Neutral Citation Number: [2019] EWCA Civ 248

Case No: C4/2017/2066

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
HHJ KEYSER QC
CO/55512/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2019

Before :

LORD JUSTICE DAVIS
LORD JUSTICE SIMON
and
SIR STEPHEN RICHARDS

- -

Between :

TT (VIETNAM)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Stephen Knafler QC (instructed by **A2 Solicitors**) for the **Appellant**
Jennifer Thelen (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 13 February 2019

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Approved Judgment

Lord Justice Davis :

Introduction

1. This appeal, brought with permission granted by Irwin LJ, raises two discrete matters: albeit both arise in the context of human trafficking. The first is whether the Secretary of State was lawfully entitled to certify the appellant's asylum claim as clearly unfounded. The second is whether the appellant is entitled to substantive damages in respect of his immigration detention between 4 July 2015 and 14 September 2015.

2. The judge in substance decided both points adversely to the appellant. As to the unlawful detention claim, it is a feature of the case that (for reasons I will come on to explain) it throughout has been conceded on behalf of the respondent Secretary of State that the relevant period of detention was unlawful in that relevant published policies had not been applied. But the judge accepted that the Secretary of State both could (lawfully) and would have detained the appellant throughout that period in any event. Thus he awarded only nominal damages.

3. Before us the appellant was represented by Mr Stephen Knafler QC (who had not appeared below) and the Secretary of State was represented by Ms Jennifer Thelen (who had appeared below). I would like to acknowledge the careful and thorough arguments presented to us.

Background Facts

4. The background, in summary, is this.

5. The appellant is a national of Vietnam. Although there has been some dispute as to his age, the Secretary of State concluded that he was born in 1991; and at all times relevant to these proceedings he has been regarded (and was regarded by the judge) as an adult.

6. During the course of 2013 he entered the United Kingdom illegally (via France). His claim has subsequently been that he was trafficked into the United Kingdom and was required to work in producing cannabis at a location in Fleetwood in order to pay off a large debt incurred to those who had trafficked him from Vietnam into the United Kingdom.

7. In due course the appellant was apprehended, following a police raid at that address. He appeared to have been living there for a significant period of time. He also had been responsible for helping to cultivate a large quantity of cannabis plants at that address. The production set-up was to be described as "sophisticated".

8. He was (with another) charged with producing cannabis and abstracting electricity. He was remanded. He in due course pleaded guilty. No defence of duress, for example, was raised or pursued. There is no record of there being any basis of plea. He came before HHJ Altham in the Preston Crown Court on 3 November 2014, where he was represented by counsel. The judge treated him as 23 years old at the time. The judge fully described the sophisticated nature of the cannabis production operation. The valuation of the yield from the plants over the relevant period was estimated at £182,000 at street level.

9. The judge in his sentencing remarks recorded the appellant as having said that he had been at the premises for about a year and that he had been there to work. It was recorded that he said that he had received a "notional" remuneration of £200 per week but that was "to be set off against a debt which he apparently owed to those who brought him from France into the United Kingdom".

10. The judge described his role as having elements of a significant and of a lesser role. The judge said of both accused: "these men were, for reasons that they had largely brought upon themselves, under pressure to assist." Each, it was found, knew of the scale of the operation.

11. As for the appellant he had made early admissions and was given full credit for his plea. The judge regarded it as an aggravating factor that he had been at the premises as a "gardener" for, as the judge put it, "a considerable period of time". He was of good character. With credit for plea, he was given a sentence of 20 months imprisonment. In consequence he stood to be released at the halfway stage less time spent on remand. The judge also observed in his sentencing remarks that the end of their sentences in each case may be marked by deportation, although that was not a matter for the court.

12. A notice of decision to deport was served on the appellant on 19 December 2014.

13. By letter dated 9 February 2015 the appellant, through his solicitors, then claimed asylum. No such claim had previously been made. The letter was accompanied by a witness statement from the appellant. In it, he said that he was single. His foster mother lived in Vietnam. He had a sister living in the United Kingdom, although at that time he did not say where.

14. He was to state that a customer, whom he called Anh and whom he met in a restaurant in Hanoi where he worked, in 2012 offered him the chance of a well-paid job. He agreed. He was taken to Thailand where he worked in a bar. In due course he was deported from Thailand. He returned to Hanoi to his various old jobs. The same customer, Anh, saw him in the restaurant and was surprised to see him. According to the appellant, Anh then said that he was owed money for taking him to Thailand. He was arrested by the police in Hanoi when he refused to work again for Anh. He was released and then Anh arranged for him to leave Vietnam for China at the end of 2012. From there he travelled by air to France, with a passport provided to him. He stayed in France for around 2 months and then came to the United Kingdom by car. He was told that he had to work hard to pay off all the money he owed. He was then taken to the house in Fleetwood. He was told that he had no choice. He says that he was "slapped a few times" and that threats were made with regard to his foster mother in Vietnam and to his sister, if he did not cooperate.

15. At the conclusion of his statement he said this:

> "I am afraid to go back Vietnam now. Anh Hung got me arrested the last time, I am afraid the same or worse will happen to me now. I cannot go anywhere else in Vietnam because of the household registration system in Vietnam. The police will find me easily because of this.

> I believe that if sent back to Vietnam, I would be imprisoned and treated in an inhumane manner. I further believe that if sent back to Vietnam, I will be trafficked to another country and I may not survive if this happens."

Detention

16. The appellant was due to be released from custody on 15 April 2015. However, on that date he was removed into immigration detention, pending his prospective deportation. He was detained at IRC Dungavel in South Lanarkshire. No complaint is made as to that initial detention.

17. On 23 June 2015 (some two months after entering immigration detention) the appellant by his solicitors submitted formal representations that he had been a victim of trafficking. He was interviewed shortly thereafter. In his interview, he among other things said: "I just fear for the safety of my life. I don't want to go back." He gave answers broadly consistent with his previous statement. He then said: "If they return me to Vietnam I fear they will beat me up and my life will be in danger. And they might force me to work like I was in Thailand." He also made reference to sexual abuse in Thailand: something which he had not previously mentioned.

18. On 14 September 2015, the appellant (on the direction of the First-tier Tribunal) was released on bail. He was bailed to the address of his sister (who had by now been located in London) and reporting conditions were imposed.

19. The response to the representations as to trafficking was (unacceptably) not produced by the Competent Authority until 5 October 2015. That concluded that there were reasonable grounds to believe that the appellant had been the victim of modern slavery (human trafficking). A conclusive grounds decision was indicated as being forthcoming after the usual 45 day recovery and reflection period.

20. In the event such conclusive grounds decision was (again unacceptably) not forthcoming until 28 April 2016. As notified to the appellant, it stated the conclusion on the part of the Competent Authority that the appellant had been trafficked. Having stated that conclusion, the letter went on:

> "Although you were found to be trafficked because of the particular circumstances of your case, those circumstances no longer exist and as you do not qualify for leave to remain in the United Kingdom you will be liable for removal."

21. The underpinning conclusive grounds consideration minute with regard to that decision letter set out in detail the reasons for the conclusion that the appellant had been trafficked. He met the three constituent elements of trafficking: "action, means, exploitation". It was also considered that, following the reasonable grounds decision, the appellant had provided an internally consistent account. Overall, it was concluded that he was a victim of human trafficking both into and within the United Kingdom. The minute concluded:

> "However, it has been decided that you do not require a period of leave for any reason. Consequently a positive conclusive grounds decision without leave has been made".

22. Thereafter, by decision letter of 22 July 2016, the Secretary of State refused the appellant's claims for asylum and humanitarian protection and his claim based on Article 8 of the Convention. The claims were also certified under s.94 (1) of the Nationality, Immigration and Asylum Act 2002.

23. After correspondence, the Judicial Review claim was issued on 1 November 2016.

Certification

24. Against that background, I turn to the first point: which is the challenge to the certification of the appellant's claims. This matter came before the judge by way of renewed application, the single judge having refused permission on the papers on this issue.

25. The relevant legal principles are by now sufficiently well established and I do not think that for present purposes I need engage in any detailed discussion of them. They are particularly helpfully reviewed and discussed in the judgment of Beatson LJ in *FR (Albania) v Secretary of State for the Home Department* [2016] EWCA Civ 605. The relevant core principle is, in short, that a claim can only properly be certified if it is rationally assessed as "bound to fail". That sets a very high bar. Further, whilst the actual decision is for the Secretary of State nevertheless the courts, in reviewing such a decision, will adopt an appropriate intensity of review.

26. It was Mr Knafler's submission that the Secretary of State could not rationally or properly conclude that this claim to asylum was bound to fail. He said that the appellant "ticked all the boxes" for being at risk of retrafficking if returned to Vietnam. The conclusive grounds decision had found that the appellant had been the victim of trafficking. Further, he owed money to the traffickers; he had no family in Vietnam and had no support network; he had barely any education; and he had no vocational skills or other resources available to him. He had, it was stressed, already been trafficked into Thailand and then re-trafficked into Europe. Yet further, the objective evidence showed that trafficking remains a constant problem throughout Vietnam and frequently involves organised crime.

27. However, this was not a case where the Secretary of State had purported to reject as not credible all the factual matters as advanced on behalf of the appellant or had purported to go behind the findings in the conclusive grounds letter. What the Secretary of State had concluded, in the very lengthy and careful decision letter extending over 107 paragraphs and 15 pages, was that this appellant would not be at risk if returned. Vietnam was a large country, with a population of over 90 million and several cities. There was a sufficiency of protection. Further, there was no reason to think that those to whom the appellant owed money in Hanoi would know of his return or of his location; and there was no reason why – as an able-bodied young man with work experience – he could not relocate from Hanoi.

28. In this respect, the decision letter had most fully set out and applied relevant aspects of the country information and guidance material relating to Vietnam. As identified, the

risk of re-trafficking (if returned to Vietnam) depended, among other things, on the particular circumstances of the case and the capacity and interest which those owed the debt or other persecutors had in pursuing and locating the individual.

29. Mr Knafler said that the Upper Tribunal decision of *Nguyen* [2015] UKUT 160 (IAC), which is referred to in some of the relevant policy documents relating to Vietnam, was distinguishable from the present case. That decision had, among other things, noted that there was no universal rule that a victim of trafficking is unreturnable to the country from which he or she was trafficked. Mr Knafler did not in any way dissent from that. But he pointed out that in that case (where it was adjudged that there was no real risk in the appellant in that case being returned to Vietnam) there were a number of distinguishing factual features as to the trafficking and other background as compared to the present case. I accept that: that case in its actual outcome, albeit instructive as to its general approach, was to an extent based on its own facts. But nowhere in the decision letter in the present case was it indicated that *Nguyen* was binding as to the outcome here. To the contrary, the decision letter – which did not even cite *Nguyen* – appraised all relevant objective materials, including country material post-dating the decision in *Nguyen*.

30. Mr Knafler further said that there was objective evidence that persons in Vietnam who reside away from their home are required to register with the local police. He said that if the appellant re-located he would be required so to register and thereby, he said, would potentially become known to his persecutors. But this point was dealt with in the decision letter, which noted further objective evidence that residency laws were not usually implemented; and which also noted that it was unexplained how the persecutors in Hanoi would even know of the appellant's return to Vietnam or be able or inclined to access any registration records.

31. It is also to be borne in mind, of course, that the conclusive grounds letter had itself said of the circumstances surrounding his trafficking: "those circumstances no longer exist".

32. I do not propose to say more on this issue. Accepting, as I do for present purposes, the very high bar for certification, I nevertheless conclude that this very thorough and fully-reasoned decision letter rationally explained just how that very high bar was surmounted in this case. It withstands intensive review. In my judgment, the judge below was correct in his conclusion. This ground therefore fails.

Detention

33. No challenge is made to the appellant's detention between 15 April 2015 and 4 July 2015. The question is whether he was unlawfully detained thereafter until his release on bail on 14 September 2015.

34. As the judge noted, there are three relevant published policies in this regard.

35. The first is the Competent Authority Guidance with regard to Victims of Trafficking. In the version then applicable it was among other things stated:

> "If the potential victim of trafficking is in immigration detention they will normally need to be released on TA [Temporary Admission] or TR [Temporary Release] unless in the particular

> circumstances, their detention can be justified on grounds of public order. The decision letter advises the person that they have been granted 45 days for recovery and reflection on TA or TR to remain in the UK whilst a conclusive decision is made on their case. This does not grant any leave to enter to remain."

36. Second, in Chapter 9 of the then applicable Enforcement and Instructions Guidance (EIG), which relates to victims of trafficking, the following is among other things stated at paragraphs 9.9 and 9.10:

> "Competent Authorities will aim to complete an assessment of whether there are 'reasonable grounds to believe' someone is a victim within 5 days of referral. A positive decision will trigger a 45 day 'recovery and reflection' period during which time individuals will not be detained and removal action will be suspended. Victims will have access to certain rights, including accommodation and advice.
>
> …
>
> The FR should refer the case to the CA [Competent Authority] using the approved referral form. The CA has a target of 5 working days from the receipt of the referral to reach a decision. Where a case needs to be fast tracked, e.g. the person may be detained, the CA is expected to treat the case as a priority and reach the decision as soon as possible. Once the decision has been reached as to whether there are reasonable grounds to believe that the person may have been trafficked the CA will notify the decision to the FR and the PVoT. If they meet the reasonable grounds threshold they will be given a period of 45 calendar days for reflection and recovery, whilst the CA makes a conclusive decision on the case.
>
> …
>
> Where the CA accepts the reasonable grounds the PVoT is allowed a 45 day reflection period to recover and consider their options. The PVoT cannot be detained on immigration grounds unless in the particular circumstances their detention can be justified on grounds of public order."

37. Third, in Chapter 55 of the EIG, which deals with detention and temporary release, it was among other things said at paragraph 55.1.3:

> "Detention must be used sparingly and for the shortest period necessary …. Due to the clear imperative to protect the public from harm, the risk of reoffending or absconding should be weighed against the presumption in favour of temporary admission or temporary release in cases where the deportation criteria are met…."

A little further on this was said:

> "Substantial weight should be given to the risk of further offending or harm to the public indicated by the subject criminality. Both the likelihood of the person re-offending and the seriousness of the harm if the person does re-offend must be considered. Where the offence which is triggered in the deportation is included in the list [and there is a link which includes drugs offences in such list] the weight which should be given to the risk of further offending or harm to the public is particularly substantial when balanced against other factors in favour of release. In cases involving these serious offences therefore a decision to release is likely to be the proper conclusion only when the factors in favour of release are particularly compelling. In practice release is likely to be appropriate only in exceptional cases because of the seriousness of violent, sexual, drug related and similar offences."

And in paragraph 55.10 this was said:

> "Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration accommodation or prisons. Others are unsuitable for immigration detention accommodation because their detention require particular security care and control. In criminal casework cases the risks of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise normally indicate a person was unsuitable for detention. The following are normally considered suitable for detention in only very exceptional circumstances whether in dedicated immigration detention accommodation or prisons … persons identified by the competent authorities as victims of trafficking (as set out in Chapter 9 which contains very specific criteria, concerning detention of such persons). If a decision is made to detain a person in any of the above categories the casework character must set out the very exceptional circumstances for doing so on file."

38. In the present case the letter from the appellant's solicitors making the formal trafficking representations was received on 23 June 2015. The resulting interview was conducted on 25 June 2015; and the relevant referral form, as the judge found, was returned by the detention centre on 29 June 2015 and scanned and submitted for consideration on 30 June 2015.

39. Under paragraph 9.10 of the EIG a decision should then have been expected at all events within 5 working days. However, as the appellant was already in detention the competent authority was expected under the policy guidance to treat the case as a priority and to reach the decision as soon as possible. The judge found that proper adherence to the policy meant that such a decision should have been made by Friday 3

July 2015. There is no challenge by the Secretary of State to that finding. Mr Knafler was, very fairly, prepared to allow some time for the (putative) decision to be implemented. But he said that the appellant should at all events have been released on 4 July 2015. In the event, of course, the reasonable grounds decision was, as I have said, only made on 5 October 2015.

40. Moreover, and in addition to that, it was accepted on behalf of the Secretary of State that, in accordance with the EIG, a conclusive grounds decision should then have been made within 45 calendar days. The judge found, on the evidence, that such decision should have been made by 17 August 2015: and there is no challenge to that finding either. Allowing (as Mr Knafler again very fairly was prepared to allow) a short implementation period, that connoted release by 18 August 2015. In the event, as I have said, the conclusive grounds decision was only made and communicated on 28 April 2016.

41. The Secretary of State thus has conceded unlawfulness in the decision making process in the circumstances of this particular case, through want of compliance with the guidance as to timeliness set out in the published policies (a want of compliance, I note, which is not explained by evidence). His case was, however, that the Secretary of State both could (lawfully) and would have detained the appellant in any event. Accordingly the appellant was and is not entitled to substantive damages.

42. That means, among other things, that if the Secretary of State is to justify such detention he must show that from 4 July 2015 until 18 August 2015 detention was justified "on grounds of public order". Thereafter, until the appellant's actual release on 14 September 2015, the Secretary of State must show that detention was justified as being in "very exceptional circumstances". That was not in dispute before us. Nor was it in dispute before us that the relevant burden was on the Secretary of State and that the relevant standard applicable was that of the balance of probabilities: see the discussion in the judgment of Beatson LJ in *R (VC) v Secretary of State for the Home Department* [2018] EWCA Civ 57, [2018] IWLR 4781. In those circumstances, it is convenient to do as the judge did and to divide the overall period into two parts reflecting the two different applicable tests (the "public order" and "very exceptional circumstances" grounds respectively).

43. The judge found on the evidence that if the Secretary of State could lawfully have detained the appellant then the Secretary of State would have done so in each period: see paragraphs 45 and 50 of his judgment. Although Mr Knafler queried the finding that the Secretary of State would so have detained, I see no sufficient basis for interfering with that factual evaluation made by the judge. So the real question then becomes as to the "could" ground: that is, whether the judge was correct to conclude that the "public order" ground and the "very exceptional circumstances" ground were respectively made out.

The detention reviews

44. The Secretary of State has not sought to put in substantive evidence in this case. Instead, reliance is essentially placed on the contemporaneous detention reviews, coupled with a degree of amplification in the written arguments below.

45. As the judge found, in the present case the "critical factors were clearly risk of absconding and risk of reoffending". He considered that, at least until 17 August 2015, the question of risk of harm was "of secondary importance": paragraph 42.

46. Thus in the third detention review relating to the appellant signed off on 7 July 2015, it was noted that the appellant was by then a potential victim of trafficking and that the claim "is still under consideration". Risk of absconding was assessed as "high". Risk of reoffending and risk of harm were assessed as "medium". The outstanding barriers to deportation were recorded as being the extant victim of trafficking claim and the extant asylum claim.

47. The recommendation in the detention review was recorded as follows:

> "[T] was convicted of count 1; production of class B-drug cannabis and count 2; abstracting electricity and was sentenced for count 1; 20 months imprisonment and for count 2; sentence to lie on file. He has been assessed as a medium risk of harm and re-offending. There is no evidence of legal entry into the UK. He has failed to comply with Immigration laws, by avoiding Border control on entry. This would suggest that he is unlikely to comply with reporting restrictions. He has been assessed as high risk of absconding. [T] made an application for asylum only after being notified of his liability to deportation, this is under consideration. A person in genuine need of humanitarian protection would likely make such an application at their first opportunity. This is more like the expected actions of someone attempting to frustrate the deportation process. There are no compelling reasons to believe that he would remain in contact with the Home Office so we can effect his removal.
>
> Bearing these facts in mind, I have considered the presumption to liberty as outlined in Chapter 55 of the Enforcement Instructions and Guidance. In this case the presumption is on balance outweighed by the risk of harm to the public should he re-offend, the likelihood of re-offending, and the significant risk of absconding. I concur with the proposal that detention remains proportionate at this time."

Authoriser's comments were as follows:

> "I agree but we really need to be getting on with the asylum consideration and I would like to know that an interview has been arranged before the next review is due."

The reviewing officer agreed with that recommendation. It was noted that "simply claiming to be a PVOT is insufficient in itself to rule out detention". It was assessed that the presumption of liberty was "outweighed by the risk of harm to the public should he reoffend, the likelihood of reoffending and the significant risk of absconding".

48. It is to be observed that, in the supporting materials forming part of that review, it was expressly recorded, among other things, that the appellant had been non-compliant at a

previous interview relating to travel documentation, having refused to sign the bio-data form and having refused to have his photograph taken. In addition, it had been noted, for the purposes of assessing the risk of absconding, that at that time the appellant had little known ties in the UK such as to make him stay in one place.

49. At a further (fourth) review on 7 August 2015 the assessment was to like effect. The authorising officer's response to the continued recommendation to detain was this:

> "Detention is agreed due to the high risk of flight posed. [T] has made a PVOT and asylum claim. It is critical that the asylum action is completed and that the CO works closely [sic] the PVOT competent authority in order to establish whether there is merit to his claim."

50. In the subsequent (fifth) detention review dated 8 September 2015, the risk of absconding again was assessed as "high". But by now the assessment of the risk of harm had also been increased to "high". This is explained by the following entry in the case summary:

> "On 17 August 2015 [T] was involved in an incident at Dungavel House. On 18 August 2015 [T] was placed under Rule 40 conditions after being identified along with six other Vietnamese nationals in being in an assault causing severe injury to two detainees. The Scottish Police will attend the centre on the 18 August to interview. The case owner contacted Depmu to have FNO transferred to another IRC. On 24 August 2015 [T] was transferred to Brook House IRC. On 25 August 2015 a RSRA has been completed and [T] is deemed to be a high risk, as such he has been granted single occupancy. This will be reviewed again on the 25 November 2015."

The text further explained that the risk of harm was high "due to the nature of his offence and to the fact that he has been involved in a serious assault on 2 other detainees". Some concerns were expressed about the delay in consideration of the asylum claim: but the recommendation to detain was approved.

51. Finally, for these purposes, there was the bail application to the First-tier Tribunal made on behalf of the appellant in September 2015. That was opposed. In the Bail Summary submitted by the Home Office it was said of the incident which occurred on 17 August 2015:

> "The applicant was involved in an incident at Dungavel House. The applicant along with six other Vietnamese nationals was involved in an assault causing severe injury to two detainees. The Scottish police will attend the centre on 18/08/15 for interview."

The entry in the summary for the following day said:

> "The Scottish police attended the centre and charged the applicant with assault. The applicant was placed under Rule 40 conditions (deemed to be high risk)."

52. Neither we nor the judge had any further evidence about this assault incident. When we enquired, Mr Knafler said, on instructions, that the appellant had not in fact been charged with any offence. When we asked Ms Thelen, she said, on instructions, that the appellant had certainly not been convicted of such an offence and that the Secretary of State also had no record of any charge in fact being brought against him.

The judge's decision on the detention issue

53. The judge carefully went through the detention reviews. He also reviewed the recorded answers of the appellant in interview: where, amongst other things, he had said when interviewed in June 2015 that he did not then know the residence of his sister in the United Kingdom, although he had known where she worked, and was thoroughly vague about his degree of contact with her.

54. So far as the first period of detention under challenge is concerned, the judge's conclusion is encapsulated in paragraph 45 of his judgment:

> "The starting point is that potential victims of trafficking are not usually to be detained. However, they can be detained on public order grounds. The nature of the public order grounds that might be material appears clearly from the passages that I have read from the policies dealing with matters before the conclusive grounds determination. In the present case the fact of the drugs conviction, the fact of lack of any close ties in the UK, and the fact of failure to comply with border controls (albeit that this might have been explicable by trafficking), when taken together with the material fact of the lateness of the asylum claim, lead me to the conclusion on the balance of probabilities that detention would have been continued notwithstanding the reasonable grounds decision. In my judgment, detention would have been justified on public order grounds in those circumstances, bearing in mind in particular that the conviction for the drugs offences was a matter to be regarded as of significant seriousness."

55. So far as the second period of detention under challenge is concerned, the judge said this at paragraph 47:

> "But for one thing, the "very exceptional circumstances" criterion could not in my view have been met. If the circumstances had remained as they were at the time of the third and fourth detention reviews, continued detention on normal public order grounds would have involved undue dilution of the "very exceptional circumstances" criterion."

Having then considered the entries relating to the assault incident on 17 August 2015, the judge expressed his conclusion in these terms at paragraph 50:

> "These matters seem to me to indicate that the circumstances were at that point "very exceptional" within the meaning of paragraph 55.10. There was already a high risk of absconding. There was already considered to be a medium risk of re-offending. Both of those risk assessments were eminently justified, where [T] was said to be in debt-bondage to the traffickers who brought him to the UK. The incident on 17 August was one to which the defendant was bound to have regard to in deciding whether or not to continue detention. The fact that, over and above significant but in themselves unexceptional risks of absconding and re-offending, there was now a specific incident involving a serious assault on other Vietnamese nationals was itself, in my judgment, sufficient to constitute very exceptional circumstances. It must be remembered that "very exceptional circumstances" are to be considered from the starting point of someone who has a conclusive grounds determination. Factors that are particular to this case and would themselves justify detention (such as criminality) are therefore capable of forming part of the matrix of very exceptional circumstances, even if they are not in and of themselves very exceptional. The claimant's previous history and circumstances (in particular, his immigration infractions, criminality and lack of domestic ties) would not themselves have been sufficient to constitute very exceptional circumstances. However, the incident recorded in the fifth detention review, which caused [T] to be assessed as posing a high risk to others, was properly to be regarding as constituting very exceptional circumstances. I find that it was strongly probable that the Secretary of State would have continued the detention in the light of such an assessment."

Disposal

56. Mr Knafler at the outset of his submissions placed considerable emphasis on the decision of the Court of Appeal, Criminal Division, in the case of *R v L* [2013] EWCA Crim 991, [2014] 2 Cr. App. R 23. He said that, the applicant being a victim of trafficking in the way that he had been, his criminal offence was a manifestation of that exploitation. He said that, had the true position been known at the time, the appellant should not and would not have been prosecuted at all. Further, his conviction should not, given those circumstances, provide any proper support to a finding of a risk of reoffending or absconding. Moreover, the risk of reoffending for drugs offences of this type also had to be viewed in the light of the fact that the appellant had been removed from his trafficked situation. Yet further, the fact that the appellant had been trafficked also was relevant to the assessment of the risk in other ways: for example, his illegal entry into the UK could not fairly be used against him in circumstances where (as now established) he had been trafficked into the UK.

57. I do not accept, on the evidence available, that in the circumstances the appellant would not and should not have been prosecuted or convicted. As the decision in *L* makes clear, all these cases ultimately are fact specific. In the present case, the prosecution and plea

both postdated the decision in *L*. It is not thinkable that the legal teams for the prosecution and defence, and the judge himself, would have overlooked the decision in *L* had it really been clearly in point. As the recent decision of the Court of Appeal, Criminal Division in *R v S(G)* [2018] EWCA Crim 1824, [2019] 1 Cr. App. R 7 confirms, there is no blanket immunity from prosecution conferred on victims of trafficking. The level of coercion involved is not necessarily such that criminal culpability is reduced to a point where it would not be in the public interest to prosecute; and moreover there needs to be a causal nexus between the trafficking and the offence. In circumstances where the appellant here had been at the property for over a year, and where there was no evidence from him as to his degree of supervision or freedom to leave the house or access to mobile phones and so on, those points stressed in *S(G)* apply here. The appellant, it will be recalled, had legal representation at the time. It is noticeable that, apparently, no defence of duress was ever mooted; and no basis of plea seemingly was ever proffered to the sentencing court, either.

58. As to the risk of absconding, Mr Knafler accepted that in an appropriate case a high risk of absconding could be a ground of "public order" which, under the relevant policy, could justify detention. But his submission remained that this was not an appropriate case and that the decision to detain for the first period was made at this time without the relevant officials having (as they should have had) the letter from the Competent Authority stating that there were reasonable grounds for believing the appellant to be a victim of trafficking.

59. In my opinion, the reasonable grounds letter from the Competent Authority cannot in any way be taken as determinative on the question of risk. The fact is that the appellant had properly been assessed as of a high risk of absconding. The focus for detention purposes was not simply, or even principally, on his conviction. There was also the high risk of absconding because of his perceived lack of ties with the UK and his obstructiveness towards obtaining the travel documentation needed to return him to Vietnam. Moreover, the asylum claim had only emerged very late in the day, after the notice of intention to deport. The reasonable grounds letter impacts on none of those points.

60. In my opinion, the reasoning of the judge at paragraph 45 of his judgment is wholly sustainable. The public order ground was made out. I would endorse the judge's conclusion that detention in this period was justified. The appellant could have lawfully been detained in that period; and, as also found by the judge, he would have been.

61. Clearly, however, the whole approach is required to be significantly different for the second, later, period of detention: by reason of the requirement of "very exceptional circumstances" (and the word "very" is for this purpose also not to be ignored).

62. As will be gathered, the judge had accepted – in my opinion, quite rightly – that had circumstances remained the same after 17 August 2015 then continued detention could not, without more, have met the "very exceptional circumstances" requirement. But he concluded that, when added to the other matters, the assault incident on 17 August 2015 made the crucial difference for this purpose. So the question is: did it?

63. It is unfortunate that we, and the judge, had such limited evidence on this aspect. But as Mr Knafler entirely properly pointed out, the burden is on the Secretary of State: and the Secretary of State is confined to the materials adduced.

64. The entry in the fifth detention review provides very little hard evidence of what actually occurred on 17 August 2015. Mr Knafler in fact submitted that the entry is just as consistent with the appellant being innocently caught up in the fracas: and he also suggested that he may have been placed on his own in a cell under Rule 40 for his own protection. However, in my view the entry, naturally read, more obviously suggests that the appellant had been in some way a participant in the attack on the two victims: and that is also consistent with the information provided in the subsequent Bail Summary.

65. But, that said, the information remains woefully scant. It remains wholly unclear just what part the appellant himself actually played in the assault. Further, what he was asked, and said, in police interview was not put before the court. Although the assault was described as a group assault and the injury caused was said to be "severe" there was no medical or other evidence adduced as to what that injury actually was. It is not explained whether or not any weapons or objects were used in the attack; it is not explained whether or not the assault was planned or suddenly erupted; and so on.

66. It is also of concern that there is no evidence of any charge or conviction: to the contrary, it would seem, from what we were told, that there was neither. If that is so, that also places some doubt on the seriousness of the assault and the severity of any injury caused. Moreover, reliance on one isolated incident of this kind in a detention centre (there was no other evidence of any violent misconduct on the part of the appellant at any other time whilst he was in custody or in detention) provides a slender basis for inferring a propensity to violence or a risk of harm to the public.

67. That being the evidential position, and so much being left unexplained, in my opinion it cannot be concluded that continued detention would have been justifiable on the "very exceptional circumstances" basis. Therefore, with all respect to the judge, I would disagree with his appraisal set out in paragraph 50 of his judgment. In saying that, I stress that I should not be taken as saying that violent misconduct whilst in custody or in detention on the part of a victim of trafficking (whether comprising one incident of appropriate gravity or a series of incidents) can never bring a case within the "very exceptional circumstances" criterion. Of course it may. But it all depends on the particular circumstances. And here those circumstances, on the evidence (or, rather, lack of evidence), do not, in my opinion, suffice.

68. Consequently, I would for my part reverse the judge's decision on this aspect of the detention. I would hold that the appellant was wrongfully detained between 18 August 2015 and 14 September 2015; and thus is entitled to substantive damages.

Conclusion

69. I would reject the appeal on the certification ground. I would reject the appeal with regard to the first period of detention. But I would allow the appeal with regard to the detention between 18 August 2015 and 14 September 2015 and would award damages accordingly.

70. It is to be hoped that the parties can in due course agree the quantum of such damages. If they cannot, the issue of quantum is to be remitted for assessment by a Master of the Queen's Bench Division. Any submissions on matters such as costs (if they cannot be agreed) should be provided to this court in writing and will be decided by this court on the papers.

Lord Justice Simon:

71. I agree.

Sir Stephen Richards:

72. I also agree.