Case No: CO/3646/2017

Neutral Citation Number: [2018] EWHC 681 (Admin)
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/03/2018

**Before** :

**PETER MARQUAND**
**(SITTING AS A DEPUTY HIGH COURT JUDGE)**

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**Between:**

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|---|---|
| **OA (Nigeria)** | **Claimant** |
| **- and -** | |
| **Secretary of State for the Home Department** | **Defendant** |

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**Ms Raggi Kotak** (instructed by **Wilsons Solicitors LLP**) for the **Claimant**
**Mr Neil Sheldon** (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 15th March 2018

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# Judgment

**Peter Marquand:**

**Introduction**

1. The Claimant challenges a decision of the Defendant dated 20 June 2017 following his solicitor's request for reconsideration of a negative Reasonable Grounds Decision dated 19 December 2016 made under the National Referral Mechanism (NRM) for identifying victims of modern slavery (this includes human trafficking, slavery, servitude and forced or compulsory labour). The Claimant's case is that a refusal to do so was irrational and unlawful.

2. The Claimant is a Nigerian national. His mother had been living in the UK whilst the Claimant, as a child, remained in Nigeria with his grandmother and half-brothers. The Claimant says he was maltreated and moved to live with his aunt, however, he was neglected and forced to do household chores and sell food on the street. The Claimant's mother discovered this and arranged for him to come to the UK as a child visitor. The Claimant's mother made various applications to remain in the UK, but these were refused.

3. By July 2016, the Claimant was an adult. On 26 October 2016 the Claimant was detained under immigration powers. The Claimant claimed asylum and made a human rights claim on 31 October 2016 and these claims were rejected by the Defendant and certified under section 94(1) of the Nationality, Immigration and Asylum Act 2002 (NIAA) as clearly unfounded.

4. On 12 December 2016, Wilsons Solicitors LLP in a duty advice surgery, advised the Claimant to seek support from the welfare officer as in their opinion there were clear indications that the Claimant was a victim of modern slavery. On 13 December 2016, the Claimant's case was referred to the NRM for an assessment. On 19 December 2016 a negative Reasonable Grounds Decision was made.

5. Subsequently, the Claimant's solicitors obtained an expert report from Dr Naomi Wilson, chartered clinical psychologist, which was sent to the Defendant on 5 June 2017 with a request to reconsider the Reasonable Grounds Decision. In a letter dated 20 June 2017, the Defendant referring to its policy stated that such requests were not accepted from solicitors.

**The legal framework**

6. The United Kingdom Government signed the Council of Europe Convention on Action Against Trafficking in Human Beings on 23 March 2007 and it came into force on 1 April 2009. The NRM is the process through which victims of modern slavery are identified and provided with support. The process is set out in 'Victims of Modern Slavery – Competent Authority Guidance' (the "Guidance") and the relevant version is the third, published on 21 March 2016.

7. The process operates by suspected cases of modern slavery being referred to a 'first responder'. The first responders are specified statutory authorities and non-governmental organisations and the Home Office is one such authority. There are 17 other first responders, including the Salvation Army. Solicitors are not designated as first responders. The first responder's role is to identify a potential victim and make a

referral to the 'Competent Authority'. The two designated competent authority decision-makers are the UK Human Trafficking Centre (UK HTC) within the National Crime Agency and the Home Office. There are seven parts of the Home Office that undertake the Home Office role as a Competent Authority, including UK Visas and Immigration NRM HUB and Detained Asylum Casework.

8. A Competent Authority goes through a two-stage process. First, a decision is made on whether there are 'Reasonable Grounds' to believe an individual is a victim of modern slavery. The threshold is a low one: 'I suspect but cannot prove'. The consequences of such a decision are significant. The potential victim is offered a minimum of 45 days of support (reflection and recovery period) and consideration is given to matters such as granting temporary admission and release from detention. After the reflection and recovery period a competent authority must decide conclusively whether the person is a victim of modern slavery. This is decided on a 'balance of probabilities' and is referred to as the 'Conclusive Grounds' decision. If a positive Conclusive Grounds decision is made, the consequences for the victim in terms of the support that they receive and consideration of Discretionary Leave to Remain are significant.

9. Page 91 of the Guidance is headed "Appeals against a reasonable grounds or Conclusive Grounds decision." It states:

> "If a legal representative…requests a reconsideration from the Competent Authority they should be notified that:
>
> > 'Our policy in the published competent authority guidance clearly sets out that reconsideration requests of NRM decisions may only be made by first responders or support providers involved in the case. You are not the first responder or support provider involved in this NRM case so under the published guidance we cannot reconsider the NRM decision based on your request. There is no breach of our policy as you are not entitled to make a reconsideration request in our guidance.
> >
> > It is open to you to request reconsideration via a first responder or a support provider involved in the case. If a support provider or first responder submits a reconsideration request in this case it may be considered in line with the published guidance.'"

10. There is a positive obligation on the Defendant to investigate potential victims of modern slavery and to protect and assist victims. There is no dispute between the parties on the legal framework.

**The material facts**

11. On 13 December 2016 the Claimant, acting in person, filed a Judicial Review Claim Form in the Upper Tribunal Immigration and Asylum Chamber. The decision that he challenged was the certification under section 94(1) NIAA dated 29 November 2016. The Claimant's solicitors sent a pre-action protocol letter dated 23 December 2016 to the Defendant. Amongst other matters it challenged the negative Reasonable Grounds

Decision dated 19 December 2016 and the certification of the asylum claim. By letter dated 5 January 2017 the Defendant confirmed its two previous decisions and on the following day served an Acknowledgement of Service to the Claimant's judicial review.

12. In a letter dated 5 June 2017 the Claimant's solicitors wrote to the Defendant's solicitors, the Government Legal Department (GLD), enclosing a copy of an expert report dated 2 April 2017 prepared by Dr Naomi Wilson, chartered clinical psychologist. The letter included extracts from Dr Wilson's report and the following relevant passages:

> "On 19 December 2016 your client acting as a Competent Authority made a Negative Reasonable Grounds decision in respect of our client's claim to be a victim of modern slavery.
>
> …
>
> We recently received a copy of Dr Naomi Wilson's medico-legal report, which we enclose for your reference.
>
> …
>
> Plainly in the light of Dr Wilson's conclusions we submit that your client's negative Reasonable Grounds decision and your client's certification decision are unsustainable.
>
> For the reasons given above as well as previously, and in the light of Dr Wilson's findings in her medico-legal report we invite your client to reconsider: (i) her Reasonable Grounds decision dated 19th of December 2016; (ii) her decision to refuse and certify our client's asylum claim dated 29th of November 2016.
>
> With a view to saving the Upper Tribunal's time and costs we enclose a draft consent order of your client's consideration…'

13. The GLD's letter in response dated 20 June 2017 contains the decision that is challenged by the Claimant. It stated:

> "You have requested that my client reconsider her decision of 29 November 2016 and the medico-legal report from Dr Naomi Wilson dated 27 February 2017.
>
> My client is not prepared to agree to your proposed consent order. In respect of your request to reconsider your client's trafficking claim, the Respondent's stated policy on such reconsideration is contained in her Guidance titled 'Victims of modern slavery – Competent Authority Guidance', Version 3.0:
>
> [*The letter then reproduces the quote from the Guidance referred to at paragraph* 9 *above*.]

> In respect of your client's asylum claim, your client has the alternative remedy of submitting further representations under paragraph 353 of the Immigration Rules.
>
> As matters presently stand, the report you rely upon post-dates the decision under challenge and there is no unlawfulness in the Respondent failing to consider it.
>
> The Respondent does not therefore agree the Consent Order you propose."

14. The claim was transferred to the High Court under an order dated 1 August 2017 for jurisdictional reasons. The order permitted the Claimant and Defendant to file amended pleadings. The Claimant's solicitors served a further pre-action protocol letter dated 6 September 2017 on the GLD. That letter recorded five challenges including:

> "'The [Defendant's] decision to refuse to reconsider the negative reasonable grounds decision in respect of our client's trafficking claim because a solicitor made the reconsideration request'"

15. In the section on trafficking the letter deals with the GLD's letter dated 20 June 2017 and states:

> "In our letter dated 5 June 2017, we requested that you reconsider the reasonable grounds trafficking decision in the light of the substantial evidence in Dr Wilson's medico-legal report, which confirms our client's vulnerability and confirmed that our client's presentation is consistent with his biographical history of exploitation and trafficking
>
> Notably there is no requirement to meet a fresh claim test in trafficking decisions.
>
> As stated above you declined to reconsider the reasonable grounds decision because we in our capacity as our client's solicitors, rather than a first responder or support provider had made the request.
>
> As you will be aware you are the first responder in our client's case. Notably the Salvation Army declines to make reconsideration requests in circumstances such as our client's because they say that the request has to come from the original first responder. Insofar as this is the case it is irrational to refuse to accept the request from us under the circumstances."

There was no response by the GLD to this letter. The Claimant served amended grounds for judicial review dated 20 September 2017 now including the challenge to the decision of 20 June 2017.

16. The Claimant's solicitors wrote to the Salvation Army on three occasions, 23 November, 27 November and 6 December 2017 asking them as a first responder to make a referral to the competent authority in light of Dr Wilson's medico-legal report. On each occasion the Salvation Army declined to make that referral on the basis that they were not the first responder in the Claimant's case. The Salvation Army in an e-mail of 6 December 2017 referred to the Guidance and pointed out that a request for reconsideration must be made by a support provider or first responder involved in the case.

**The Ground of challenge**

17. At an oral renewal hearing before Philip Mott QC (sitting as a Deputy High Court Judge) the only ground upon which the Claimant obtained permission is as follows:

> "The defendant's decision of 20th June 2017, to refuse to reconsider the claimant's trafficking conclusive decision because it is made by a solicitor, rather than a first responder or support provider is (i) irrational; and (ii) otherwise unlawful."

18. The Claimant was refused permission on the other grounds, in particular, a challenge to the policy in the Guidance of excluding solicitors from the list of first responders. Leave to apply was granted to reopen that ground if the claimant in *R (SW) v SSHD* CO/4926/2017 was successful. The Claimant made an application to vacate the hearing before me and to stay the proceedings behind *SW* but Andrew Thomas QC (sitting as a Deputy High Court Judge) refused that application by order dated 7 March 2018.

**The Parties' submissions and discussion**

19. The Claimant's case is that the Defendant is under a positive obligation to identify victims of trafficking and that obligation is a continuous one. The report of Dr Wilson identifies that the Claimant was not fit to go through the interview processes and it identifies his mental health condition is secondary to trafficking and other experiences. The Claimant points out that the Defendant is both a competent authority and a first responder and a refusal to reconsider based on the report being provided to it as a competent authority by a solicitor is irrational when it could accept the report as a first responder. The Defendant's submissions are that the Claimant's solicitors letter of 5 June 2017 was sent during litigation specifically inviting the competent authority to reconsider its reasonable grounds decision. The response from the GLD was in accordance with the Defendant's policy and quoted that policy exactly. The policy itself is not under challenge and there can be no question of any irrationality or unlawfulness when informing the Claimant's solicitors that their request fell outside the scope of the policy.

20. The letter from the Claimant dated 5 June 2017 was clearly directed to the Defendant in its role as competent authority. The letter expressly uses that terminology and invites the Defendant as competent authority to reconsider the reasonable grounds decision. The letter has also been sent in the context of ongoing litigation to persuade the Defendant to retake both the reasonable grounds decision and the certification decision in the light of Dr Wilson's evidence. The response of the Defendant correctly points out that as Dr Wilson's report was not before the decision maker it is not

something that has to be taken into account in relation to the challenges against the original decisions.

21. At this stage, the Claimant does not raise the point with the Defendant that it is also a first responder and request that it act in that capacity to refer Dr Wilson's report to the competent authority. Furthermore, the Claimant has not yet tried to approach another first responder or identified the problem that is subsequently encountered, when the Salvation Army declined to act. The Claimant's solicitors do not know at this point if the Salvation Army will be prepared to make a referral. They cannot make that point to the Defendant as on the facts it has not arisen. The first time the Claimant's solicitor raises this potential difficulty with the Defendant is in the letter dated 6 September 2017 (see paragraph 14) when it is stated that the Defendant was also the first responder. In that letter there is a reference to the Salvation Army declining to make reconsideration requests, but this must have been based on the solicitor's general knowledge as the correspondence with the Salvation Army does not take place until November/December 2017.

22. The Claimant's case conflates the response of 20 June with subsequent events when the Salvation Army said it would not make the referral. If on the 20 June that was known, then it may be that a refusal to reconsider would be irrational and/or in breach of legal obligations towards potential victims of modern slavery as there would seem to be no other way of the new information being considered. However, what the Defendant did was to follow its own published policy (which is not subject to challenge in this case). That policy has been developed taking into account a number of considerations about why referrals are not accepted from solicitors. It is not irrational or otherwise unlawful to follow the published policy when the factual position as at the 20 June matched the policy guidance exactly and the Claimant was not left in a position where there was no question of the material being considered. The Defendant's decision properly characterised was not a refusal to reconsider the Reasonable Grounds Decision, but rather a decision to follow the Guidance and inform the Claimant's solicitors of the way in which Dr Wilson's report should be handled. The decision was not unlawful.

**Conclusion**

23. For the reasons I have given, the ground of challenge fails. Accordingly, this claim is dismissed.