement in this case, dated 3 October 2024, have been rendered completely academic by reason of the making of a positive

Reasonable Grounds Decision on 6 March 2024 and a positive Conclusive Grounds Decision on 31 January 2025. The only remaining challenge that requires consideration and adjudication by the court is the challenge to the impugned guidance.

[11] In essence, it is argued that the guidance is incompatible with the requirements of procedural fairness in that it does not provide adequate procedural safeguards to ensure that those claiming to be victims of modern slavery are afforded a fair opportunity to provide sufficient information to the Single Competent Authority about their application prior to any Reasonable Grounds Decision being made (whether directly to the Single Competent Authority or via the immigration service as first responder).

[12] It is further argued that the guidance is incompatible with and in breach of article 4 ECHR, section 6 of the Human Rights Act 1998 and article 10 of the Council of Europe Convention on Action against Trafficking in Human Beings ("ECAT"). It is argued that article 4 requires that state parties are required to adopt a comprehensive approach and put in place measures not only to punish the traffickers but also to prevent trafficking and to protect the victims. It is argued that a combined and co-ordinated legislative and administrative approach is required to do this effectively and this approach mandates the imposition of a procedural obligation to investigate potential trafficking situations. It is argued that article 10(1) and (2) of the ECAT provide that state parties must ensure that the relevant state agencies and authorities collaborate with each other as well as with relevant support organisations so that victims can be identified and this means that the states are required to adopt such legislative and other measures as may be necessary "to identify victims as appropriate in collaboration with other Parties and relevant support organisations." It is argued that insofar as these obligations are not reflected in the impugned guidance:

> "then the impugned guidance is itself in breach of them, particularly by undermining the effectiveness of the measures put in place to identify victims and by failing to ensure collaboration between state authorities in that process or victim identification."

[13] Finally, it is argued in the amended Order 53 statement that the impugned guidance is unlawful because it either misstates the law or omits to explain the legal position (specifically as to the essential requirements of procedural fairness in this context) and so is apt to mislead officials charged with applying the said policy. In this regard, reliance is placed on the case of *A v SSHD* [2021] UKSC 37 at para [41]. The applicant argues that the challenge to the guidance is far from academic as this challenge will highlight the need for fair procedures to be adopted and implemented in future National Referral Mechanism Reasonable Grounds decisions. Such an approach is required to reduce the risk of otherwise meritorious trafficking claims being unfairly rejected by the Single Competent Authority at first instance and for

want of adequate detail. The applicant reminds the court that the Home Office is involved in this case as the respondent in respect of its distinct roles both as first respondent and as the Single Competent Authority, the body charged with making decisions on the trafficking claim in this case.

[14] The applicant argues that the reconsideration of the Reasonable Grounds Decision and the making of a positive Conclusive Grounds Decision in this case do not represent a vindication of the NRM procedure, as claimed by the respondent. Rather, it reveals its inadequacy and this case highlights the risk to others who may not have the benefit of skilled and diligent legal representation. It is argued that this case will demonstrate that there are ongoing and justifiable concerns over the decision-making processes that underpinned the original negative Reasonable Grounds Decision in this case.

[15] It is further argued on behalf of the applicant that a negative Reasonable Grounds Decision is a stand-alone decision which represents a defined, final decision in respect of a trafficking claim (albeit subject to the possibility of reconsideration). It is argued that it is a distinct legal determination with distinct legal consequences. For instance, under section 18 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, any state support for a potential victim of modern slavery that was put in place pending the making of a Reasonable Grounds Decision is withdrawn from the applicant once a negative Reasonable Grounds Decision is made. It is argued that it is, therefore, no answer for the respondent to suggest that such a decision, no matter how unfair or otherwise unlawful, can be saved because it is possible to seek reconsideration. It is argued that this is not the correct approach, not least because a request for reconsideration must first be accepted, ie the request for reconsideration must set out grounds for reconsideration, and these grounds have to be accepted before any reconsideration will take place. As such, it is argued, that there is an additional hurdle to be surmounted in respect of reconsideration that does not apply to a first instance Reasonable Grounds Decision.

[16] It is further argued on behalf of the applicant that it is wrong for the Home Office to characterise a Reasonable Grounds Decision as a gateway decision. It is not a gateway decision when the gate is effectively shut by a negative Reasonable Grounds Decision. It is argued that it would be wrong for the court to conclude that there is a right to reconsideration of a negative Reasonable Grounds Decision. There is a right to seek a reconsideration of such a decision and the refusal of a reconsideration is amenable to judicial review (see the recent decision in *R (KM) v SSHD* [2024] EWHC 2870 (Admin)). However, there is no automatic right to have a negative Reasonable Grounds Decision reconsidered. The applicant argues that, as things stand, there is a real risk that genuine victims of modern slavery will not be identified due to the unfairness of the current procedure and guidance as operated by the Home Office which steers the Single Competent Authority away from directly engaging with applicants or their legal representatives when they consider that there is a paucity of information or a lack of detail.

[17] It is argued that although the respondent now seeks to attribute the initial flawed decision making to a series of unfortunate oversights and communication breakdowns, the effects of which were relatively swiftly remedied, thus demonstrating that the National Referral Mechanism does, indeed, work, there is a much deeper issue at the heart of this case and that is the fundamental inadequacy and unfairness of the procedure by which the initial Reasonable Grounds Decision was made. The core argument mounted by the applicant is that this procedure is not fit for purpose as the procedure adopted and the guidance in place in essence militates against the obtaining of sufficient information about such claims prior to the Single Competent Authority making Reasonable Grounds Decisions.

[18] The applicant attempts to meet head on one of the main justifications relied upon by the respondent in this case for including in its guidance a recommendation that first responders should be contacted if further information is sought or further detail is considered necessary and to be wary of contacting applicants directly for such information. The justification put forward by the respondent is the entirely reasonable concern of the respondent to avoid doing anything which might risk the re-traumatisation of or causing distress to potential victims of modern slavery. Firstly, the applicant argues that the receipt of a negative Reasonable Grounds Decision based on the provision of inadequate information or detail might very well cause significant distress to a genuine victim of modern slavery. The risk of re-traumatisation in such circumstances is clearly present. It is argued with some justification that this is much more likely to cause distress than simply being asked to provide further information, especially if the applicant has the assistance of a solicitor. Moreover, it is argued that any concerns about causing distress by engaging directly with this particular applicant were misplaced, given that she specifically contacted the respondent and provided them with her mobile telephone number to enable them to contact her.

[19] The applicant identifies what she alleges to be a number of important systemic shortcomings in the National Referral Mechanism where the immigration service is the first responder which it is argued are revealed by what happened in this case:

> "(a) The extremely short duration of the screening interview and the specific context of same, where the focus is on the applicant's asylum claim. It is argued that a very high percentage of these screening interviews are conducted with the assistance of an interpreter (as was the case here). It is pointed out that in the preamble discussion given prior to screening, there is no reference to trafficking decisions or the need to provide adequate information in that context. Those being interviewed are unlikely to have any appreciation

of the significance of their responses in terms of the NRM process. Moreover, those being interviewed are expressly told that they will only be asked to provide a brief outline and that a further detailed asylum interview will be arranged (implying that there will be an opportunity to give a more detailed account later). It is argued that this gives (or could give) a false sense of security to victims of modern slavery that there will a further opportunity to give a full account of their experiences. Even when trafficking issues are then raised during the screening interview, it is pointed out on behalf of the applicant that those conducting the interview are advised to record brief details and the impugned guidance advises that it would not be appropriate to conduct a full interview at screening. Although the guidance advises that brief details are to be recorded it is also stipulated that it is important that first responders provide "as much information as possible at the point of referral." This, it is argued on behalf of the applicant, constitutes somewhat contradictory guidance.

(b) The time pressure to make a Reasonable Grounds decision within just 5 days of referral, as recommended by the guidance. Although this timescale was not met in this case, it is clear that the perceived need for prompt decision making was initially at play to the detriment of good decision making in this case.

(c) It is argued that the much vaunted "second pair of eyes review" that apparently takes place before the issuing of a Reasonable Grounds Decision did not reveal the obvious shortcomings in the decision-making process. It is highlighted that the applicant was denied a positive Reasonable Grounds Decision even though her account was considered, in effect, to be credible and consistent with country information on Libya and in circumstances where she had given her account at the earliest opportunity.

(d) It is submitted that whilst the respondent argues that the guidance does not flatly preclude direct

engagement with victims or their representatives, it is clear that the general thrust of the guidance and the clear message emanating from the guidance is that the Single Competent Authority should not normally seek further information directly from victims or their legal representatives. Part of the justification for the adoption of this approach has been set out above (risks of re-traumatisation and causing unnecessary distress). However, it is also argued on behalf of the respondent that the applicant may not be best placed to deal with requests for further information, such as where the first responder has raised issues about the credibility of the applicant. It is argued on behalf of the respondent that if the first responder has expressed an opinion that an account given to the first responder by the applicant lacks credibility, it is appropriate to seek further information from the first responder so that the first responder can explain why they formed this opinion. The applicant does not really address this specific issue but, instead, directs the court's attention to the situation where the potential problem is an alleged lack of detail (as arose in the instant case). The applicant argues that it is hard to understand what additional information the first responder would be able to give about that specific issue when common sense would suggest that it would be appropriate to seek such further details directly from the victim or their legal representatives. It is argued with some force by the applicant that any efforts made by the Single Competent Authority to engage with a first responder in order to seek further information in a case involving a concern about a lack of detail may not represent the sensible, efficient and effective use of their time and resources.

(e) In her supporting affidavit evidence, the applicant refers the court to other cases in which similar issues have arisen and relies on these other cases to demonstrate that this is indeed a systemic issue with its origins in the guidance which strongly discourages direct contact with the applicant and/or their legal representatives in order to ascertain further information.

(f) The applicant also seeks to rely upon a report published by the International Organisation for Migration, a United Nations "related organisation" through a relationship agreement adopted by the General Assembly of the UN on 8 July 2016, in which data from January 2023 to June 2023 is analysed, which, it is argued, demonstrates a very sharp disparity in terms of the numbers of positive Reasonable Grounds Decisions where the immigration service in the Home Office is the first responder and where other organisations such as the police or social services act as First responders. It is argued that this data shows that just 32% of referrals made by the Home Office as first responder received positive Reasonable Grounds Decisions in the first half of 2023. It is pointed out that this was 50 percentage points lower than the proportion for Local Authorities and half of the 64% of positive decisions for referrals made by the police. On behalf of the applicant, it is argued that these statistics show that the chances of being refused a Reasonable Grounds Decision are much greater where a referral is being made by the Home Office than by a Local Authority or the Police. It is further argued that the updated International Organisation for Migration report does nothing to dispel the stated concerns.

(g) It is alleged that the International Organisation for Migration conducted an analysis of statistics in the United Kingdom for the first half of 2024 on 14 October 2024. This analysis allegedly shows that there were 373 reconsiderations of negative Reasonable Grounds Decisions in the first half of 2024. Of those, 66% subsequently received a positive decision. It is argued on behalf of the applicant that a system whereby initial negative Reasonable Grounds Decisions are overturned in two thirds of cases upon reconsideration is not a system which can be described as working properly. The International Organisation for Migration concluded that:

> 'the high rate of positive decisions for reconsidered cases raises concerns about

the quality of decision making and the current practical challenges to have a decision reconsidered suggest a need for review of the policy around such requested and the timelines in which they can be made.'

(h) One final delve into the publications of the International Organisation for Migration reveals that in March 2025, it published a report in March 2025 in which it concluded that more women and girls than ever are being given negative decisions through the National Referral Mechanism. In 2024, only 53% of women referred to the NRM received a positive Reasonable Grounds Decision, the lowest percentage since records began. The statistics for positive Reasonable Grounds Decisions for girls in 2024 were the second worst since records began in 2014. In this context, the applicant makes reference to unpublished guidance provided by the Home Office to the Single Competent Authority which it is alleged goes further than the published guidance in that this unpublished guidance specifically directs that statements should not be sought from alleged victims in cases where sexual exploitation is alleged to have occurred.

(i) The applicant also seeks to place reliance on a recently uncovered 18 page prompt sheet for first responders in respect of conducting interviews with potential victims of modern slavery. The applicant seeks to highlight what she regards as a significant disparity between the more robust approach envisaged by the prompt sheet and the approach taken by the Home Office as first responder when conducting screening interviews which, it is alleged, are not really designed for potential victims of modern slavery. For example, the prompt sheet asks how many sessions were required to complete the first responder interview process which it is argued connotes an involved procedure."

[20] The applicant argues that these systemic problems are rendered all the more significant in cases where the first responders are also able to make negative

credibility comments about a victim or potential victim, without the victim or potential victim being given any notice of this and thereby having no opportunity to comment upon or rebut the points made against them, as happened in this case. It is further argued that it is plainly contrary to the requirements of procedural fairness and may also amount to indirect discrimination against women and girls (who make up the vast bulk of those individuals claiming to be the victims of sexual exploitation), to issue guidance which positively discourages the Single Competent Authority from seeking further information from applicants, for instance, by way of a statement, which is arguably one of the best and fairest means by which a victim could give a full account, on the basis that it would be inappropriate to do so due to the actual or perceived vulnerabilities of the applicants. It is argued that a victim who has been subject to sexual exploitation may well prefer to give a witness statement, as opposed to having to provide details of their account in interview, especially if they have a solicitor to assist them and where they may also be receiving other appropriate support.

[21] Turning then to address the relevant legal framework, the applicant points out that the United Kingdom is party to both the 2000 Palermo Protocol to the UN Convention against Transnational Organised Crime (the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children) and the ECAT. The purposes of ECAT are to prevent and combat trafficking, to protect the human rights of victims, as well as to ensure effective investigation and prosecution, and to promote international co-operation on action against trafficking (see article 1). An essential component of this protective framework is the effective identification of victims (see article 10). Accordingly, the United Kingdom has established the National Referral Mechanism. The NRM is designed to fulfil the obligations arising under articles 10, 12 and 13 of ECAT. ECAT has been given effect in our domestic law through the NRM policy and the decision-making structures put in place by that policy. The Home Secretary accepts that the NRM must comply with ECAT: see *R (Atamewan) v Secretary of State for the Home Department* [2013] EWHC 2727 at para [55] and, in the UK Supreme Court, *MS (Pakistan) v SSHD* [2020] UKSC 9 at paras [19] – [20].

[22] It is argued that ECAT imposes a large number of obligations upon states parties. The following are the most relevant to this case. Article 5 requires parties to establish or strengthen effective policies for preventing trafficking and to use a child-sensitive approach to their development and implementation. Article 10 requires parties to identify victims by a procedure which takes account of the special situation of child victims and to have people trained and qualified in preventing and combatting human trafficking to do this. Where there are reasonable grounds to believe that a person is the victim of trafficking, that person should not be removed from the country until the identification process is completed. Article 12 requires parties to provide necessary assistance to victims in their physical, psychological and social recovery, including subsistence, accommodation, counselling and information.

[23] The applicant notes that the UK Supreme Court in *MS* referred extensively to the European Court of Human Rights decision in *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1. As per para [29] of the Supreme Court judgment in *MS*, the obligations on the state include the following:

> "…member states are required to adopt a comprehensive approach and put in place measures, not only to punish the traffickers, but also to prevent trafficking and protect the victims (para 86). This required the trilogy of measures set out in *Rantsev*: a legislative and administrative framework to do this effectively (para 87); an obligation to take operational measures to protect individual victims in certain circumstances (para 88); and a procedural obligation to investigate potential trafficking situations (para 89)."

[24] Reliance is placed on the decision of Treacy J, as he then was, in *RE* [2014] NIQB 15 at paras [54]–[64] where he considered the issue of both the failure to investigate and procedural fairness in the context of a challenge to a Conclusive Grounds Decision. Treacy J, granting judicial review on both grounds, found that there was a failure to investigate (applying *Tameside* principles) because there was no evidence in the letter of decision that there had been any consideration given to the possible reasons for an apparent lack of credibility and so no weighing up of these other considerations (see para [61]). Treacy J also found a breach of the requirements of procedural fairness at para [64], applying the well-known principles in *Doody* [1994] 1 AC 531 at page 561. The court considered that a "fairly rigorous standard of fairness must apply to these decisions" and that the applicant was entitled to know the gist of the case against her and be given an opportunity to rebut the suggestion of lack of credibility (see para [63]). Significantly, in respect of an earlier iteration of the guidance issued by the Home Office, Treacy J considered that this "clearly envisages a comprehensive evidence gathering procedure" in advance of a Conclusive Decision (see para [64]).

[25] In relation to the issue of procedural fairness and the court's role in dealing with any challenge grounded on a breach of procedural fairness, the applicant also relies on the principles set out in the English Court of Appeal decision of *Balajigari* [2019] EWCA Civ 673 at paras [46], [59] and [60]:

> "[46] …the question of whether there has been procedural fairness or not is an objective question for the court to decide for itself. The question is not whether the decision-maker has acted reasonably, still less whether there was some fault on the part of the public authority concerned.
> …

[59] …although sometimes the duty to act fairly may not require a fair process to be followed before a decision is reached (as was made clear by Lord Mustill in the passage in Doody which we have quoted earlier), fairness will usually require that to be done where that is feasible for practical and other reasons. In Bank Mellat v HM Treasury (no. 2) [2013] UKSC 39, [2014] AC 700, Lord Neuberger (after having cited at para. 178 the above passage from Doody) said, at para. 179:

> 'In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality or pointlessness should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute.'

[60] … unless the circumstances of a particular case make this impracticable, the ability to make representations only after a decision has been taken will usually be insufficient to satisfy the demands of common law procedural fairness. The rationale for this proposition lies in the underlying reasons for having procedural fairness in the first place. It is conducive to better decision-making because it ensures that the decision-maker is fully informed at a point when a decision is still at a formative stage. It also shows respect for the individual whose interests are affected, who will know that they have had the opportunity to influence a decision before it is made. Another rationale is no doubt that, if a decision has already been made, human nature being what it is, the decision-maker may unconsciously and in good faith tend to be defensive over the decision to which he or she has previously come. In the related context of

> the right to be consulted, in *Sinfield v London Transport Executive* [1970] Ch. 550, at p. 558, Sachs LJ made reference to the need to avoid the decision-maker's mind becoming "unduly fixed" before representations are made. He said:
>
> > '"any right to be consulted is something that is indeed valuable and should be implemented by giving those who have the right an opportunity to be heard at the formative stage of proposals - before the mind of the executive becomes unduly fixed.'"

[26] The applicant also places reliance upon a recent Northern Ireland immigration case, *Tahmasebi* [2021] NIQB 99, which concerned the decision of the Home Office to refuse an applicant's asylum claim and declare it inadmissible. The applicant was not informed of this decision until he was arrested at Home Office premises in Belfast when reporting in compliance with immigration bail. Scoffield J stated at para [71]:

> "My primary concern in relation to the practice highlighted by this case is that it offends the court's basic sense of justice and propriety. A decision which was formally taken and recorded, on an application properly made by the applicant, which was likely to have a momentous effect on his life and personal circumstances and which he was likely to wish (and was entitled) to challenge in a variety of ways available to him, was, metaphorically speaking, put in a closed drawer and kept from him. That seems to me to be antithetical to the values of fair process."

[27] The applicant calls in aid the oft quoted exposition of the *Tameside* duty provided by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at paras [99], [100] and [139]. In that passage, having referred to the speech of Lord Diplock in *Tameside*, Haddon-Cave J summarised the relevant principles which are to be derived from *Tameside* as expounded upon in a number of subsequent authorities:

> "(a) First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable.
>
> (b) Secondly, subject to a *Wednesbury* challenge, it is for the public body and not the court to decide upon the manner and intensity of enquiry to be

undertaken: see *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37, at §35 (Laws LJ).

(c) Thirdly, the court should not intervene merely because it considers that further enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision.

(d) Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further enquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient.

(e) Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion.

(f) Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

[28] The applicant addresses the respondent's reliance upon the possibility of reconsideration of a negative Reasonable Grounds Decision as an answer to the applicant's claim. The applicant submits that the mere possibility of the reconsideration of a negative Reasonable Grounds Decision does not address the gravamen of the applicant's complaint, given the legal significance of a negative Reasonable Grounds Decision, as described above. Moreover, the applicant submits that the reference by Scoffield J in *Tahmasebi,* to the UK Supreme Court case of *R (Pathan) v Secretary of State for the Home Department* [2020] UKSC 41 at para [108] is important in that the Supreme Court put the issue of providing a person with information which the decision maker will take into account which may result in a decision which is adverse to that person's interests in advance of the decision being made in its proper legal context:

> "The duty to act fairly in these circumstances involves a duty not to deprive, not an obligation to create…[T]here is nothing incompatible with the legislation or the Rules in allowing the affected person to know, as soon as may be, of the circumstances which imperil their application, so that they may make use of whatever time remains to them under those provisions. This does not confer a substantive benefit. It may be properly characterised as a procedural duty to act fairly. It is not a duty to bestow. It is an obligation not to deprive."

[29] The applicant argues that any reliance placed by the respondent on the possibility of reconsideration as a cure to earlier unfairness is also at odds with the earlier English Court of Appeal authority of *R (Refugee Legal Centre) v SSHD* [2005] 1 WLR 2219 in which the court stated at para [15]:

> "It was urged on us by Mr Tam that, while one could never guarantee against error in the initial decision-making process, the built-in access to the Immigration Appellate Authority was there to cure any such error. While this will no doubt afford sufficient redress in many individual cases - and so tends to reduce the risk of unfairness in the system, viewed as a whole - we do not consider that it is a sufficient answer to the issue raised by the RLC. First of all, an applicant is entitled not only to a fair appeal but to a fair initial hearing and a fair-minded decision. Secondly, and perhaps more important, the consequences of the risk which most concerns the RLC may very well not be susceptible of appeal. If the record of interview which goes before the adjudicator has been obtained in unacceptably stressful or distressing circumstances, so that it contains omissions and inconsistencies when compared with what the applicant later tells the adjudicator, the damage may not be curable."

[30] The applicant argues that allied to the inadequacy of the screening interview procedure, as described above, is the fact that the Home Office policy and guidance strongly encourages the Single Competent Authority not to engage directly with putative victims prior to a Reasonable Grounds Decision being made and this is reflected in the practice of the Single Competent Authority. The applicant argues that there are no good reasons for this policy or practice and that this guidance, policy and practice offends the principles of procedural fairness, particularly in a case where the Single Competent Authority considers that there is a lack of detail in respect of aspects of the trafficking experience noted in the referral. The applicant

asserts that such a lack of detail is only likely to be rectified, if it can be rectified at all, by direct engagement with a putative victim or their legal representatives.

[31] The applicant also claims that the guidance and policy leading to the practice which has been adopted in the NRM Reasonable Grounds Decision process give rise to a breach of article 4 ECHR (when read with article 10 ECAT) because the Home Office has failed to implement an administrative framework that can effectively identify victims of trafficking. It is argued that the statistical data shows this framework is not effective in identifying victims. The standard use of screening interviews by the Home Office (when acting as a first responder) and the discouragement of any direct contact between the Single Competent authority and the applicant or their legal representatives for the purpose of obtaining further information mean that the duties encompassed in article 4 ECHR are not met.

[32] The applicant argues that the impugned guidance, which is reflected in the practice/procedures of the Single Competent Authority, itself a body within the Home Office, does not provide for adequate involvement of potential victims in the decision-making process, in breach of the requirements of procedural fairness. The guidance does not safeguard the article 4 ECHR rights of such potential victims. It is argued that the effect of the impugned guidance which has seen the adoption of the general practice of not engaging directly with putative victims, when combined with the blanket prohibition on obtaining witness statements from a large cohort of potential victims, renders the guidance unlawful and satisfies the *Gillick* test as explained by the UK Supreme Court in *R (A) v SSHD* [2021] UKSC 37 at para [41]. It is further argued that the impugned guidance, in the context noted, effectively directs decision-makers to act in ways which contradict the law by sanctioning or encouraging them to act unfairly and to proceed to make Reasonable Grounds Decisions without sufficient information. As such it is argued that the guidance is clearly unlawful. Reliance is placed upon para [46] of the *R (A) v SSHD* decision:

> "In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others: (i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (i.e. the type of case under consideration in *Gillick)*; (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of

> the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position. In a case of the type described by Rose LJ, where a Secretary of State issues guidance to his or her own staff explaining the legal framework in which they perform their functions, the context is likely to be such as to bring it within category (iii)."

[33] The applicant argues that the impugned guidance presents a misleading picture of the true legal position in that it:

(a) fails to ensure that decision-makers gather adequate information prior to making negative Reasonable Grounds Decisions and permits the use of a procedure for gathering such evidence that is not fit for that purpose (ie screening interviews);

(b) fails to provide adequate safeguards to ensure procedural fairness for putative victims at all stages of the NRM; and

(c) operates, in practice, to effectively exclude putative victims from the decision-making process.

[34] In response to the applicant's submissions, the respondent reminds the court that the UK Supreme Court, in the conjoined appeals of *R (on the application of A) v Secretary of State for the Home Department* [2021] UKSC 37 and *R (on the application of BF (Eritrea)) v Secretary of State for the Home Department* [2021] UKSC 38, has set out the correct test to apply when challenging guidance or policy. In those cases, the Supreme Court said in the clearest of terms that the test to be applied is that set out by the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 11 where the House stated that guidance or policy is unlawful if it sanctions, positively approves or encourages unlawful conduct by those to whom it is directed, but not otherwise. It is argued by the respondent that the court's focus in this case should be on the question of whether the guidance in this case misdirects the decision makers in law.

[35] The respondent characterises the applicant's challenge in the following terms. According to the respondent, the applicant's case is that the Home Office guidance should require the body charged with making Reasonable Grounds Decisions to make direct contact with the individual who is the subject of the referral to ask them for further information, and the omission of that specific direction from the terms of the guidance renders the guidance unlawful. It is argued by the respondent that since the applicant's challenge to the original impugned decision became academic, as a result of the positive Reasonable Grounds Decision (and more recently the positive Conclusive Grounds Decision), the applicant is now unsuccessfully attempting to re-shape her complaints about the original decision into a coherent

challenge to the guidance and, in doing so, it is argued that she is impermissibly conflating the principles that would have applied in the challenge to the original impugned decision and the *Gillick* test which applies to her guidance related challenge.

[36] The respondent reminds the court of the following salient matters. The National Referral Mechanism is the procedure introduced by the United Kingdom to determine who is and who is not a victim of modern slavery, a term which is used to encapsulate several different forms of exploitation, including slavery, servitude, forced and compulsory labour. The National Referral Mechanism is one of the ways in which the United Kingdom meets its obligations under the ECAT, an unincorporated treaty to which the UK is a signatory. Individuals are referred for consideration under the National Referral Mechanism by first responders; they do not apply for victim status. First responders are trained to identify indicators of potential exploitation. There are first responders in several different public authorities: they include immigration officers, border officers, police officers, social workers, as well as other NGOs. If a first responder believes someone may be a victim of modern slavery, they make a referral on a pro forma (electronic) document to the Single Competent Authority. The Single Competent Authority is a part of the Home Office but is separate from the various units which deals with asylum and other immigration decisions.

[37] There are two stages in the determination of whether someone is a victim of modern slavery. The first stage is a Reasonable Grounds Decision. The test is whether there are "reasonable grounds to believe that a person is a victim of modern slavery (human trafficking or slavery, servitude or forced or compulsory labour)." The second stage is a Conclusive Grounds Decision. Subject to reconsideration and/or challenge, this is the final decision. It involves a more detailed interrogation of the circumstances of the individual, which can potentially include an interview, although most cases are determined without an interview.

[38] The circumstances in which referrals to the Single Competent Authority can arise vary significantly. UK nationals can be victims of modern slavery in the UK and can be trafficked in the UK and, indeed, UK nationals are most frequently referred to the Single Competent Authority. In respect of non-UK nationals who are potential victims of modern slavery coming to the UK, a first responder might encounter a potential victim at a port or airport when they are attempting to enter the UK; the individual might have already entered the UK and subsequently only come to the attention of a first responder when seeking asylum; the individual may come to the attention of the police (either as a victim or after having been arrested as a suspect); they may be encountered in an educational setting; or through contact with a health or social care professional. Trafficking or modern slavery need not have occurred in the UK and need not be linked to an individual coming to the UK in order for the UK authorities to assess whether an individual is a victim of modern slavery. In this case, the referral was made by the immigration official who conducted the welfare interview after the applicant made a claim for asylum.

[39] It should be remembered that in the case of an adult, a referral can only be made with the consent of that adult. The same does not apply in the case of a child. After a referral is made, the decision maker in the Single Competent Authority is encouraged to ask the first responder for more information, if it is considered that there are gaps in the information that has been provided in the NRM Referral Form. If the individual who is referred is a child, the decision maker must liaise with social services. In relation to the procedure to be followed when seeking further information in the case of a referred adult, the normal process is to request further information from the first responder rather than the individual who is the subject of the referral, although as acknowledged by the applicant, the guidance does not specifically prohibit direct contact between the Single Competent Authority and the subject of the referral. The rationale behind the decision maker not normally making direct contact with the individual is that the individual may be a vulnerable victim of serious abuse. If the decision maker were to make direct contact with such an individual, this would, in all likelihood, involve contact being initiated by someone the individual had never met or spoken with before. Further, any such contact is unlikely to be in person. In contrast, the appropriately trained first responder has already spoken face to face with the individual and is, to some extent, already known to them. What is envisaged is that if the first responder cannot directly provide the further information sought by the Single Competent Authority, the first responder can be the point of contact with the referred individual. The rationale for such an approach being adopted is that it reduces the prospects of causing further trauma/distress. It should be remembered that the guidance has been devised with input from experts in trauma informed practice and one of the guiding principles which underpins the guidance is the need to ensure that the risks of re-traumatisation from engagement in the National Referral Mechanism are minimised.

[40] It is the respondent's contention that Reasonable Grounds Decisions are screening in nature. The respondent asserts that there are good public administration reasons for having a two-stage process, not least the large number of referrals which have to be considered (over 17,000 in 2023 and over 19,000 in 2024). The respondent also highlights the importance of making decisions in a timely manner, given the potential vulnerabilities of the individuals involved. Every Reasonable Grounds Decision is subject to a "Second Pair of Eyes" review before a decision letter is issued. If the decision is negative (ie it is assessed that the individual does not appear to be a victim) the decision letter sets out the reasons for reaching that conclusion. If that happens, the individual is offered the opportunity of requesting a reconsideration and the reconsideration process enables the individual and/or his/her representative to provide any further information, with the intention of directly addressing the reasons for the earlier negative decision. It is argued on behalf of the respondent that requests for reconsideration can be quite effective. The respondent also points out that if an individual disagrees with the reconsideration decision, they can challenge it by judicial review. This option is also

open to an individual who has requested a reconsideration but that request has been denied.

[41] Dealing with the specific allegations made by the applicant in her challenge, the respondent notes that the applicant's skeleton argument refers to a "*blanket*" policy of refusing to accept statements. The respondent asserts that there is no such policy, as is evident from consideration of the applicant's witness statement during the reconsideration process. The guidance cautions against *requesting* witness statements from certain categories of potential victims on the basis that to do so runs the risk of re-traumatisation. It is important to recall that the guidance was formulated with significant input from those with expertise in trauma informed practice.

[42] The respondent refers to the original (negative) Reasonable Grounds Decision letter which was issued to the applicant and which explained that the Single Competent Authority had contacted the first responder by email requesting any further information but that no response had been received. It is asserted that this is an example of transparency on the part of the respondent. This approach is further evidenced by the fact that the letter went on to list all the evidence the decision maker had considered, including the information provided by the applicant and about the applicant. The letter then detailed the relevant country information that was considered. The letter then went on to set out each of the tests applied and then explained the reasons for the negative decision against those tests.

[43] The respondent readily and very fairly accepts that there were some administrative imperfections in the referral process. However, the respondent asserts that the safeguards already put in place in the National Referral Mechanism process meant the right decision was made albeit not at the earliest opportunity.

[44] When an asylum officer acts as first responder, this officer conducts an initial asylum screening interview with the aid of a pro-forma known as the "Asylum Screening Pro-Forma" which provides for questions relating to modern slavery. This officer is trained both in recognising the indicators of modern slavery and in trauma informed practice. If the officer considers that the individual is a potential victim of modern slavery they should act as a first responder and should seek the consent of the adult individual to make a referral under the National Referral Mechanism and if this consent is forthcoming, they must then complete the online referral pro-forma. If consent is not forthcoming in the case of an adult, the first responder is still under a duty to notify the Home Office that the individual concerned is a potential victim of modern slavery.

[45] There is nothing specific in the guidance about completing the on-line referral pro-forma in the presence of the individual. The guidance certainly does not prohibit this and, indeed, the Home Office has provided a 'Prompt Sheet' version of the referral pro-forma which can be downloaded and printed and used in situations where asylum officers are speaking with the individual away from their computer

and/or internet connection. It would, therefore, appear that the guidance envisages that immigration officers will, where it is practicable to do so, at least partially complete the on-line referral pro-forma in the presence of the individual concerned. Even in a case where the printed "Prompt Sheet" is used, the guidance is clear that the officer will still have to complete the online form after the interview and the officer is advised that the potential victim will not be referred until this is done.

[46] The respondent opines that the approach taken by the applicant in this challenge is one where she seeks to utilise the shortcomings identified in the initial decision-making process in order to mount her policy challenge. The respondent seeks to remind the court that the two challenges, and the test to be applied to each respectively, must not be conflated. The respondent argues that the shortcomings in the initial decision-making process were remedied through the existing National Referral Mechanism process, with its built-in safeguards, without any the need for any intervention by the court. In relation to the applicant's challenge against the guidance, the respondent reminds the court that in order to succeed in her guidance challenge, the applicant would have to establish that the test set out in *Gillick* was met, as *per* the decisions in *R(A)* and *R(BF)*.

[47] In the two appeals of *R(A)* and *R(BF)* which were heard together in 2021 because they raised similar issues, the UK Supreme Court sought to correct an error that had crept into the approach adopted by the courts when dealing with judicial review challenges to public authority policies and guidance. *R(A)* was concerned with the guidance used when a request for information was made of police about an individual who has been convicted of sexual offences against a child. The issue was whether the offender should be given the opportunity to make representations before any information was released. *R(BF)* was concerned with the guidance used by the Home Office when an individual asserts that they are a child but two officials consider there to be substantial grounds for believing they are over 18 years of age. The resolution of age was directly relevant to the issue of whether the individual could be detained, as a child cannot be detained on immigration grounds, whereas an adult can.

[48] In both *R(A)* and *R(BF)*, the Supreme Court emphasised that the *Gillick* test must be applied. It identified three broad categories of case where a policy might be found unlawful on a *Gillick* basis (see paras [46] and [47] of *R(A)*):

> "(i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty;
>
> (ii) where the policy was issued pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or

because of an omission to explain the legal position; and

(iii) where the policy purports to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position."

[49] The applicant seeks to characterise the failures in this case as systemic resulting from built in procedural unfairness and she argues that there is a lack of sufficient inquiry (*Tameside*). The applicant argues that the guidance should include a requirement for direct contact between the Single Competent Authority and the potential victim and that there is an unlawful blanket policy of refusing to consider statements. The respondent compellingly argues that the latter complaint has no basis in fact, as the applicant's statement was accepted so that leaves only first limb of the challenge and it is argued by the respondent that the omission complained of is not sufficient to satisfy the *Gillick* test.

[50] In these conjoined appeals, the UK Supreme Court specifically considered two decisions of the Court of Appeal in England and Wales: *R(Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014] EWCA Civ 827 and *R(Refugee Legal Centre) v SSHD* [2005] 1 WLR 2219. Both of those cases have repeatedly been cited as authorities for the application of an "inherent unfairness test" when considering challenges to guidance. Indeed, the applicant sought to place some reliance on those authorities in this case. However, it is clear that the UK Supreme Court was critical of the application of such a test, and, indeed, unanimously held that it was the wrong test to apply when guidance was the subject of challenge. Further, at para [40] of *R(A)* the Supreme Court discouraged academic challenges and said that, while policies had to accurately reflect the law if they commented upon it, they were not "legal textbooks." The court said that treating them otherwise would mean that:

> "the courts would be drawn into reviewing and criticising drafting of policies to an excessive degree. In effect they would have a revising role thrust upon them requiring them to produce elaborate statements of the law to deal with hypothetical cases which might arise within the scope of the policy. Such a role for the courts cannot be justified. Their resources ought not to be taken up on such an exercise and it would be contrary to the strong imperative that courts decide actual cases rather than address academic questions of law."

[51] The quoted passage pithily enunciates the well-established principle that it is not for courts to determine public authority policy in that a policy is not unlawful simply because a court believes improvements could be made within it. Further, at para [41] of *R(A)*, the UK Supreme Court said the *Gillick* test was straightforward and that it did not involve statistical analysis, of the kind the applicant is inviting in this case, based only on partial information:

> "[41] The test set out in *Gillick* is straightforward to apply. It calls for a comparison of what the relevant law requires and what a policy statement says regarding what a person should do. If the policy directs them to act in a way which contradicts the law it is unlawful. The courts are well placed to make a comparison of normative statements in the law and in the policy, as objectively construed. The test does not depend on a statistical analysis of the extent to which relevant actors might or might not fail to comply with their legal obligations: see also our judgment in *BF (Eritrea)*."

At para [65] of *R(A)* the UK Supreme Court reiterated that challenges to guidance should not be based on the assessment of statistics.

[52] In an earlier part of the *R(A)* judgment, at para [42], the UK Supreme Court said a guidance document was not unlawful because it fails to spell out in fine detail how to assess whether representations should be obtained from an offender:

> "[42] …The Guidance is not defective, still less unlawful, because it does not spell out in fine detail how decision-makers should assess whether to seek representations in a particular case. As in *Gillick*, so also in this case it was not incumbent on the Secretary of State in issuing the Guidance to eliminate every legal uncertainty which might arise in relation to decisions falling within its scope..."

[53] Flitting forward to paras [63] to [66] of the *R(A)* judgment, the UK Supreme Court referred to the importance of having systems in place, including and ending with judicial review (and associated appeals), which would correct errors made in individual cases. However, the existence of errors in individual cases does not demonstrate that a guidance document is unlawful. The issue is whether the guidance was capable of being operated lawfully (bringing it back to the question of whether the policy misdirects the official in law) and that safeguards exist to correct any errors:

> "[63] We agree that this is a fundamental distinction for the purposes of analysis. If it is established that there has

in fact been a breach of the duty of fairness in an individual's case, he is of course entitled to redress for the wrong done to him. It does not matter whether the unfairness was produced by application of a policy or occurred for other reasons. But where the question is whether a policy is unlawful, that issue must be addressed looking at whether the policy can be operated in a lawful way or whether it imposes requirements which mean that it can be seen at the outset that a material and identifiable number of cases will be dealt with in an unlawful way.

[64] In our view, reading the *Refugee Legal Centre* case in this way in line with *Gillick* removes the risk of misunderstanding it as stating an unprincipled and vague test. If one simply asks whether a policy creates an unacceptable risk that an individual will be treated unfairly (which is to say, unlawfully), there is a danger that this could be taken as a freestanding principle distinct from that in *Gillick*, as seems to have been envisaged in *Tabbakh.*

[65] First, it is unclear what the relationship of such a principle is with the authoritative guidance given in *Gillick*. If the principle were that a policy is unlawful if it creates an unacceptable risk that an individual will be treated unlawfully, that is a substantially wider principle than that stated in *Gillick* and is inconsistent with it. There is no sound conceptual basis for separating out unlawfulness due to unfairness from unlawfulness for any other reason. Secondly, a test whether a policy creates an "unacceptable risk" that an individual will be treated unfairly or unlawfully provides no criterion of what makes a risk count as unacceptable. The distinction drawn in *Tabbakh* between whether a policy is inherently unfair or it just leaves a risk of unfairness arising in the ordinary course of individual decision-making is similarly unclear. A determinate criterion is required to distinguish the two cases in a principled way. *Gillick* supplies it. Thirdly, a test for the lawfulness of a policy based on "unacceptable risk" or the like would be a new departure in public law and cannot be regarded as an incremental extension from existing principle. On the contrary, as we have explained, in our opinion it would subvert existing principle. By contrast, if the test of inherent unfairness is applied by reference to the

> principle in *Gillick*, the law supplies a reasonably clear criterion of unlawfulness which has a sound foundation in principle. Fourthly, without such a foundation, the assertion of such a power of review by the courts, in relation to functions (the operation of administrative systems and the statement of applicable policy) which are properly the province of the executive government would represent an unwarranted intrusion by the courts into that province. Anchoring the lawfulness of policy to the principles articulated in *Gillick* avoids that outcome. Fifthly, if one moves away from that principled foundation, there is a risk that a court will be asked to conduct some sort of statistical exercise to see whether there is an unacceptable risk of unfairness, as was urged upon the court in the *BF (Eritrea)* appeal: see our judgment in *BF(Eritrea)* at paras [35] and [41]. But a court is not well equipped to undertake such an analysis based upon experience. In principle, the test for the lawfulness of a policy should be capable of application at the time the policy is promulgated, which will be before any practical experience of how it works from which statistics could be produced. The test for the lawfulness of a policy is not a statistical test but should depend, as the *Gillick* test does, on a comparison of the law and of what is stated to be the behaviour required if the policy is followed. Both aspects of this test are matters on which the court is competent and has the authority to pronounce.
>
> [66] Some of the cases coming after *Refugee Legal Centre* and *Tabbakh* have treated them as authority for such a wider principle of review (is there a real or unjustified risk of unfairness or illegality?) without examination of its consistency with the principles articulated in *Gillick*. In our view, this tendency should be corrected. Statements of such a wider principle have also drawn force from what is in truth a distinct and valid principle of access to justice which was reviewed in detail in *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening) (Nos 1 and 2)* [2017] UKSC 51; [2020] AC 869 *("UNISON"),* discussed below. This has obscured the proper analysis of cases to which that principle applies…"

[54] In *R(A)* the Supreme Court said that the impugned guidance was "clearly lawful" (para [42]). The guidance in that case suggested that police officers should consider whether they needed to seek representations from the offender. It did not mandate a particular procedure or compel contact to be made in all cases. In this

case the applicant argues that direct contact with the individual who is the subject of the complaint should be specifically mandated in the guidance. It is argued by the respondent that is not what the law requires, nor is the omission of such a direction a misstatement of the law. In summary, it is argued by the respondent that even if errors are made in individual cases, as clearly occurred in this case, the current guidance is capable of being operated lawfully and therefore, the test in *Gillick* is not made out.

[55] In *R(BF)* the Court of Appeal of England and Wales had applied a test which asked whether there was a real risk of more than a minimal number of children being affected by the age assessment policy (and potential detention). The respondent argues that the applicant's submissions in this case invite the court to go down a similar road. However, the UK Supreme Court clearly states that this was the wrong approach to adopt. The UK Supreme Court said the Court of Appeal's approach would turn the limited test of unlawfulness set out in *Gillick* into a requirement to issue a policy which removes the risk of possible misapplication of the law on the part of those who are subject to a legal duty (paras [50] to [51]). The UK Supreme Court said that was too wide a test. It held that the Court of Appeal in *R(BF)* was wrong to find the guidance was unlawful because it did not sufficiently remove the risk that immigration officers might make a mistake when assessing the age of an asylum-seeker claiming to be a child. The UK Supreme Court said that it is inherent in the nature of law that a person subject to a legal duty might misunderstand or breach it. If that happens, the remedy is to have access to the courts to compel that person to act in accordance with their duty (para [52]).

[56] In the amended Order 53 statement in this case, the applicant's approach to the *Gillick* test is to allege that by failing to promote direct contact between the decision makers and the individual concerned, the guidance does not sufficiently explain procedural fairness to the relevant decision makers. The respondent argues that there are good reasons for not making direct contact and, even if that were not the case, such an omission would not amount to a misdirection in law.

[57] I am very grateful to the parties' legal representatives for their careful and comprehensive written submissions which I have found very helpful in this case. I am grateful to learned senior counsel for their eloquent and persuasive arguments marshalled and presented over a number of days. I must also state that I was particularly impressed by the approach adopted by the applicant's solicitor in this case in his constructive efforts to engage with the respondent with a view to bringing about improvements in the National Referral Mechanism by suggesting well-reasoned and well-meaning improvements to the guidance issued by the Home Office. Having given this matter careful consideration, I am entirely persuaded by the arguments and submissions marshalled and articulated on behalf of the respondent in this case and I am firmly of the view that the policy and guidance in this case does not fall foul of the test enunciated by the House of Lords in *Gillick* as explained by the Supreme Court in *R(A)* and *R(BF)*.

[58] The guidance does not expressly forbid the Single Competent Authority from seeking further information from the individual concerned or their legal representative. The guidance steers the Single Competent Authority towards seeking further information from the first responder. The rationale for such an approach is set out above at para [39] and is said to chime with trauma informed practice; the guidance having been prepared with the aid of and input from experts in this area. Frankly, it is hopeless to argue that the guidance is unlawful because it does not mandate or positively encourage direct contact between the Single Competent Authority and the individual concerned when the guidance specifically sets out a mechanism for obtaining further information which is consistent with trauma informed practice and that is to seek the information from the first responder in the knowledge that if the first responder does not have that information, the first responder can initiate contact with the individual and obtain that information. This is the process that the guidance clearly envisages will occur and it is hopeless to argue that this is unlawful.

[59] In this case, the decision maker did make a request for further information from the first responder and when the first responder did not respond, a follow up request was sent within the recommended timeframe which was neither acknowledged nor responded to. The guidance highlights the need to make such decisions quickly as delay gives rise to the risk to unnecessary and avoidable distress and this is again an example of trauma informed practice. The decision maker went on to make the decision, which was a negative decision, citing as a reason a lack of detail. It is argued that the policy/guidance is unlawful because it did not deal with such circumstances and in essence should have stipulated that where there is a perceived lack of information and the first responder has not replied to a request for information, the decision maker should make direct contact with the individual before making the Reasonable Grounds Decision in order to try to obtain the information sought.

[60] As clearly stated by the UK Supreme Court, policy/guidance does not have to deal with each and every what if scenario. Nor should a court declare that a policy is unlawful because it does not spell out in precise detail how a decision maker should act when faced with every possible scenario. As stated above, the policy/guidance does not forbid the decision maker from seeking information from the individual directly. It cautions against this approach being adopted for good reasons. It recommends another approach be adopted instead and that is going down the first responder route. There is nothing in the guidance/policy which prevents the decision maker approaching the individual in circumstances where the first responder has failed to respond and in this case the time, effort and cost of this litigation would probably have been avoided if that particular course of action had been followed. However, that does not make the policy/guidance unlawful. This issue really falls into the realm of the individual decision maker's implementation of the policy/guidance.

[61] The second issue raised by the applicant relates to the stipulation in the guidance to the effect that witness statements should not be sought from specific categories of potential victims who may be particularly vulnerable. Again, this guidance is based on advice from those with expertise in trauma informed practice. The guidance stipulates that witness statements should not be sought from such individuals. It does not prevent the Single Competent Authority from accepting and considering witness statements proffered or provided by such applicants. It specifically envisages that such statements may be produced during the National Referral Mechanism process. Indeed, such a statement was produced, accepted and considered in this case. I reiterate that I entirely accept the case put forward on behalf of the respondent in defence of the guidance in this case. The first limb of the applicant's challenge, the challenge to the initial negative Reasonable Grounds Decision, was rendered academic by the subsequent reconsideration and the making of a positive Reasonable Grounds Decision, followed by a positive Conclusive Grounds Decision. The second limb of the applicant's challenge fails for the reasons set out above.

[62] I note that the applicant has the benefit of a legal aid certificate and in the circumstances this application for judicial review is dismissed with no order as to costs other than an order that the applicant's costs be taxed as an assisted person.