R (on the application of FT) v Secretary of State for the Home Department ("rolling review"; challenging leave granted) [2017] UKUT 00331(IAC)

# Upper Tribunal
# Immigration and Asylum Chamber

# Judicial Review Decision Notice

**The Queen on the application of FT**
(Anonymity Direction Made)

**Applicant**

**v**

**Secretary of State for the Home Department**

**Respondent**

**Before Mrs Justice Cheema-Grubb**
**Upper Tribunal Judge Blum**

**Application for judicial review: substantive decision**

Having considered all documents lodged and having heard the parties' respective representatives, Ms M Knorr, of Counsel, instructed by Wilson Solicitors LLP, on behalf of the applicant and Mr Z Malik, of Counsel, instructed by the Government Legal Department, on behalf of the respondent, at a hearing at Field House, London on 09 June 2017.

1. *The intrinsic undesirability of and the strong general presumption against allowing a "rolling review" in judicial review proceedings whereby the Upper Tribunal admits material evidence that has not been considered by the primary decision maker are important factors in considering an application to amend grounds to challenge a supplementary or new decision (see R (Caroopen & Myrie) v SSHD [2016] EWCA Civ 1307). However, the decision whether to allow amendments of the grounds of challenge is a case management decision taking account of all relevant considerations.*

2. *In applying the policy set out in the Competent Authority Guidance and the Discretionary Leave Guidance, the fact of the respondent having "mishandled" the case*

*and the impact of that upon the applicant, are relevant/material considerations in determining the duration of leave to be granted to a Victim of Trafficking.*

3. *Where the respondent has regard to an earlier disengagement from treatment in considering the duration of leave to be granted, a relevant consideration is whether that disengagement from treatment was because of a failure to provide support as a VOT because of an earlier incorrect "conclusive grounds decision".*

**Decision: the application for judicial review is granted**

1. This judicial review application concerns the lawfulness of the duration of leave granted to the applicant, a recognised Victim of Trafficking (VOT).

**Background and procedural history**

2. These proceedings have a long and protracted history. The essential facts giving rise to the applicant's eventual recognition as a VOT are not in dispute. He is a citizen of China born on 26 July 1980. He and his younger sister lived with their parents who fought, often about money. The applicant was frequently beaten by his parents with a rod or leather belt. His mother, with whom the applicant had a particularly fraught relationship, died in the year that he left primary school. His father drank to excess and suffered from liver disease. After an unhappy time at school the applicant obtained work as a manual labourer. During the course of this employment he had quarrels with one of the workers and was subsequently assaulted by police officers acquainted with the worker. The applicant's uncle borrowed a significant sum of money from people traffickers to facilitate his departure from China sometime in 2007 and his clandestine entry into the United Kingdom in August 2007.

3. The applicant remained under the control of the traffickers and was compelled to work, under threat of violence and without remuneration, in a 'cannabis house' where he was locked in and held in debt bondage. On one occasion, having asked to leave, he was threatened with a knife and a gun and his arm was cut causing extensive bleeding and leaving a scar.

4. On 23 November 2007 the applicant was arrested on suspicion of cultivating cannabis. On the day of his arrest he gave a statement to the duty solicitor disclosing indicators of trafficking. These included the borrowing of £17,000 from the traffickers, the absence of any wage for his work, and concern about his indebtedness and the problems he believed may be visited on his family in default of repayment. He was later charged with that offence and he pleaded guilty on 24 November 2007. He was convicted and sentenced to 20 months imprisonment on 31 January 2008.

5. During an interview with immigration officers on 14 March 2008 the applicant claimed asylum. He was not questioned about the arrangements for his travel to the UK, the money owed to the traffickers, or how he came to be working in the cannabis house. Trafficking was not considered as part of his asylum claim. He was taken into immigration detention on 23 September 2008 following

completion of his sentence, and his asylum claim was refused on 11 October 2008. The applicant did not appeal that decision. A deportation order was made against him on 12 November 2008.

6. The applicant remained in immigration detention for nearly 4 years before being released into NASS accommodation on 20 September 2012. He was placed under curfew and electronically tagged. These restrictions were only lifted on 31 March 2016 following the threat of judicial review action. On 15 August 2013 the applicant was referred by the Salvation Army into the National Referral Mechanism (NRM) for the purpose of identifying him as a potential VOT. A positive "reasonable grounds" decision was made on 22 August 2013. A civil claim for damages challenging the lawfulness of the applicant's detention and the failure to identify him as a VOT was issued on 29 September 2013. Those proceedings, which remain outstanding, have been stayed pending the outcome of this litigation.

7. Written representations were provided on behalf of the applicant in support of the awaited "conclusive grounds" decision. These included, *inter alia*, a statement from the applicant (1 November 2013) and a medico-legal report (14 November 2013) prepared by Mary Robertson, a Chartered and Consultant Clinical Psychologist and Head of Service at the Traumatic Stress Clinic, Camden and Islington NHS Foundation Trust. Her medico-legal report diagnosed the applicant with severe Post-Traumatic Stress Disorder (PTSD), a Major Depressive Disorder in the severe range, and anxiety in the moderately severe range.

8. The respondent made negative "conclusive grounds" decisions on 13 January 2014 and 3 March 2014 finding that the applicant was not a VOT. This brought about the end of outreach and financial support that had been provided to him between 23 December 2013 and 23 January 2014 following the initial "reasonable grounds" decision. The "conclusive grounds" decisions were challenged by way of judicial review which ultimately settled by consent. On 02 July 2014, the respondent accepted that the applicant was a VOT but declined to grant him Discretionary Leave (DL) and decided that his deportation would be pursued. This decision was maintained on 17 September 2014 following further submissions by the applicant's representatives that included a letter from a counsellor at Room to Heal dated 08 September 2014, confirming that the applicant attended a lengthy assessment, that he was severely isolated and had great difficulties trusting people, and that he would be well suited to the kind of therapeutic program provided by the organisation. No steps were taken by the respondent to reinstate the applicant's support following her acceptance that he was a VOT.

9. The applicant challenged the decisions dated 2 July 2014 and 17 September 2014 by way of judicial review. He also made a fresh asylum and human rights claim on 5 May 2015. On 12 May 2015 further representations were made seeking a grant of leave to remain in reliance on the respondent's trafficking policy. These representations were accompanied by a letter indicating that the applicant was due to attend an appointment at the Refugee Therapy Centre (RTC), which had offered him counselling, a China country expert report prepared by Dr Jackie Sheehan and documents confirming that an application had been made to the

Criminal Cases Review Commission (CCRC) regarding his conviction. On 15 July 2015, following a grant of permission to proceed with the judicial review, the respondent issued a further decision maintaining her position.

10. The judicial review proceeded to a full hearing. On 3 February 2016, the eve of the 3rd day of that hearing, the respondent withdrew her decisions of 2 July 2014, 17 September 2014 and 15 July 2015. She accepted that her decision of 15 July 2015 was made without having regard to all materially relevant considerations and undertook to review all matters relating to the applicant's case and to issue a fresh decision.

11. A fresh decision was made on 22 April 2016 granting the applicant DL for 6 months (this was formally granted on 18 May 2016 valid until 18 November 2016), and revoking the deportation order. The decision noted however that the applicant remained liable to deportation. This decision read, in material part,

> Due to your personal circumstances, specifically in respect of you [sic] health, it is considered that a period of leave is appropriate in your case. It has been agreed that you will be granted 6 months temporary residence, which will allow you access to medical treatment and public funds. If there are any changes to your situation your leave may be curtailed or extended, depending on the specific nature of such changes … The decision to grant you discretionary leave has been taken in light of the medical evidence that has been supplied in respect of your case. In making any further application, the Secretary of State would expect to see evidence that you have access to treatment. The Secretary of State would also expect that any further application will also include an up-to-date medical assessment.

The decision of 22 April 2016 constitutes the **1st decision** under challenge in these proceedings.

12. The applicant's representatives responded by stating that the grant of 6 months DL was inconsistent with the respondent's Competent Authority Guidance (which provides that leave would normally be granted for a minimum of 12 months and normally up to 30 months), that the applicant was already accessing treatment at the RTC, and that he required more stability than afforded by the grant. The GLD responded stating that the 6-month grant of leave was designed to allow the applicant to "start" treatment and that he could apply for an extension once treatment had commenced. A response from the applicant's representatives on the same day highlighted that the applicant had been accessing counselling treatment since May 2015 which continued to date, that he could not access further specialist trauma-focused treatment until he was in receipt of a more settled immigration status (in reliance on Ms Robertson's report), and that 6 months DL was insufficient for this purpose. The applicant issued a Pre-Action-Protocol Letter on 28 June 2016 and issued this judicial review claim on 21 July 2016. Accompanying the Pre-Action-Protocol Letter was a 2nd report from Ms Robertson dated 3 June 2016. Permission to proceed with the judicial review was granted at an oral renewal hearing on 20 December 2016.

13. Prior to the expiry of his 6 months DL the applicant applied for further leave. On 3 February 2017, in response to this application, the respondent considered the totality of the submissions made on behalf of the applicant. The respondent

explained why she believed the earlier grant of 6 months DL was lawful with reference to the evidence to hand at the relevant date. She then considered the 2nd medical report provided by Ms Robertson, further statements from the applicant dated 16 November 2016 and 13 December 2016, and further correspondence from the RTC. On the basis that there had been a "material change in circumstances", including a reference to preliminary steps taken by the applicant to commence trauma-based therapy with the Helen Bamber Foundation (HBF), the respondent considered it appropriate, in line with her Competent Authority Guidance, to grant the applicant 24 months DL. She declined to grant him ILR maintaining that the applicant's case did not present as having "particularly exceptional compelling or compassionate reasons" in reference to her Discretionary Leave Policy. The respondent found there was "… nothing materially different in this claim compared to others commonly seen by the Secretary of State" and that the applicant's circumstances "… are not unusual at all and nor can they in any way be distinguished from the other cases to the extent it is necessary to deviate from a standard grant of DL." The respondent additionally confirmed that the applicant remained liable to deportation under section 3(5) of the Immigration Act 1971. The decision of 3 February 2017 constitutes the **2nd decision** under challenge.

14. The applicant's conviction of 31 January 2008 was overturned on appeal on 13 February 2017. He made representations on 21 February 2017 and 2 March 2017 raising concerns with the approach taken in the 2nd decision and requesting that the respondent grant him ILR. These representations were accompanied by a report (1 March 2017) by Dr Eileen Walsh, Head of Therapies and a Consultant Clinical Psychologist at the HBF. The respondent responded to those representations on 21 March 2017. She accepted that, in making her decision to grant the applicant 6 months leave on 22 April 2016, she failed to consider evidence from the RTC. She maintained however that the grant of 6 months leave was nevertheless lawful and that the applicant now had the benefit of the full 30 months DL. The respondent did not dispute that the applicant had been diagnosed with PTSD and with a Major Depressive Disorder. There was no challenge within the decision to the standing or expertise of Ms Robertson or Dr Walsh or to their conclusions. In refusing to grant ILR the respondent set out extensive extracts from Dr Walsh's report and, with reference to her Competent Authority Guidance and her Discretionary Leave Guidance, concluded that the applicant's mental health was not so serious as to warrant a grant of ILR exceptionally. She stated,

> To be granted ILR, a case needs to meet a high threshold of not just being unusual but [sic] can be distinguished from other cases to a high degree. Having considered your client's case in the round, and allowing for his mental health diagnosis, it is not considered that this makes his case unusual. Unfortunately, mental health issues and the consequent need for treatment will often occur in trafficking cases. The fact that your client has been diagnosed with such does not, in of itself, make it possible to distinguish his from other cases in the scope of this policy to a high degree.

15. The respondent noted the reluctance by the HBF to treat the applicant whilst in receipt of only 2 years DL but she did not consider that the points raised by Dr Walsh were sufficient 'in of themselves' to warrant a grant of ILR. It was noted

that the applicant had yet to commence substantive treatment and it was unclear and speculative to assume that he would work with the HBF for the duration of any treatment. This conclusion was supported by reference to the absence of any evidence that the applicant had engaged with the therapy offered by Room to Heal for more than one session or that anything arose from an appointment with his GP detailed in a solicitor's letter dated 24 April 2015. The respondent concluded that the applicant's "previous failure to engage" was a "relevant factor" in considering whether to grant him ILR. Noting Dr Walsh's report that the applicant would be unable to access specialist trauma-focused treatment without having sufficient duration of leave to complete it, the respondent concluded that this was, "ultimately … A matter for your client and HBF to discuss further." At paragraph 30 the respondent stated,

> Consideration has been had to the points raised with respect to the handling of your client's case. It is the Secretary of State's position that this does not present as a relevant factor as to whether your client should be given ILR exceptionally.

The decision of 21 March 2017 constitutes the **3rd decision** under challenge.

16. On 26 April 2017 Upper Tribunal Judge Jordan granted permission to the applicant to amend his grounds in order to challenge the decisions of February and March 2017. This was however subject to any application being made by the respondent within 10 days of the order to set it aside. In so doing Judge Jordan stated, "… It is not clear to me whether the amendments render the existing proceedings academic in which case a conventional response is to refuse relief or whether the existing proceedings … remain a practical vehicle for the resolution of the issues remaining between the parties. Whilst the former approach would permit fresh proceedings to be initiated to challenge the later decisions, it may well result in the incidence of further costs." No formal application was made by the respondent within that 10 day period although replacement Detailed Grounds of Defence were received within that time in which the Tribunal were invited to set aside the grant permitting the applicant to amend his grounds on the basis that the judicial review was now academic and in light of the general prohibition against 'rolling review'.

**Basis of the legal challenge**

17. Although there has been an evolution in the scope of the challenge to the 3 decisions, the core criticisms have not shifted to any material degree. The grounds essentially contend that the applicant was entitled to a grant of ILR and that in refusing to issue him ILR or a period of leave greater than that actually granted the respondent acted other than in accordance with the principles established in her guidance, that she failed to take into account relevant considerations and gave weight to legally irrelevant matters, and that she acted perversely. The applicant additionally contends that the inadequacy of the periods of leave granted constitute breaches of his rights protected by articles 3 and 8 of the European Convention on Human Rights (ECHR).

<u>The 1st ground</u>

18. The first detailed ground contends that the respondent failed to take into account, when considering the appropriate duration of leave, her own

mishandling of the applicant's case. Such mishandling, which was not disputed, aggravated the applicant's mental illness, severely undermined his recovery, exacerbated his vulnerability to exploitation, and shattered his sense of trust and safety. The applicant relies extensively on the medicolegal report from Ms Robertson which causally links the deterioration in his mental health to the respondent's acts and omissions.

The 2nd ground

19. Secondly, the applicant contends that the respondent failed to take into account the full circumstances surrounding the discontinuance of his therapy with Room to Heal, and that she acted unreasonably in attaching weight to his perceived failure to engage with treatment. It is argued that no account was taken of the explanations offered for the discontinuance of earlier treatment, which related to the withdraw of the applicant's financial support following the unlawful "conclusive grounds" decision, the nature of that particular treatment (group therapy in which the applicant felt vulnerable and exposed), the applicant's continuous commitment to his therapy sessions at the RTC and his stated commitment to trauma-based therapy and his attendance at HBF.

The 3rd ,4th and 5th grounds

20. The third ground contends that the refusal to grant ILR is inconsistent with the purpose of the Competent Authority Guidance and that the respondent's assessment of and conclusions on the medical evidence, to the effect that the applicant was unable to access the specialist therapy he requires until granted a sufficient period of stability, was unreasonable. Given that the applicant requires lengthy and specialist treatment in relation to his trauma, and given that such treatment can only occur if the applicant has a sense of safety and stability in respect of his immigration status, the refusal to grant ILR was inconsistent with the purpose behind the trafficking policy which was intended to reflect the U.K.'s international obligations under the European Convention on Trafficking. Allied to this are the applicant's fourth and fifth grounds contending that the respondent failed to take into account the applicant's need for stability in order to progress with social recovery, and that she failed to take into account that the grant of limited leave is likely to further undermine his recovery and mental health.

The 6th ground

21. The applicant's sixth ground contends that the refusal to grant ILR constitutes a breach of his article 3 and article 8 ECHR rights and is therefore contrary to section 6 of the Human Rights Act 1998. It is argued that the refusal to grant ILR constitutes a serious interference with the applicant's mental integrity and private life and that such interference reaches the high article 3 threshold of degrading treatment and is disproportionate under article 8. The applicant places much reliance on the Administrative Court decision in *Y v SSHD* [2013] EWHC 2127.

The 7th ground

22. The applicant finally contends that the respondent failed to take into account relevant matters other than the applicant's treatment needs such as his ill-treatment in China, the risk of further trafficking, his vulnerability to exploitation, his increased suicide risk associated with his fears and predicated

on the decline in his mental health, and the likelihood that he would face destitution on return.

23. By way of relief the applicant seeks an order requiring the respondent to exercise her discretion to grant him ILR, alternatively, an order requiring her to reconsider the duration of leave in accordance with her obligations under the Human Rights Act 1998, her relevant policies and all material factors.

**Whether it appropriate to set aside the decision allowing the applicant to amend his grounds**

24. It is apparent from our summary of the history of this matter that the 1st decision has now been superseded by the subsequent grant of 2 years DL. At this juncture it is appropriate to deal with the "rolling review" submissions advanced by Mr Malik and his submission that these proceedings are rendered academic by the grant of 2 years DL. In so doing we remind ourselves of the terms in which Upper Tribunal Judge Jordan granted the applicant permission to amend his grounds.

25. Mr Malik submits that the initial challenge to the decision of 22 April 2016 is now academic given the grant of 2 years DL and the respondent's confirmation that the applicant is not liable for automatic deportation under the UK Borders Act 2007 or the Immigration Act 1971 following the overturning of his conviction. Mr Malik further submits that it would be inappropriate to use the current proceedings as a vehicle to challenge the decisions of 3 February 2017 and 21 March 2017. He relies on a number of authorities that consider the effect of further decisions made in the course of existing judicial review proceedings which the claimants then seek to challenge. These include *R (Tesfay and Ors) v SSHD* [2016] EWCA Civ 415, *R (Naziri and Ors) v SSHD (JR –scope – evidence) IJR* [2015] UKUT 437 (IAC), *R (Rathakrishnan) v SSHD* [2011] EWHC 1406, *R (Bhatti) V Bury MBC* [2013] EWHC 3093 (Admin), *R (Spahiu and Another) v Secretary of State for the Home Department (Judicial review - amendment - principles) IJR* [2016] UKUT 230 (IAC) and *R (Caroopen and Myrie) v Secretary of State for Justice* [2016] EWCA Civ 1307. The 2nd and 3rd decisions were said to be different in character to the 1st decision and, in light of the general undesirability of permitting an applicant to sidestep the usual filtration process in which initial arguability has to be considered, we should set aside the amendments challenging the more recent decisions.

26. For her part Ms Knorr relies on many of the same authorities as well as *R (Turgut) v SSHD* [2000] EWCA Civ 22 and *R (Hussain) v Justice Secretary* [2016] EWCA Civ 1111. She submits that the 2nd and 3rd decisions were to the same effect as the 1st decision and that the core challenge to all three decisions has remained the adequacy of the period of leave granted and the respondent's failure to take account of relevant considerations, including her mishandling of the applicant's status as a VOT. The applicant indicated from the outset his belief that he was entitled to ILR (although we detect a shift in emphasis in respect of the relief sought - the applicant was seeking a longer period of leave "… such as ILR" in his original grounds whilst the amended grounds insist that the only rational decision compatible with the applicant's ECHR rights is a grant of ILR) and has consistently submitted in respect of all 3 decisions that the respondent

failed to take into account relevant considerations in determining the appropriate grant of leave.

27. We have no hesitation in refusing the respondent's application to set aside the decision of Upper Tribunal Judge Jordan. We readily acknowledge the intrinsic undesirability that judicial review proceedings be transacted in circumstances where material evidence on which an applicant seeks to rely has not been considered by the primary decision maker, and that there is a strong general prohibition in contemporary litigation against rolling review by the Upper Tribunal in judicial review proceedings (*R (Naziri and Ors*)). In the present application the respondent has however already considered the further material and has made further decisions. The respondent has not withdrawn her 1st decision. The present situation constitutes a "new materials" type case as described by Lord Justice Underhill in *Caroopen* (at [32]), a situation that has the benefit of detailed consideration by the Court of Appeal in *Turgut*.

28. The applicant has consistently maintained that he is entitled, under the relevant policies, to a grant of leave of adequate duration such as to reflect his need for stability before he can commence specialist medical treatment and to enable him to undertake that treatment, and to reflect his particular personal circumstances (his considerable vulnerability if returned to China and, in particular, the impact upon him of the respondent's 'mishandling' of his claim to be a VOT.) The material issues in respect of the lawfulness of all 3 decisions have remained essentially the same and his targets have not materially shifted. We note that the applicant has formulated his reasons as to why the 2nd and 3rd decision are unlawful and that the respondent has had sufficient opportunity to formulate her response. We note the protracted litigation history in this matter, the significant costs that have been incurred, and the applicant's vulnerability. Ultimately, as acknowledged by both Mr Malik and Ms Knorr, the decision whether to set aside the grant to amend the grounds of challenge is a case management decision taking account of all relevant considerations (see *R (Hussain) v Justice Secretary*, at [20] to [22]). For the reasons stated above we satisfied it is appropriate to maintain the amendments to challenge the 2nd and 3rd decisions.

**The respondent's handling of the applicant's trafficking claim**

29. A key element of the legal challenge concerns the relevance of the manner in which the respondent handled the applicant's VOT case. The applicant essentially contends that the respondent failed to identify him as a VOT in circumstances when he should have been so identified, that she detained him for just short of 4 years when he should have been identified as a VOT, that she made a number of unlawful decisions relating to his status as a VOT, that she failed to initially issue him with any leave as a VOT in circumstances where he was entitled to such leave in accordance with respondent's policy, that he was unlawfully subjected to a curfew and electronic tagging, and that she failed to provide appropriate support to which he was entitled. These factors, it is argued, should have been considered by the respondent when determining the duration of leave granted to the applicant but were not.

30. The respondent does not dispute the factual basis underlying the above assertions. Although the applicant currently has a civil claim for damages in respect of the lawfulness of his detention and other related matters, the fact that he was detained for almost 4 years, and the fact that he was released with an electronic tag and curfew condition in excess of 3 years, is not denied (it is not our place to consider the lawfulness of his near four-year detention). Given the central importance placed by the applicant on the respondent's conduct in determining the lawfulness of the duration of leave granted, it is opportune to now consider that conduct, which we summarise below.

31. A letter from the applicant headed "allegation", which was sent to the respondent sometime in 2009, set out the core elements of his claim to be a VOT. This letter was not acted upon. The applicant remained in immigration detention for just short of 4 years. After leaving immigration detention he was subject to the restrictive NASS regime in which he was provided with vouchers rather than cash. He was also electronically tagged and subject to a curfew. This persisted for some 3 ½ years. We note that the Court in *R (Gedi) v SSHD* [2016] EWCA Civ 409 found that the imposition of a curfew condition and electronic tagging, in a situation similar to that the applicant, to be unlawful.

32. After the "reasonable grounds" decision of 22 August 2013 the respondent should have referred the applicant for support as a potential VOT (which would include safe and appropriate accommodation, cash payments, access to a trafficking support worker, and counselling). The respondent failed to provide the applicant with the appropriate support and he only started receiving some support in December 2013, which only lasted about a month. The respondent made two negative "conclusive grounds" decisions on 13 January 2014 and 3 March 2014, both of which were unlawful and were subsequently withdrawn, and the applicant was finally recognised conclusively as a VOT on 2 July 2014. Significantly, no steps were ever taken by the respondent to reinstate the applicant's support despite the reversal of the "conclusive grounds" decision. We note the various requests made by the applicant's legal representatives for the respondent to comply with her obligations to support the applicant as a VOT, which met with little or no response (this include correspondence dated 5 May 2015, 12 May 2015, 5 June 2015, 19 August 2015, 2 March 2016, 9 March 2016, 14 March 2016 and 28 June 2016). The respondent unlawfully failed to provide to the applicant any grant of leave, decisions which were successfully challenged by way of judicial review and which eventually led to the grant of 6 months leave on 22 April 2016.

**The medical evidence**

33. The applicant's grounds rely heavily on the medical evidence provided to the respondent. The following is a summary of that evidence.

Medico-legal report by Ms Robertson, 14 November 2013

34. The applicant met the full diagnostic criteria for a diagnosis of PTSD in the severe range. His symptoms included intrusion and re-experiencing events in the form of frequent recurrent nightmares and intrusive memories, particularly in respect of his time in the cannabis house, avoidance of stimuli associated with

trauma and numbing (such as forcing himself to sleep to avoid bad thoughts and loss of interest in activities), and persistent symptoms of increased arousal and hypervigilance (such as getting irritable and angry easily and difficulty in concentrating).

35. The applicant additionally met the full diagnostic criteria for a Major Depressive Disorder in the severe range. Symptoms included depressed mood, diminished interest or pleasure in activities, weight loss, insomnia, loss of energy, feelings of worthlessness or guilt, and diminished ability to concentrate. He also presented with high levels of anxiety, best understood within the context of the PTSD diagnosis and ongoing fear and uncertainty regarding his future.

36. The multiple, severe, and complex problems presented by the applicant resulted from his traumatic experiences, including his trafficking experiences. His symptoms, which had a significant and detrimental impact on his day-to-day functioning, were unlikely to improve without evidence-based psychological treatment and support.

37. The applicant's period in immigration detention led to a deterioration in his mental health and significantly exacerbated his symptoms of depression and anxiety. The uncertainty relating to the period of his detention and the witnessing of other detainees with similar histories being released contributed to his sense of helplessness, disempowerment and despair. His experience of helplessness and loss of control was likely to have triggered and exacerbated his PTSD symptoms, and the failure to recognise and act upon his being a victim of trafficking was very likely to have resulted in a further shattering of his sense of trust and safety. An earlier release and public acknowledgement of his suffering and exploitation would have helped towards restoring some sense of meaning and moral order. His prolonged detention exacerbated his difficulties trusting other people, especially those in authority, which is likely to impact on his interpersonal relationships in the future and his overall recovery.

38. Removal to China would have a significant and negative impact on the applicant's mental health. His risk of suicide would increase significantly as he believes he would be in extreme danger from his traffickers. Removal would increase feelings of helplessness and hopelessness and would exacerbate his depression and PTSD. On his account he would face a lack of social support in China. His difficulty in trusting people and building new relationships, coupled with his poor mental health, would make it difficult for the applicant to seek help and support in China. If removed he would be at risk of homelessness and destitution, and would not have the emotional resources to cope with that sort of situation making him more vulnerable to further abuse and exploitation, particularly given his mental health problems and his difficulty in asserting his rights and seeking help.

39. For individuals with the applicant's complex psychological presentation the expert recommended a service specialising in the treatment of complex trauma presentations which may require at least 40 sessions of treatment. She recommended evidence-based psychological treatment which would include stabilisation and ensuring a sense of safety prior to engaging in trauma-focused treatment. Only once this has been established could he engage in trauma

focused treatment aimed at reducing his symptoms of PTSD. Given the chronic nature of the applicant's experiences, including having experienced trauma as a minor, Ms Robertson recommended that he be offered long-term psychological therapy in a specialist service. She did not believe that he would be able to engage in trauma focused psychological treatment whilst still in a situation of uncertainty regarding his future. This would prevent him from establishing the required sense of safety necessary for treatment and would trigger trauma memories maintaining and exacerbating his PTSD.

Letter from Room to Heal councillor, Mr Caglar, dated 8 September 2014

40. The applicant attended a lengthy assessment process comprising 4 sessions between 30 January and 27 February 2014. It was clear that he was severely isolated and had great difficulty trusting other people. He was assessed as being well suited to the kind of therapeutic program offered at the organisation and this was indicated to him. The applicant had however found it very difficult to access Room to Heal services since the assessment, ostensibly because of a lack of funding to enable him to travel but also probably because of his traumatic history and the lack of trust that had ensued from this.

Refugee Therapy Centre (RTC) letter, 28th of April 2015

41. This brief letter indicated that the organisation would be glad to work with the applicant therapeutically and would invite him for an assessment appointment when a vacancy arose. The letter further noted that the organisation's policy was that their councillors and psychotherapists did not provide reports for external agencies in any circumstances.

Statement from the applicant dated 26 November 2015, and a statement from Nina Rathbone Pullen, solicitor of Wilson solicitors LLP, dated 30 November 2015

42. In his statement the applicant maintained that he started attending sessions at the RTC which lasted 1 hour every Friday afternoon. These were one-to-one sessions with a councillor. The sessions, which were very good and positively affected his mood, were ongoing. In her statement Ms Rathbone-Pullen confirmed that she made efforts to obtain a letter from the RTC to confirm that the applicant attended weekly one-to-one specialist counselling sessions. This information was confirmed to her over the telephone by the RTC.

2nd medicolegal report from Mary Robertson, dated 3 June 2016

43. Ms Robertson described in some detail the benefits received by the applicant from his weekly therapy sessions at the RTC. These were very important to him and played a significant role in helping him cope with his difficulties and managing his feelings of hopelessness. The applicant had built a trusting relationship with his therapist.

44. The applicant was again assessed as suffering from PTSD in the severe range. There had been a slight reduction in the frequency of his daytime intrusive memories, and he also felt more able to manage his distress when he had these memories by distracting himself with other things. He experienced symptoms

well in excess of those required for a diagnosis of PTSD, and his symptoms caused him significant distress and impairment in all areas of functioning.

45. The applicant still met the full diagnostic criteria for a Major Depressive Disorder, which was now reduced to the moderately severe range. He also presented with high levels of anxiety in the moderately severe range. This was a slight reduction in severity comparison with the conclusions of Ms Robertson's 2013 report.

46. Despite the slight reduction in some of his PTSD symptoms the applicant continued to have frequent and distressing nightmares causing significant impairment to his sleep and there was little change in his symptoms of avoidance. He continued to have difficulties relating to increased arousal and presented as much angrier than in the previous assessment. In the expert's view this anger had been exacerbated by the prolonged period of detention and electronic tagging and his associated sense of injustice, and the long delay in investigating his trafficking claim and in resolving his immigration status. There had been no significant clinical improvement in his symptoms since the last assessment. The applicant still experienced symptoms at clinically significant levels which interfered with his day-to-day functioning and overall quality of life. His symptoms were severe, complex and chronic.

47. A decision to return the applicant to China would shatter any sense of hope for a better future and would exacerbate his sense of failure and associated helplessness. Several factors were identified as placing him at increased risk of suicide. His removal to China would have a severe detrimental impact on his mental health and would increase his sense of hopelessness and despair. Given his difficulty in forming relationships and feelings of isolation, together with his other mental health difficulties, he would encounter difficulty in seeking help and support, if this was available, causing significant deterioration in his already fragile mental health. An inability to take the necessary steps to provide for his basic needs would place him at increased risk of destitution and homelessness and he lacked the emotional resources to cope with such a situation. A significant worsening of his mental health symptoms would render him extremely vulnerable and at risk of suicide.

48. In the expert's opinion 6 months DL was inadequate for the applicant to start the recovery process. Based on her clinical experience of patients with similar presentations the applicant would require at least 40 sessions of treatment (up to 2 years of treatment) within a service specialising in the treatment of complex trauma presentations. Without this treatment his PTSD was very unlikely to improve. The counselling he receives from the RTC is supportive and present focused but is not focused on recovery from PTSD, although Ms Robertson believes that the RTC treatment is nevertheless extremely important as stabilising treatment in the interim.

49. The applicant would be unable to engage in trauma-focused treatment with 6 months DL as this was insufficient time to complete the treatment and would not provide him with the necessary sense of safety required before this type of treatment could commence. He required a secure form of leave such as refugee status or ILR. Any short grant of leave would still carry the risk of return and

would be a barrier to his feeling sufficiently secure and stable to engage in the required treatment. Clinicians would not commence trauma focused treatment with the applicant as it would be clinically contra indicated to embark on a course of treatment without any guarantee that this could be completed. Trauma focused treatment involves "re-living" past traumatic events which the patient has been trying to avoid. This can result in increased levels of distress and an increase in symptoms and is therefore contra indicated in patients who are currently facing highly stressful situations such as the threat of removal. Interrupting treatment midway through the process of trauma- focused therapy would potentially leave the applicant in a psychologically aroused and vulnerable state and for this reason he would not be offered such treatment while facing this level of uncertainty regarding his future.

50. Given the chronicity and severity of the applicant's condition, it is highly unlikely that he will recover without the recommended treatment. Without this treatment he is likely to experience significant difficulties in all areas of his functioning including his relationships, and his occupational and social functioning.

51. In the expert's opinion the applicant's mental health needs were a consequence both of his experiences as a victim of trafficking and the lengthy period of detention and electronic tagging. The electronic tagging between September 2012 and March 2016 was, in the expert's view, extremely detrimental to the applicant's mental health. The experience of tagging further reinforced his feelings of shame and negative beliefs about himself which exacerbated his mental health difficulties. The lengthy period of electronic tagging was one of the main reasons for the applicant's increased anger as this left him feeling imprisoned and aggravated his low self-esteem.

Report of Dr Eileen Walsh, qualified clinical psychologist, Head of Therapies at the HBF, 1 March 2017

52. When the report was composed the applicant had been seen by the HBF for 6 psychological assessments and stabilisation sessions. The therapy team planned to offer him trauma-focused treatment for PTSD as soon as his social circumstances were stable enough for this treatment to be appropriate. Dr Walsh also found that the applicant met the diagnostic criteria for PTSD and Major Depressive Disorder relating to his experiences, and that his symptoms for both were chronic and severe.

53. Dr Walsh agreed with Ms Robertson's opinion that the applicant was likely to need long-term treatment, of at least 2 years duration, and that while active trauma-focused psychological treatment may take between 2 and 3 years the applicant was highly likely to continue to need social care support for a longer period of time in order to facilitate rebuilding his life. Whilst he could in theory start treatment while his leave to remain is short-term and unstable, this would not be clinically recommended and nor would it be likely to be effective particularly during the latter part of his two-year grant of leave to remain. It is highly likely that progression of treatment will be detrimentally affected by his leave gradually reducing. Dr Walsh would not expect the applicant to be able to continue with trauma-focused treatment with his leave gradually expiring and

he was unlikely to be able to engage in other aspects of his recovery within a timeframe limited to 2 years. Any attempts to develop personal friendships and or a partner relationship will be severely affected by the possibility that he would be unable to pursue these relationships if removed after 2 years. This aspect of his recovery was of key importance given the impact of his very extended adverse experiences, and was at least as important as the psychological treatment.

54. The commencement of specialist trauma-focused treatment without having leave of sufficient duration was not recommended in the clinical guidelines, and would not be professionally ethical. Whilst the applicant could be offered stabilisation work to manage his symptoms and help with coping with his very difficult circumstances, Dr Walsh would not be willing to commence a course of trauma-focused treatment with this uncertainty. While the applicant will be offered coping strategies, and HBF would liaise with his GP and other NHS services in relation to his mental health needs, he would not be able to obtain the only evidence-based treatment for his main mental health problem.

**Relevant legal framework**

55. The source of the respondent's power to grant leave to remain stems from the Immigration Act 1971. Section 3(1) of the Immigration Act 1971 reads:

> (1) Except as otherwise provided by or under this Act, where a person is not a British citizen—
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;
>
> (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;

56. Section 4(1) of the Immigration Act 1971 states:

> The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the power to give leave to remain in the United Kingdom, or to vary any leave under section 3(3)(a) (whether as regards duration or conditions) or to cancel any leave under section 3C(3A), shall be exercised by the Secretary of State;

57. Article 11(2) of Council Directive 2011/306/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims imposes a freestanding duty to provide a trafficked person with assistance and support as soon as the competent authorities have a "reasonable grounds" indication for believing that the person might be a VOT. *R (Galdikas) v SSHD* [2016] EWHC 942 (Admin) confirms that consideration of an application for DL in compliance with the Directive includes consideration of the duty to provide support under Article 11(2).

58. The Council of Europe Convention on Action against Trafficking in Human Being (ECAT) is an unincorporated treaty and cannot be relied on directly by the

applicant (see *R (Galdikas)* at [66][1]). The respondent's trafficking guidance has however specifically adopted parts of ECAT and, to this extent, the Convention and its Explanatory Note remain of relevance. Article 14 of ECAT states:

> 1. Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:
> a) the competent authority considers that their stay is necessary owing to their personal situation;
> b) the competent authority considers that their stay is necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings.

59. Paragraph 181 of the Explanatory Note identifies factors rendering unsatisfactory the immediate return of victims to their countries. These include a fear of reprisals by the traffickers, either against the victims themselves or against family or friends in the country of origin. Paragraph 184 indicates that the personal situation requirement takes in a range of situations, depending on whether it is the victim safety, state of health, family situation or some other factor which has to be taken into account.

60. The respondent's policy, 'Victims of Slavery – Competent Authority Guidance', version 3.0, 21 March 2016, implements parts of the ECAT. This policy reads, in material part:

> **When is discretionary leave to remain relevant?**
> Someone will not normally qualify for a grant of leave solely because they have been identified as a victim of human trafficking or slavery, servitude and forced or compulsory labour – there must be compelling reasons based on their individual circumstances to justify a grant of discretionary leave, where they do not qualify for other leave on any other basis such as asylum or humanitarian protection.
>
> **Criteria for granting Discretionary Leave to Remain**
> A grant of discretionary leave will be considered where the Competent Authority has conclusively identified (with a positive conclusive grounds decision) that an individual is a victim of trafficking (within the meaning of Article 4 of the Council of Europe Convention on Action against Trafficking in Human Beings) and either:
> they have particularly compelling personal circumstances which justify a grant of discretionary leave to allow them to remain in the UK for a temporary period of time
> …
> Each case must be considered on its individual merits and in full compliance with the UK's obligations under EU Directive 2011/36 on preventing and combating trafficking and the Council of Europe Convention on Action against Trafficking in Human Beings.
>
> **Personal circumstances**
> When a victim receives a positive conclusive grounds decision, it may be appropriate to grant a victim of modern slavery a period of discretionary leave

[1] Ms Knorr referred us to a recent decision of the European Court of Human Rights, *Chowdhury v Greece* (Application no. 21884/15) suggesting that the approach in R (Galdikas) may need to be revised, but she accepted that this was not relevant for our consideration

to remain in the UK if their personal circumstances are compelling, in line with Article 14 of the Council of Europe Convention on Action against Trafficking in Human Beings. This must be considered in line with the discretionary leave policy.
Personal circumstances might mean for example, to allow them to finish a course of medical treatment that would not be readily available if they were to return home. Such leave would normally be granted for the duration of the course of treatment or up to 30 months, whichever is shorter.

**Period of discretionary leave grants**
The period of leave will depend on the individual facts of the case and should be for the amount of time required, without further grants of discretionary leave being necessary in most cases. However, leave should normally be granted for a minimum of 12 months, and normally no more than 30 months. However, shorter or longer periods may be granted if the facts of the case justify it in accordance with the discretionary leave guidance.
Once the leave expires, a further period of leave may be granted subject to the following process (see Process for further applications for discretionary leave), whether by formal request from the police or via an application form from the individual victim as appropriate and paying the fee as specified in this guidance. Where they continue to meet the relevant criteria under the policy further leave may be granted.
Where someone is granted an initial period of discretionary leave this does not necessarily mean they are entitled to further leave or settlement.
Further details on granting or refusing discretionary leave and the duration of leave can be found in the discretionary leave guidance.

**Requests for indefinite leave to remain**
There is no requirement under the European Convention to issue indefinite leave to remain (ILR) to confirmed victims and the threshold for a grant of ILR outside the Immigration Rules is a high one.
Any request for ILR from a person who has had a conclusive grounds decision from the NRM should be considered in line with the approach to ILR set out in the discretionary leave guidance. Every case will be considered on its merits.

61. The respondent's Asylum Policy Instructions on Discretionary Leave (DL Guidance), 18 August 2015, reads, in material part:

5.3 Non-standard grant periods: longer periods of stay
There may be cases where a longer period of leave is considered appropriate, either because it is in the best interests of a child (and any countervailing considerations do not outweigh those best interests), or because there are other particularly exceptional compelling or compassionate reasons to grant leave for a longer period (or ILR). In cases not involving children (as the main applicant or as dependants), there must be sufficient evidence to demonstrate that the individual circumstances of the case are not just unusual but can be distinguished to a high degree from other cases to the extent that it is necessary to deviate from a standard grant of DL under this policy.

5.4 Modern Slavery cases (including trafficking)
Where a person qualifies for DL under the criteria relating to personal circumstances, helping police with enquires or pursuing compensation the period of leave to be granted will depend on the individual facts of the case and should normally be sufficient to cover the amount of time it is anticipated they will need to remain in the UK. However, leave should normally be granted for a

minimum of 12 months, and normally not more than 30 months (2.5 years). A further period of leave may be granted if required and appropriate.

**DISCUSSION**

62. Our summary at [5] to [10] and [29] to [54] of the procedural history and the medical evidence, unchallenged by the respondent, compels us to three inescapable conclusions. Firstly, there has been 'mishandling' by the respondent. She does not deny this in any of her decisions, in her responses to the Pre-Action-Protocol Letters, or her Detailed Grounds of Defence. As Mr Malik stated during the course of his submissions, "no one disagrees that the applicant should have been recognised as a victim of trafficking at an early stage." He accepted there were problems with the way in which the applicant's case was dealt with. The failure to provide assistance and support to VOTs when such a request has been made is contrary to Article 11 of Directive 2011/36/EU, Article 12 of ECAT, and the aims of the NRM (see *R (Galdikas)* at [44] and *R(Atamewan) v SSHD* [2014] 1 WLR, at [37]).

63. Secondly, that the respondent's actions and omissions that constituted her mishandling of the applicant's case contributed to the severity of the applicant's mental health condition by aggravating his pre-existing PTSD and his Major Depressive Disorder.

64. Thirdly, all the medical evidence flows in one direction. It has not been challenged. Mr Malik had "no particular submissions" to make in respect of the medical evidence and said "it is what it is." The medical evidence indicates in clear terms that the applicant requires specialist trauma-focused treatment and that such treatment cannot effectively or ethically be initiated until he feels that he is in a stable and secure position.

65. Our assessment of the legal framework set out at [55] to [61] leads us to the following conclusions. There is no entitlement to a grant of ILR in either the Directive or ECAT. Sections 3 and 4 of the Immigration Act 1971 give a broad discretion to the respondent to decide whether to grant leave to remain and, if so, for how long (see *IT (Sierra Leone) v SSHD* [2010] EWCA Civ 787, at [15], per Pill LJ, and *R (Alladin) v SSHD* [2014] EWCA Civ 1334, at [53], per Floyd LJ). The terms of the Competent Authority Guidance, in particular those detailed under the headings 'Criteria for granting Discretionary Leave to Remain', 'Personal Circumstances' and the 'Period of discretionary leave grants' indicate a relatively wide degree of flexibility, although the range of decisions reached by the respondent must be in full compliance with the U.K.'s obligations under the Directive and the relevant Articles of ECAT. We note that in determining whether to grant a period of DL an individual's personal circumstances must be compelling and that the period of leave will depend on the individual facts of the case. There is no challenge to the policy which states that the period of leave granted should be for the amount of time required, without further grants of DL being necessary "in most cases." There is therefore a degree of flexibility within the Competent Authority Guidance, and by reference to the Discretionary Leave Guidance, entitling the respondent to bestow a grant of DL greater than 30 months depending on the individual facts of the case.

66. The Discretionary Leave Guidance, which is to be applied in respect of a request for ILR, establishes a high threshold for such a grant outside the immigration rules. Paragraph 5.3 of the Guidance indicates that ILR or a longer period of DL will be appropriate where there are particularly exceptional compelling or compassionate reasons, and that there must be sufficient evidence to demonstrate that the individual circumstances of the case are not just unusual but can be distinguished to a high degree from other cases. Both the Competent Authority Guidance and the Discretionary Leave Guidance refer to the individual facts or circumstances of the case, suggesting that a range of factors may be relevant and which will be determined on a case by case basis.

The 1st ground

67. With these conclusions firmly in mind we proceed to consider the 1st ground of challenge. In her response, dated 19 July 2016, to the Pre-Action-Protocol Letter dated 28 June 2016, the respondent indicated that, "Consideration has been given to your claim that your client should be granted a longer period of discretionary leave as a consequence of your client's previous treatment by the Secretary of State. This point is rejected. It is not considered that this factor, in of itself, presents as sufficient cause to extend the grant of discretionary leave." This response suggests that the manner in which the respondent dealt with the applicant's status as a VOT was at least a relevant factor, although not one that was sufficient on its own to warrant an extended grant of DL. It is however apparent from paragraph 30 of the 3rd decision under challenge that the respondent did not consider her handling of the applicant's case as being a relevant factor at all. The respondent's position between her response of 19 July 2016 and her decision of 21 March 2017 appears to have shifted.

68. In his written and oral submissions Mr Malik submits that, whilst the applicant may have been the subject of a historic wrong, this is irrelevant for the purpose of determining the duration of leave granted. It is not the Tribunal's role to express its displeasure at maladministration by issuing to the applicant a period of leave to which he is not entitled. In support of his contention Mr Malik relies on the authorities of *R (S) v SSHD* [2007] EWCA Civ 546 and T*N (Afghanistan) v SSHD* [2015] UKSC 40.

69. In *R(S)* the Court of Appeal considered *R (Rashid) v SSHD* [2005] EWCA Civ 744, which concerned a rejection of a person's asylum claim when that person met the requirements for a grant of leave in accordance with a policy that was unknown to the relevant caseworker but which he or she should have been aware of. The policy had been withdrawn owing to a material change of circumstances when its existence came to light. On application for judicial review the Court of Appeal held that the applicant was entitled to unconditional leave to remain on the basis that there had been an 'abuse of power' as a result of 'conspicuous unfairness' and that the Court could intervene to give such relief as was properly and appropriately open to it. It is relevant to note that Mr Rashid was not entitled to any grant of leave by virtue of any applicable policy when the Court of Appeal granted its relief.

70. The reasoning in *Rashid* met criticism in *R(S)*. Carnwath LJ found the reasoning to be not "altogether convincing". The 'abuse of power' was not a special or extreme category of illegality but rather a 'general concept' underlying other

'particular forms' [40]. At [41] Carnwath LJ noted that the Court's proper sphere was illegality and not maladministration. It was the unlawfulness, not the cause of it, which justified the Court's intervention and provided the basis for the remedy. At [46] Carnwath LJ noted that the Court itself had no power to grant ILR. Nor did it have power to direct the Secretary of State to grant ILR. The power and the discretion rested with the Secretary of State. It was however open to the Court to determine that a legally material factor in the exercise of the Secretary of State's discretion was the correction of injustice. Further, in an extreme case, the Court could hold that the unfairness was so obvious, and the remedy so plain, that there was only one way in which the Secretary of State could reasonably exercise his discretion. On its particular facts (which concerned the Secretary of State's fettering of discretion by deferring consideration of a whole class of applicants for no good reason and without consideration of the effects on the applicants) the decision in *R(S)* was remitted to the Secretary of State to be re-determined in light of the Court judgement, with the expected consequence that the claimant would be granted ILR. We once again note that the claimant in *R(S)* was not entitled to any grant of leave by virtue of any policy in existence at the date the challenged decision was made.

71. In *TN (Afghanistan)* the Supreme Court overturned *Rashid* holding that it was not proper for a Court to require the respondent to grant unconditional leave to an individual who would not be entitled to such relief under current policy (or who did not have a current right to remain in the UK on other grounds, such as article 8) as a form of relief for an earlier error or breach of obligation [at 72].

72. The authorities relied on by Mr Malik, including *R (S)* and *TN*, all relate to instances where individuals sought ILR in order to correct an historic injustice in circumstances where there existed no other relevant basis making provision for a grant of leave to remain to those individuals. That is not the case on the present facts. Unlike the individuals in the aforementioned authorities the applicant does fall within a policy that enables the respondent to grant him a period of leave, that being the Competent Authority Guidance. That the applicant met the terms of the policy allowing for a grant of leave to remain is readily apparent from the two periods of DL already granted to him. The present case is not one where the injustice has "lost current significance due to the passage of time" (see *TN* at [58] and [59]).

73. We have considered the Competent Authority Guidance and the Discretionary Leave Guidance (see [60] and [61] above). Nothing in the wording of either Guidance expressly excludes the respondent's conduct from being taken into account when assessing 'the individual facts of the case', and the impact on the applicant of that conduct, from constituting a relevant consideration. We are satisfied that this is a case where the respondent's conduct has "causative relevance" to the applicant's entitlement to leave to remain (*TN*, at [52] and [53]) by reference to the causative link, contained in the unchallenged medical evidence, between her mishandling of his case and the exacerbation of his mental health symptoms.

74. Given that the respondent refused to take into account her own conduct in determining the duration of the leave granted, we are satisfied that she failed to take into account a relevant consideration. Had she fully considered her own

conduct and the impact of her conduct on the applicant's mental health, she may have concluded that the applicant was either entitled, in compliance with her Competent Authority Guidance and her Discretionary Leave Guidance, to a grant of leave in excess of 30 months, or that the very high threshold needed to warrant a grant of ILR was met. In reaching this conclusion we note in particular the unchallenged expert opinion by Ms Robertson that the applicant's symptoms were most likely aggravated by his prolonged period of immigration detention, the imposition of a curfew and electronic tagging, the restrictions of the NASS regime and long delay in investigating his trafficking claim. Ms Robertson concluded that being subject to electronic tagging between September 2012 and March 2016 was extremely detrimental to the applicant's mental health. The experience of being tagged and subjected to a curfew each night was similar to being in detention and further reinforced his feelings of shame and which exacerbated his mental health difficulties. We find that the 1st ground is made out as the respondent failed to take account of a relevant matter in determining the duration of leave.

The second ground

75. We now consider the 2nd of the applicant's grounds. Part of the respondent's justification for refusing to issue the applicant ILR, contained in her 3rd decision, was that it was considered unclear and speculative to assume that the applicant would work with HBF for the duration of any treatment. This, in turn was premised on the absence of any reason provided by the applicant for his failure to pursue therapy with Room to Heal, as disclosed in the letter of 8 September 2014, and the absence of anything arising from a referral in a letter written to Dr Theymozhi by the applicant's representatives on 24 April 2015. The respondent therefore considered that the applicant's "previous failure to engage presents as a relevant factor for the purposes of this consideration and that it is reasonable to give weight to them." The applicant contends that this approach is unreasonable and that, in reaching her conclusion, the respondent failed to take into account the explanations provided in the evidence before her as to why there had been no lasting engagement with the treatment offered by Room to Heal.

76. We find little merit in the challenge, to the limited extent that it is advanced, that this aspect of the respondent's reasoning was perverse in the *Wednesbury* sense. An individual's history of engagement with medical treatment is rationally relevant to an assessment as to whether that individual will engage in further medical treatment, and therefore relevant to the assessment of what period of leave ought to be granted to enable that medical treatment to be undertaken. Within the parameters of a rationality challenge, we do not find that the respondent has acted unreasonably.

77. We are however satisfied that the conclusion that no reasons were provided for the applicant's failure to engage in treatment offered by Room to Heal failed to take into account material evidence. Despite replicating the relevant part of the Room to Heal letter in her 3rd decision, the respondent has not engaged with the reasons proffered within that letter for the appellant's reluctance to continue that specific treatment. As can be seen from [40] above, the applicant found it difficult to access the services offered by the organisation ostensibly because of a lack of funding to enable him to travel to their offices, but also as a result of his traumatic history and the lack of trust that ensued from this.

78. The unchallenged history in the evidence presented to the respondent indicated that his support as a VOT, including cash support, had been cut off as a result of the respondent's unlawful "conclusive grounds decision". This supported the assertions relating to lack of funds. In his statement of 12 May 2015 the applicant describes the difficulties he encountered in trying to get to Room to Heal without money, and that he felt exposed within the group therapy. In Ms Robertson's 2nd medico-legal report (at 10.8) she recounted how the applicant said he had not felt safe or comfortable at Room to Heal as there were too many strangers. He started going there very soon after his release from detention when he was still very unwell and when he did not trust anyone and had little sense of safety.

79. Nor are we satisfied that the respondent has given adequate consideration to the subsequent evidence from the RTC indicating that the applicant has hardly missed a session, the applicant's own evidence, contained in his statements of 20 July 2016 and 13 December 2016, that he wants to have the trauma-focused therapy, and Dr Walsh's evidence that the applicant attended the HBF on at least 6 occasions between December 2016 and 1 March 2017. This evidence, when holistically considered, undermines the respondent's assertion that no reasons were provided, and is capable of undermining her assertion that the likelihood of the applicant working with HBF for the duration of any treatment was speculative. It is, at the very least, a further consideration that ought to have been taken into account. The failure by the respondent to take into account the full circumstances surrounding the earlier disengagement with treatment constitutes a failure to take into account relevant considerations. Had those circumstances been taken into account the respondent may have reached a different conclusion both in respect to the period of leave ultimately granted to the applicant, and in respect of the request for ILR. To this extent we find that the 2nd ground is made out.

<u>The 3rd, 4th and 5th grounds</u>

80. We consider it appropriate to consider the applicants 3rd 4th and 5th grounds together. These grounds overlap to a significant extent and are intrinsically interrelated. Properly and holistically considered the grounds can be summarised as follows: in refusing to grant the applicant ILR the respondent has failed to take adequate account of his broader need for stability to achieve recovery, has failed to take into account the conclusions of the medical evidence as to (i) why trauma-focused therapy would not be offered without sufficient stability in the applicant's life, (ii) the anticipated duration of that therapy once it is commenced, and (iii) the continuing impact on the applicant's mental health of his unresolved immigration status, and has acted in contravention of the purpose of her policy and without adequate engagement with the medical evidence. These criticisms can be categorised as a failure to take into account all material considerations, a failure to give legally adequate reasons in the context of the specific evidence before her, and acting in a perverse manner.

81. In her written submissions Ms Knorr argues that, on the particular facts of this case, the only decision open to the respondent, which is consistent with the purpose of the respondent's policy, is to grant ILR. We note once again the absence of any obligation in ECAT, the Directive, or the Guidance, requiring a

Competent Authority to issue permanent residence. The Competent Authority Guidance reflects Article 14 of ECAT which allows for the grant of a renewable residence permit to VOTs in circumstances where the Competent Authority considers that their stay is necessary owing to their personal situation, which can include their medical needs. Mr Malik submits that the reference to the word "stay" in Article 14(1)(a) connotes a temporary period of leave being granted. This is, to some degree, supported by the reference in Article 14 to a "renewable residence permit" which may suggest that the issuance of a residence permit granting indefinite leave was not envisaged in the Convention. Paragraph 187 of the Explanatory Note' indicates that the Convention leaves the length of the residence permit to the party's discretion, but that the parties must set a length compatible with the provision's purpose. We did not however hear detailed submissions on this point and we do not find that Article 14 in any way prevents a grant of ILR. In any event, such a grant is anticipated in the exceptional circumstances identified within the Competent Authority Guidance, by reference to the Discretionary Leave Guidance.

82. In all three decisions the respondent explained that the compelling circumstances justifying a grant of DL arose from the applicant's need for medical treatment. In her 2nd decision she considered there to have been a material change in circumstance as a course of treatment had been identified for the applicant of specific duration and he had taken preliminary steps to commence this treatment by way of his engagements with the HBF. It was on this basis that the grant of 24 months was made. It is therefore clear, and not in dispute, that the compelling reason identified and relied on by the respondent related to the specialist medical treatment offered by HBF, and that the leave was granted in order for the applicant to pursue that specialist trauma-focused therapy.

83. We have already noted that the medical evidence flowed in one direction. The respondent did not identify any basis for challenging the opinions and conclusions of the medical experts. The consistent view of both highly qualified medical experts was that a period of stability was required before the applicant would be able to commence the specialist trauma-based therapy, and that such stability was also necessary to aid a full recovery. We consider, in particular, the view of Dr Walsh that the trauma-focused psychological treatment could take between 2 and 3 years to complete, and that it was neither professionally ethical, nor recommended in the clinical guide lines, for the applicant to commence specialist trauma-focused treatment without having sufficient duration of leave to complete it.

84. In her 3rd decision, whilst not disputing the medical diagnosis, the respondent did not consider that this was sufficient of itself to render the applicant's case so exceptional, by reference to her Competent Authority Guidance and her Discretionary Leave Guidance, such as to warrant a grant of ILR. In so concluding the respondent indicated that she considered the applicant's case in the round and that she made allowance for his mental health diagnosis, and noted that mental health issues and the consequent need for treatment would often occur in trafficking cases.

85. We readily accept that diagnoses of PTSD and depression are likely to occur in a

large number of trafficking cases. We accept that the threshold for a grant of ILR, or a period of leave greater than that identified in the relevant guidance, is a very high one, and we again note the terms of the Competent Authority Guidance that "leave should normally be granted for a minimum of 12 months, and normally no more than 30 months", and the terms of the Discretionary Leave Policy that "there must be sufficient evidence to demonstrate that the individual circumstances of the case are not just usual but can be distinguished to a high degree from other cases to the extent that it is necessary to deviate from a standard grant of DL under this policy." We additionally accept that the respondent has a relatively high degree of flexibility within the terms of the applicable policy guidance when considering the duration of any period of leave granted. We note the extensive citation of the medical evidence in the respondent's 2nd and 3rd decisions. We are additionally mindful of the authorities cited to us supporting the principle that decisions must be 'intelligible 'and 'adequate' such as to enable the reader to understand why the matter was decided as it was, and the absence of an obligation to identify every material consideration in a written decision. The respondent must however determine the period leave to be granted by taking account of the particular facts of each case, and her decision must be in compliance with the overall purpose of the polices, and consistent with the principal reason given by her for granting leave. Our analysis makes clear that the grants of DL both in April 2016 and in February 2017 were to enable the applicant to receive specialist trauma-focused therapy. Having decided that the need and offer of this specialist treatment amounted to a compelling reason sufficient to warrant a grant of DL, the respondent must also have been aware that the period of leave granted, on the basis of all the medical evidence, was insufficient to enable the applicant to commence that treatment.

86. Despite her extensive quoting from the medical reports we are satisfied that the decisions do not adequately engage with the central elements of the medical evidence. Other than by reference to the high threshold for grants of leave beyond 30 months, as detailed in the Competent Authority Guidance, the respondent's reasoning is, at best, opaque. At paragraph 31 of her 3rd decision she does not consider that the points raised by Dr Walsh concerning the difficulties treating the applicant are sufficient "in of themselves" to warrant a grant of ILR exceptionally outside the respondent's published policy. No consideration is given to the possibility of a grant of limited leave beyond 24 months. The only other explanation offered for this conclusion is the applicant's previous failure to engage with the services offered by Room to Heal. However, for the reasons given at [75] to [79] of our decision, we have found that this aspect of her reasoning is unlawful. At paragraph 36 the respondent considers that 2 years DL is sufficient to enable the applicant to commence work with the HBF, and at paragraph 37 she states that the question whether the applicant would be able to access specialist trauma-focused treatment was ultimately a matter for him and HBF to discuss further. This seemingly fails to appreciate that the need for stability is not just to enable the commencement of medical treatment, but to aid full recovery. By restricting her consideration to the actual treatment recommended for the applicant, and by not considering the need for stability as a factor relevant for aiding full recovery, the respondent has failed to take into account a relevant matter when determining duration of leave.

87. The medical basis advanced by both Dr Walsh and Ms Robertson to support a grant of leave of sufficient duration to provide the applicant with the requisite degree of stability has been established on strong grounds. The specialist trauma-focused therapy required by the applicant which constituted the basis for the grant of 2 years DL, cannot be achieved within that period, and it would breach clinical guidelines and be medically unethical to commence that treatment in the meantime. We are not satisfied that the respondent, despite replicating at length extracts from the reports of both Ms Robertson and Dr Walsh, has in fact adequately engaged with the core conclusions of the medical evidence. In our judgement the respondent has failed to provide adequate reasons for refusing to grant ILR and for refusing to grant a period of DL in excess of 2 years in light of the clear and unchallenged medical evidence. This can also be categorised as a failure to take into account relevant considerations.

88. We do not however find that this is such an exceptional case, as understood in *R (S)*, that the respondent would be necessarily compelled to grant the applicant either ILR or a period of DL in excess of that identified in her guidance. We note the very high threshold for a grant of ILR under the Discretionary Leave Guidance and the wide degree of flexibility within that policy and her Trafficking policy. We note Ms Robertson's view that the applicant requires a secure form of leave such as refugee status or ILR. The respondent cannot however be held captive to the conclusions of the medical experts as this would effectively fetter her discretion, although in exercising her discretion she has to take into account and accord appropriate weight to those expert and unchallenged conclusions. Ms Robertson's reports, read holistically, do not assert that only a grant of permanent residence would suffice to establish the requisite degree of stability before trauma-based medical treatment could commence. We have considered with particular care the most recent medico-legal report, that prepared by Dr Walsh. She is the clinician at the organisation that will undertake the proposed trauma focused specialist therapy. Nowhere in her report does she indicate that a grant of ILR is necessary in order to establish the stability required in order to commence specialist treatment and to aid recovery.

<u>The 6th ground</u>

89. The applicant contends that the refusal to grant ILR breaches his article 3 and 8 rights as it constitutes a very serious interference with his mental integrity and private life. In determining whether the challenged decisions are contrary to section 6 of the Human Rights Act 1998 we adopt the principles enunciated in a line of cases including *R (on the application of Nasseri) v Secretary of State for the Home Department* [2009] UKHL 23, *Bank Mellat v HM Treasury (no. 2)* [2013] SC 38 & 39, [2014] AC 700, and *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945, encapsulated in Lord Underhill's consideration in *Caroopen & Myrie* [2016] EWCA Civ 1307, where he stated at [73] that, "… where the issue raised by a judicial review challenge is whether there has been a breach of Convention rights, the Court cannot confine itself to asking whether the decision-making process was defective but must decide whether the decision was right."

90. The applicant places significant reliance on *Y v SSHD* [2013] EWHC 2127. Y, an Afghan national, arrived in the UK in 2008 aged 16. Although his asylum appeal

was dismissed in the same year, in 2010 a judge allowed a subsequent appeal on the basis that Y's removal would breach his article 8 rights as he was suffering from a serious mental condition that developed whilst in the UK and which required continuing treatment. He was granted 3 years DL. The Secretary of State's DL policy at the time entailed two reviews of Y's circumstances before he would be entitled, after 6 years, to ILR. Although initially diagnosed with severe PTSD Y ultimately received the additional diagnoses of Conversion Disorder with Seizures, the symptoms of which included serious headaches, delusional behaviour and violent seizures, and Major Depressive Disorder. The refusal of his applications for ILR outside of the policy and the grants of time-limited DL caused a number of serious reactions involving bizarre behaviour, self-harm and seizures and played a significant part in triggering his mental disability. His Honour Judge Anthony Thornton QC concluded that Y's mental illness was so serious that the refusal to waive the DL policy by granting ILR was contrary to article 3 ECHR because of the direct link between that decision and the breakdown of Y's mental health and social well-being, the risk of the intensification of that breakdown, and his inability or likely inability to embark upon essential treatment therapy which had a good chance of producing substantial improvements. The Deputy High Court Judge additionally concluded, with respect to article 8 ECHR, that the Secretary of State failed to properly analyse Y's mental health reports and the link between Y's lack of ILR and his feelings of insecurity and his inability to be treated. As such she failed to appreciate that a refusal of ILR would have a direct and potentially lasting impact on Y's continued suffering and on the future degradation of his private life. This impact could not be outweighed by the need to maintain the U.K.'s immigration laws or any other countervailing interest of the state given that Y had already been held to be entitled to article 8 protection and because his circumstances were now even more unusual. An additional factor was that the departure from the Secretary of State's published DL policies was no more than nominal.

91. It can be readily discerned from the above analysis that there are material differences between Y's circumstances and that of the applicant in the present case. Y's mental health condition was of a particularly serious and complex nature with extremely debilitating symptoms. The medical evidence concluded that Y's fear of return to Afghanistan caused, and would continue to cause, his mental disability. There was a clearly established link between his previous time-limited status in the UK and the breakdown of his mental health. No such direct causative link has been established in the medical evidence in the present case. In her 2013 report Ms Robertson noted that the applicant's "unresolved immigration status is maintaining and exacerbating his difficulties". In her June 2016 report she confirmed that the delay in resolving his application for long term leave continued to undermine his mental health. The medical reports do not suggest that the refusal to grant ILR has caused the applicant's mental illness. In Y's case a judge had already concluded that his removal would breach article 8. There is no such judicial decision in the present case. Further, although the ultimate decision to grant Y ILR depended on 2 further reviews, he was on a path that could ultimately lead to settlement under the DL policy applicable at the time. As was noted by the Deputy High Court Judge (at [59]), "A final piece of this complex jigsaw is the fact that the request for ILR, when considered in February 2012 was, in all likelihood, no more than a request to accelerate and

bring forward the grant of ILR from June 2014 to February 2012." The present applicant cannot benefit from any underlying policy that could lead to a grant of ILR.

92. The applicant is not being denied access to counselling or other forms of coping therapy. At the date of the most recent challenged decision there was little evidence to indicate that he was at any real risk of suicide or self-harm. Whilst his medical condition is severe and chronic, we do not find that it has reached the level of seriousness as that displayed by Y, and we note a slight improvement in his condition, albeit that there has been no overall significant clinical improvement in his symptoms. The issue of the applicant's accommodation is being undertaken by other legal representatives and he can now obtain benefits to which he is entitled. We do not find that the refusal to grant ILR is having a sufficiently serious impact on the applicant's mental health such as to reach the high threshold of article 3.

93. In considering the article 8 implications of the challenged decisions we note from the medical evidence that the refusal to grant the applicant a period of leave of sufficient duration to provide the requisite stability to enable him to undertake specialist trauma and aid his recovery has left him in an anxious condition and has contributed to the maintenance and exacerbation of his symptoms. We have read the applicant's statements in which he describes his daily routine, the aimlessness he feels, the difficulties he has encountered with his finances, and the anxiety he feels concerning his immigration status. Whilst we accept that an inability to undertake specialist trauma therapy does, to some degree, have an impact on the applicant's private life, we are not satisfied that the adverse consequences of the refusal to grant him ILR are of a sufficiently serious nature such as to constitute an interference with his mental integrity and his private life rights in general. As mentioned, the applicant does have access to forms of support and coping strategies both with the RTC and with the HBF, and he is entitled to the appropriate support from the NHS. Even if we are wrong in this assessment, we note, unlike the position with Y, that the respondent's decisions in respect of the grant of leave have not triggered the applicant's mental health condition, that he has no underlying entitlement to ILR, that the departure from the relevant policies could not be characterised as 'nominal' (see *Y*), and the strong public interest factors in the maintenance of immigration control (see s.117B of the Nationality, Immigration and Asylum Act 2002). These factors, when properly considered in conjunction with the seriousness of the applicant's mental health condition, do not render the respondent's decision disproportionate. We therefore find that the sixth ground is not made out.

<u>The 7th ground</u>

94. The applicant contends that the challenged decisions only take into account the applicant's need for treatment and fail to consider other relevant matters in determining the duration of leave granted to him. The Competent Authority Guidance specifies that a period of DL may be appropriate if a person's personal circumstances are compelling. She describes, by way of example, a situation where a person should be allowed to finish a course of medical treatment that would not be readily available in their own country. The Guidance is however flexible and the need for medical treatment may not always be the only relevant factor. This is consistent with paragraphs 181 and 184 of the ECAT Explanatory

Note.

95. Ms Robertson's medico-legal reports note that removal to China would have a significant detrimental impact on the applicant's mental health, that he does not have a social support network, that he has difficulty in trusting people, building new relationships and seeking help, and that he would be at risk of homelessness and destitution and vulnerable to further exploitation and abuse. It appears to us however that these factors all stem from the applicant's mental health condition and his need for treatment. His potential vulnerability and inability to seek help or place trust in others, and his potential destitution, all flow from the consequences of his mental health condition. With recovery he would be much better placed to obtain employment, as he did in the past, and establish relationships with others. In circumstances where the respondent has decided that the applicant should be granted a period of discretionary leave that would facilitate his recovery, we are not persuaded that the respondent has acted unlawfully by failing to expressly consider these additional factors.

96. The applicant has additionally expressed a continuing fear of reprisals by his traffickers. Under the terms of the withdrawal of the respondent's decisions of 02 July 2014, 17 September 2014 and 15 July 2015 she should have considered the applicant's fresh protection claim at the same time as determining the duration of leave granted to him under the relevant policies. She failed to do so and only made a decision refusing his fresh protection claim on 28 February 2017. Although Ms Knorr argues that this decision contains several significant failings it is a decision that attracts a right of appeal. An appeal has been lodged and will be the subject of a full merits consideration by the First-tier Tribunal, an adequate alternative remedy. In any event, the judicial review grounds did not seek to challenge the lawfulness of this decision. Given that the respondent expressed her view as to the applicant's fear from those who trafficked him, it is irresistibly clear that this is not a factor that would have been held in the applicant's favour if expressly considered by the respondent. We consequently find that the 7th ground of challenge is not made out on the particular facts of this case.

**Conclusion**

97. We are satisfied, for the reasons given, that all 3 decisions under challenge were unlawfully made as the respondent failed to take into account relevant considerations and failed to provide adequate reasons. We have only a little more to say in relation to the 1st decision. By her own explanation the respondent's grant of 6 months DL was to enable the applicant to undertake the specialist trauma-based therapy identified in Dr Robertson's first report. Yet this report made clear that such treatment may require at least 40 sessions with a service specialising in complex trauma presentations, and that the applicant would be unable to engage in such treatment whilst still in a situation of uncertainty regarding his future. In these circumstances it is extremely difficult to discern how the respondent could rationally conclude that 6 months was an appropriate duration.

98. The respondent is required to make a lawful decision as to the appropriate duration of leave. We are not satisfied that this is such an extreme case, where the refusal to grant ILR is so obviously unlawful and the remedy so plain, that

the only rational decision open to the respondent is a grant of ILR. The duration of leave is ultimately a matter for the respondent, but her decision must lawfully reflect the matters identified in this judgment including the protracted history of this litigation, the applicant's clear vulnerability, the unchallenged recommendations in the medical evidence and her own conduct.

**Order**

1. **The judicial review application is granted**

2. **The respondent is ordered to reconsider the duration of leave granted to the applicant taking account of the factors identified in this judgment**

**Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the applicant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the applicant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: _____

**Upper Tribunal Judge Blum**

Dated: **30 June 2017**