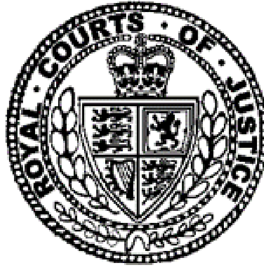

Neutral Citation Number: [2024] EWHC 2870 (Admin)

Case No: AC-2024-LON-001388

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/11/2024

Before :

DAVID PIEVSKY KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

R (on the application of KM)	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Amy Childs (instructed by **A J Jones Solicitors**) for the **Claimant**
Sam Way (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 31 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 14:00pm on 13th November 2024 by circulation to the parties or their representatives by email and by release to the National Archives

David Pievsky KC sitting as a Deputy High Court Judge:

Introduction

1. The Claimant is an Albanian national who entered the United Kingdom on 30 October 2022. He sought asylum and was placed into the National Referral Mechanism ("NRM"). On 14 February 2024 the Defendant issued a Negative Conclusive Grounds decision, declining to accept that the Claimant was a victim of trafficking or modern slavery. On 10 April 2024 the Claimant's newly instructed solicitors requested a reconsideration of that decision. On 15 April 2024 the Defendant refused the request, on the grounds that it had been made outside the applicable 1-month time limit referred to in the Modern Slavery Statutory Guidance for England and Wales (under s.49 of the Modern Slaver Act 2015, version 3.7) ("the Guidance"), and no "*exceptional*" case had been made out for an extension of time. That refusal is the decision which has become the focus of this claim for judicial review.

Factual background

2. The Claimant arrived in the UK on a small boat from France and was detained. He sought asylum on the basis that he feared being killed, harmed or exploited by criminal gangs in Albania.

3. Having entered the NRM, the Claimant received a positive Reasonable Grounds decision on 23 December 2022. On 6 January 2023 he was released from detention.

4. A substantive asylum interview was arranged for 25 January 2024. The Claimant did not attend. On 6 February 2024 the Defendant determined that the asylum claim had been "*implicitly withdrawn*", in light of that non-attendance ("the asylum withdrawal decision").

5. On 14 February 2024, the Defendant sent a negative Conclusive Grounds decision ("the CG decision") to the Claimant personally, and also to the Claimant's then solicitors (no. 12 Chambers).

6. The relevant parts of the Guidance, which I set out at paragraph 28 below, dealt with reconsideration requests. There had been very recent amendments to the Guidance (on 12 February 2024). In summary, the updated Guidance stated that any request for reconsideration of a negative CG decision had to be made within one month of the decision, unless "*exceptional circumstances*" existed; that a request for an extension of time on the basis of such circumstances should be accompanied by an explanation of the reasons for the requesting person's delay, how any new evidence was material and why it had not been provided at an earlier stage; and that it was at the discretion of the decision-maker to determine whether exceptional circumstances applied.

7. The Claimant was appropriately directed to the possibility of a reconsideration, and was warned about the time limit. At the end of the CG decision letter, the writer explained:

> "You can request one reconsideration of your negative conclusive grounds decision, which has to be made within 30

> calendar days[1] of a decision. Full details of the policy relating [to] reconsideration are available at [link provided to the Guidance]."

8. On 1 March 2024, the Claimant instructed new solicitors (A J Jones Solicitors). Their details were sent to the Defendant.

9. On 15 March 2024, the Claimant was detained on the basis that there was no outstanding asylum claim and no trafficking-related reason to delay removal from the UK.

10. On 16 March 2024, the Claimant issued a pre-action letter challenging the asylum withdrawal decision along with (what was said to be) the Defendant's failure to determine an "*outstanding*" NRM referral. The implication is that the Claimant's new solicitors did not know, at this point, about the fact or content of the 14 February CG decision letter; nor was this information set out in the Immigration Factual Summary dated 15 March 2024. There is no direct evidence about the reason for this.

11. The Defendant provided the Claimant's solicitors with a copy of the CG decision letter on 25 March 2024.

12. On 4 April 2024 the Defendant replied to the 15 March pre-action letter. In response to the assertion that the Claimant had an outstanding NRM referral, the Defendant stated: "*An updated IFS has been amended and issued to show your client's failure to attend a substantive asylum interview on 25 January 2024 that resulted in the asylum withdrawal decision and the outcome to the modern slavery Conclusive Grounds consideration*." On the following day removal directions were again set.

13. On 10 April 2024, the Claimant's solicitors asked the Defendant by email for a reconsideration of the CG decision, attaching a new witness statement from the Claimant which provided more detail about the Claimant's experiences in Albania and his reasons for fearing trafficking and exploitation. The email stated:

> "We write in relation to the above-named client and further to your Conclusive Grounds decision letter dated 14 February 2024, which was received by us on 25 March 2024 from NRPC Solihull. This reconsideration request is being made within 30 calendar days of service on us… We write to request reconsideration… on the basis of the attached new evidence, a witness statement from [KM]. [KM]'s account has not been challenged, but a negative CG decision has simply been produced because the decision maker was not satisfied as to the level of detail provided. The witness statement provides further detail and follows the SCA Witness Statement Guidance. It is our position that [KM] meets parts 'a', 'b', and 'c' and should therefore be recognised as a victim of modern slavery. Should

[1] Whilst it is slightly odd that the phrase "30 days" was used in the letter, rather than "one month", as set out in the Guidance, that inconsistency did not matter on the facts of this case. Whether time expired on 14 March (one month later) or 15 March (30 days later), the reconsideration request was made on 10 April (8 weeks after the CG decision).

you require any further information, please feel free to contact us."

14. On 12 April 2024 the Claimant pointed out to the Defendant, by email, that on 26 January 2024, only one day after the scheduled asylum interview which the Claimant had failed to attend, his former solicitors had sent medical evidence to the Defendant demonstrating that he had been ill with gastroenteritis, and too unwell to attend the asylum interview. They contended that the decision to treat him has having implicitly withdrawn his asylum claim was unlawful and unreasonable. There is no evidence of any substantive pre-action response to this email.

15. On 15 April 2024, the Defendant replied to the Claimant's request for reconsideration of the CG decision. The Defendant explained that it had decided to refuse that request ("*the CG reconsideration refusal decision*"). The reason given was brief: "*the information submitted has been received over 1 month from your previous decision dated 14/02/2024 without any explanation to clarify the reason for delay*."

16. On the same day, the Claimant's solicitors replied to the decision. Their reply was also brief. It stated that they had not represented the Claimant at the time of the CG decision, and "*the request for reconsideration was made within one month of the decision served on us*".

17. A further pre-action letter was sent on 16 April 2024, to which the Defendant replied on 23 April 2024.

The claim

18. The Claimant issued proceedings on 16 April 2024. The claim form, at pages 8 and 14, unambiguously identified two decisions to be judicially reviewed, seeking quashing orders in relation to each, namely: (1) the 6 February asylum withdrawal decision; and (2) the 15 April CG reconsideration refusal decision. It did not identify the original 14 February CG decision as a target of the claim.

19. In his JR Grounds, the Claimant contended ("Ground 1") that the Defendant had, when treating the asylum claim as having been withdrawn, ignored relevant considerations, namely the medical reasons for the Claimant having missed his asylum interview, and/or unlawfully failed to follow his own policy.

20. As to the CG reconsideration refusal decision, the Claimant contended ("Ground 2") that the Defendant had failed to take relevant considerations into account or acted unreasonably, by erroneously considering that no explanation had been given for the delay; and that the procedure and result of the conclusive grounds process was "unfair", particularly by reference to the *Tameside* duty (referred to in more detail at paragraphs 25-27 below), in that the Defendant had not made sufficient enquiries about the trafficking claim before making a decision, in a context requiring anxious scrutiny.

21. On 15 May 2024 the Defendant filed an Acknowledgment of Service. As to the asylum withdrawal decision, the Defendant conceded that (i) the Claimant had indeed provided a timely explanation, on 26 January 2024, for having missed the asylum interview the previous day; and (ii) his asylum claim would therefore be reinstated, and considered on its merits. However, the Defendant maintained and defended the CG reconsideration

refusal decision, on the basis that the Claimant had not demonstrated "*exceptional circumstances*" justifying an out of time request.

Procedure

22. On 16 August 2024 Mrs Justice Foster considered the application. She refused permission to apply for judicial review in relation to the asylum withdrawal decision, on the basis that the challenge to it had become academic in light of the concessions set out in the Defendant's Acknowledgment of Service. She ordered the application for permission to apply for judicial review in relation to the CG reconsideration decision to be adjourned and listed as a "rolled-up hearing". That hearing took place before me on 31 October 2024.

The issues

23. Although not formulated in quite this way in the parties' skeleton arguments, having carefully considered the manner in which the oral arguments developed at the hearing, and the relationship of those arguments to the pleadings, I consider that resolution of this judicial review claim requires answers to the following 5 questions.

    i) Question 1. Was the CG reconsideration refusal decision unlawful on the basis that it failed to take into account a relevant consideration, namely the fact that the Claimant had indeed provided an explanation for the lateness of his reconsideration request?

    ii) Question 2. Did the Defendant, in making the CG reconsideration refusal decision, fetter his discretion by adopting an unlawful approach to the question of whether a change of solicitor could ever amount to an exceptional circumstance?

    iii) Question 3: was the CG reconsideration refusal decision otherwise irrational / unfair on *Tameside* grounds?

    iv) Question 4: Is it open to the Claimant now to mount a freestanding challenge to the 14 February negative CG decision, in light of (a) the failure to identify that decision (as opposed to the later CG reconsideration refusal decision) as a target, or seek any remedy in relation to it, in the claim form; and (b) the Claimant's failure subsequently to apply to amend the claim form so as to include a properly pleaded claim against the CG decision; and/or (c) the principle, if relevant, of alternative remedy?

    v) Question 5: If the answer to Question 4 is "yes", was the CG decision unlawful on *Tameside* grounds?

24. This summary demonstrates, as was confirmed during the course of argument at the hearing before me on 31 October 2024,[2] that there was no *freestanding* attack on the

[2] At my request, Mr Way on 5 November 2024 provided the Court with a Note setting out answers to two specific questions I had asked him at the hearing: i.e. (1) what did the previous Guidance say about time-limits?, and (2) were the changes to the time limits in the revised Guidance publicised, and if so how? I have summarised the information contained in Mr Way's written response at footnotes 3 and 4 below. On 7

Guidance itself in these proceedings. The Claimant did not contend, for example, that the introduction of a one month time limit into the Guidance in February 2024 was such as to make the procedure inherently or systemically unfair, nor that such a time limit was contrary to the UK's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings ("the Anti-Trafficking Convention") or Article 4 of the European Convention on Human Rights ("ECHR").[3] Nor was there any suggestion by the Claimant that the Defendant did not do enough to bring the changes which were set out in the February 2024 version of the Guidance to the attention of solicitors and immigration advisers.[4]

Legal framework

(1) The *Tameside* duty

25. The *Tameside* duty requires a public authority to take reasonable steps to acquire relevant information before it makes decision. Its name comes from the case of Secretary of State for Education and Science v Tameside MBC [1977] AC 1014.

26. The parties agree about the following propositions of law:

i) Whether a failure to make further enquiries or seek further information is a breach of the *Tameside* duty is ultimately a question of rationality.

ii) It is not enough to show that further inquiries would have been sensible or desirable.

iii) The Court will only intervene if no reasonable authority could have been satisfied that it already possessed the information necessary for its decision.

27. See generally R (Khatun) Newham LBC [2005] QB 37; R (Plantagenet Alliance Ltd) v Secretary of State for Justice [2014] EWHC 1662 (Admin) at paragraph 100; and Pharmaceutical Services Negotiating Committee v Secretary of State for Health [2018] EWCA Civ 1925 at paragraphs 55-56.

(2) The Guidance

28. The Guidance is a lengthy document. The key sections, relating to the possibility of seeking reconsideration of a negative CG decision, are these:

November 2024, the Claimant responded with a Note of his own, seeking to contend for the first time that the changes made to the Guidance in February 2024 had lacked any proper justification, and/or that it was "unclear" whether they are compatible with Article 4 ECHR or ECAT. I do not accept that these points form any part of the pleaded claim, and I will not attempt to resolve them. The Defendant has had no meaningful chance to address them or present detailed evidence about them. I would refuse permission to amend the claim in such a fundamental way, even if such permission had properly been sought, at this late stage.

[3] The previous version of the Guidance (version 3.6), stated at paragraph 14.222 that there was no time limit for a reconsideration request made on the basis of new available evidence. A request for reconsideration on the basis that the decision was not in line with guidance had to be brought within 3 months of the decision, subject to "*exceptional circumstances that may have caused reasonable delay*".

[4] E.g. by way of the newsletter from the Defendant's Modern Slavery Unit dated 12 February 2024 directing stakeholders to paragraphs 14.212-14.230 of the updated Guidance.

> "14.212 An individual, or someone acting on their behalf, may request reconsideration of a negative Reasonable Grounds or Conclusive Grounds decision by a relevant competent authority. A reconsideration request must be made within one month of the negative Reasonable Grounds or Conclusive Grounds decision on the following grounds:
>
> - Where additional evidence can be provided which, taken with all the available evidence already considered, could demonstrate that the individual is a victim of modern slavery.
> - There are specific concerns that a decision made is not in line with this guidance…
>
> 14.215 All relevant evidence considered to support the reconsideration request should outline specifically how the decision was not in line with the guidance, or how any supporting evidence provided could be material to the outcome of a case. If this evidence could have been provided in advance of the negative reasonable grounds or conclusive grounds decision, there should be an explanation as to why this evidence was not provided earlier…
>
> 14.219 Any further evidence must be provided with the reconsideration request itself and within one month of a negative reasonable grounds or conclusive grounds decision (unless exceptional circumstances are present – see [14.223-14.224])...
>
> 14.223 If an individual makes a reconsideration request on the basis of new information but is unable to provide the information within one month of the negative reasonable grounds or conclusive grounds decision, they should contact the Competent Authority as early as possible and request a reconsideration request extension. The potential victim should provide their reasons for not being able to meet the one-month deadline (with evidence which supports their reasons) and a timeframe by which they expect to have obtained the relevant information.
>
> 14.224 Extensions to this timeframe will only be granted in exceptional circumstances and it will be at the discretion of the decision maker to determine if exceptional circumstances apply. Circumstances are only likely to be deemed exceptional if an individual is likely to be unable to obtain or provide information to the Competent Authority for reasons beyond their control, if safeguarding concerns are present, if an individual has recently left an exploitative situation or for reasons to which the individual could not reasonably have foreseen."

29. The parties agree about the following propositions of law:

i) The Guidance is not law, but it is the primary source of the obligation to support victims of trafficking in England; and it represents a formal statement of Government policy and practice. It must be given due weight.

ii) The correct meaning of the Guidance is an objective question for the Court. It must be interpreted and applied against a backdrop of the need to avoid violations of Article 4 of the ECHR or the Anti-Trafficking Convention.

iii) A failure by a public authority to follow the Guidance is potentially open to challenge by way of judicial review.

30. Those agreed propositions are supported by what is said, for example, in MN v Secretary of State for the Home Department [2021] 1 WLR 1956 at paragraphs 84-5; R (Munjaz) v Mersey Care NHS Trust [2006] 2 AC 148 at paragraph 44; and R (TDT) v Secretary of State for the Home Department [2018] 1 WLR 4933 at paragraph 5.

Question 1: relevant considerations

31. For the Claimant, Ms Childs submitted that when the Claimant on 10 April 2024 asked for a reconsideration of the CG decision, he *did* give an adequate explanation for the delay in making that request. The explanation, she contended, was that the Claimant's new solicitors had only received the CG decision on 25 March 2024. The request was made (well) within 30 days of *that* date. The Defendant's failure to recognise or understand this or treat it as a potentially good explanation amounted to a failure to take relevant considerations into account.

32. I unhesitatingly reject that submission. It misunderstands the nature of explanation that was required. What was required was clearly set out in the Guidance. It was an explanation for the *Claimant's* delay (during the relevant period), not the Claimant's newly instructed solicitors' delay. (It could not sensibly be otherwise: the authors of the Guidance could not have intended to create a situation in which a person who acquires a new solicitor gains an automatic procedural advantage over someone who does not, or over someone who has no solicitor at all.) There was simply no information in the Claimant's 10 April request about what had happened between 14 February and 14 or 15 March. There is still no evidence about that. The Defendant was not only entitled (rationally) to say that no explanation for the relevant delay had been provided; his conclusion on that point was plainly correct.

Question 2: fettering

33. I agree with Mr Way's submissions on this point also. The Claimant had not provided the Defendant, in his request, with any particular facts *other than* the fact that he had changed solicitors and that *they* had only received the decision on 25 March 2024. What the Defendant was saying was that those facts alone were not in his view sufficient to give rise to exceptional circumstances. The Defendant was *not* saying, and it would not be fair to infer that he considered, that a change of solicitors could *never* give rise to exceptional circumstances. The fettering complaint goes nowhere.

Question 3: whether the CG reconsideration decision was irrational / unfair on Tameside grounds

34. Ms Childs began by submitting that the words "*exceptional circumstances*" in paragraphs 14.219 and 14.224 of the Guidance needed to be construed using a "*low threshold*", given the need for the State to comply with its duties owed to victims of trafficking. She referred to the use of "*exceptional circumstances*" in R (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11 [2017] 1 WLR 823 at paragraph 60, describing "*circumstances in which refusal would result in unjustifiably harsh consequences of the individual such that the refusal of the application would not be proportionate*".

35. Mr Way initially relied, in his skeleton, on R v Kelly [2000] QB at p.208B-D for an alternative definition of an "*exceptional circumstance*": i.e. one which "*is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon.*"

36. There was also reference at the hearing to a third contender, taken from Ali v SSHD [2016] 1 WLR 4799 at paragraph 38: referring to the notion of a "*very compelling*" situation.

37. As the oral argument developed, however, it emerged that any dispute about this legal issue was more apparent than real. It was for the Defendant to ask himself whether exceptional circumstances had arisen. He had a wide discretion to decide what circumstances might count. He had to have particular regard to his own published Guidance. Various examples of exceptional circumstances had been set out in the Guidance. One of them, at paragraph 14.224, was where a potential victim had been unable for "*reasons beyond his control*" to lodge a timely application for reconsideration. The Claimant's primary case was that there were indeed such reasons. It is unnecessary for me to resolve, certainly not in the abstract, debates about the precise meaning of the phrase "*exceptional circumstances*" in this case.

38. The real question, at this stage of the analysis, is whether the Defendant was required by fairness and rationality to have concluded, on the information before him, that the Claimant had been unable to provide timely new information for reasons beyond his control, and if not whether there were other particular circumstances which ought to have engaged the reconsideration mechanism in the Guidance.

39. Ms Childs submitted that in answering that question the Court had to bear in mind that the Claimant was vulnerable; that English is not his first language; that trafficking is a complex area of law and that the Guidance is lengthy and potentially daunting to a non-lawyer; and that it is unclear that he had access to any, or any effective, legal assistance during the relevant month.

40. I accept all of that, as far as it goes. But it is not sufficient. If the Claimant wanted to persuade the Defendant that he had faced difficulties such that he could not produce a timely request, it was for him (or his representatives) to describe or at least provide an outline of the relevant facts. The information about that matter was (and remains) in the hands of the Claimant and no one else. There is no witness statement from him in these proceedings which deals with the issue. No information was provided at all to the Defendant on the point – certainly none which *compelled* the Defendant to conclude

that there had been reasons for not making an in-time request which were beyond the Claimant's control. The mere fact that his subsequent solicitors had only themselves received a decision after the relevant time limit had expired cannot, logically, be a reason for his own failure to have requested a reconsideration before it had expired. The fact of their instruction does not restart the clock, as they appear to have assumed.

41. That is not, however, the end of the matter. I have been troubled in this case by the potential relationship between "Ground 1" (which is technically no longer live, as a result of the concessions to which I have referred) and "Ground 2", part of which I am now considering. The Defendant took the very significant step, on 6 February 2024, of deciding to treat the Claimant's asylum claim as having been *withdrawn by the Claimant*. The reason given was that the Claimant had failed to attend the 25 January 2024 asylum interview. But this was plainly unlawful; it overlooked the fact that the Claimant had a perfectly valid, and fully evidenced, reason for not attending, which he had promptly communicated to the Defendant on 26 January 2024. It is unsurprising that the asylum withdrawal decision was eventually reversed.

42. But it was not reversed immediately, and at the time of the CG reconsideration refusal decision, it had not yet been reversed. The question that arises is this: to what extent does the illegality and unreasonableness of the asylum withdrawal decision affect (or infect) the subsequent CG reconsideration refusal decision? I accept that asylum decisions, and trafficking decisions, are different, as Mr Way submitted. Asylum is primarily about whether a person has a well-founded fear of persecution in his home country, such that it would be a breach of the Refugee Convention to return him there. Trafficking raises different legal questions, under a different Convention. It has an important bearing on the kind of support a person might need to receive whilst they are present in the UK. But the two processes are potentially related, and often will be, e.g. where, as in this case, the asylum claim and the trafficking claim arise out of the same basic alleged facts.

43. It is striking that on 4 April 2024 the Defendant stated in terms that the Claimant's failure to attend the 25 January 2024 interview had resulted in "*the asylum withdrawal decision <u>and the outcome to the modern slavery Conclusive Grounds consideration</u>*." (emphasis added). That language strongly suggests that the Defendant was under the impression, when making the CG decision, that the Claimant no longer wanted to claim that he had a well-founded fear of persecution at the hands of criminal gangs in Albania and that this had affected the outcome of the trafficking enquiry.

44. Had the Defendant not unlawfully treated the asylum claim as having been withdrawn, his conclusions on the trafficking point might well have been different. There would, additionally, have been an asylum interview. That would have given the Claimant a very full opportunity – fuller than any opportunity he had had so far – to put his best possible case about what had happened to him and to answer any concerns, in person, that the decision-maker might have about his account. It is likely that a rational decision maker, looking at the Claimant's trafficking case, would then want or need to take such relevant information as was conveyed at that interview into account when making any decisions which were closely related to the ground covered in the asylum information. The 4 April 2024 letter suggests (at the very least) that the Defendant would have done so in this case.

45. In my Judgment, the Defendant's decision on 15 April 2024 that the Claimant's circumstances were not exceptional so as to permit or justify a late reconsideration request was irrational and unfair (by reference to the *Tameside* duty, and general standards of rationality), because: (i) it overlooked a highly relevant, striking, and unusual situation, which was that the Claimant was wrongly thought to have no outstanding asylum claim arising out of alleged ill-treatment in Albania, when in fact he did; and (ii) to the extent that this fact was not known to or properly understood by the decision-maker, it ought to have been, and would have been had the Defendant taken reasonable steps to ascertain the correct position (whether under *Tameside* or otherwise). Indeed, I would go further: *any* rational decision maker properly understanding the basic factual and legal situation on 15 April 2024 would have appreciated that this was an exceptional case because the CG decision had proceeded on an erroneous basis.

46. I have carefully considered Mr Way's other response to this point, which is that it was raised and developed for the first time at the hearing before me, rather than in the claim form. He contended that had the point been properly pleaded, the Defendant would have been able to put in evidence about the relationship between the asylum and trafficking regimes, both generally and in this case. He also pointed out that nowhere in any of the Claimant's pre-action correspondence, and certainly nowhere in the request itself, had the point been squarely raised. It is unsurprising, he said, that the Defendant did not address the issue in the decision itself; the Claimant was represented by solicitors, and the decision-maker was entitled to address such arguments as had been put, without having to second-guess the best points, or proactively go back to the file containing a person's complex immigration history in order to find "*exceptional circumstances*" where none had specifically been drawn to their attention.

47. These are important submissions and, I think, fully understandable ones. Ultimately, I have concluded that they are not to be upheld:

    i) First, the claim form did contend that the CG process overall was not "*fair*" (see paragraph 24); it also contended that the asylum withdrawal decision was unlawful and unreasonable (see paragraphs 13-19). If the JR Grounds were somewhat less clear than would have been ideal, this was in my Judgment the result of a failure to make the necessary *link* between those two contentions, or to particularise them, rather than a failure to raise the point at all. Further, in her skeleton argument, Ms Childs helpfully drew the Court's attention specifically to the 4 April 2024 letter (page 141 of the Bundle), observing that it suggested that "*the asylum interview was to be part of the decision-making process in the CG decision*". I do not think it would be right to proceed on the basis that the Defendant had no notice at all of the point, or a very similar one, being made at the hearing. The Claimant was clearly saying that the CG reconsideration refusal decision was effectively 'tainted' by the Defendant's misapprehensions about the status of the Claimant's asylum claim.

    ii) Secondly, I consider that the illegality of the asylum withdrawal decision is something that the Defendant must be taken to be 'stuck' with. It is not the sort of fact that needed to be specifically pointed out to the Defendant in the Claimant's reconsideration request, in order for it to be relevant. Nor is it a point of mere detail, such that expecting the Defendant to recall it would be unfair, or such that expecting him to carry out research about it from the file would be

unduly onerous. Whether someone is or is not claiming asylum is a fundamental question in this context. It should have been obvious to the Defendant, from shortly after 26 January 2024, that the Claimant did indeed have, or should be treated as having, a continuing asylum claim. The fact that his asylum claim had wrongly been treated as withdrawn, along with the fact that the error was not spotted for so long, was itself enough to make the case exceptional. I cannot conceive of any realistic situation in which evidence from the Defendant relating to the "*relationship between asylum and trafficking decisions*" might alter my conclusions about this.

iii) Thirdly, I must remind myself that anxious scrutiny is required in this context and that the consequence of wrongly being found not to be a victim of trafficking can be very serious indeed.

iv) Fourthly, whilst I do sympathise with the Defendant for the evolving and somewhat imprecise way in which this JR claim has developed, that factor can be considered when considering the question of costs. I do not consider that it is unfair on the Defendant or otherwise inappropriate for me to entertain and resolve it now.

48. For the above reasons, I conclude that the CG reconsideration refusal decision was unlawful, and must be quashed.

49. Given that a reconsideration of the CG decision will now be necessary in any event, the remaining issues that were raised in oral argument are not as critical as they otherwise would have been. I will however express brief views.

Questions 4 and 5: Can the CG decision itself (as opposed to the reconsideration decision) be reviewed on Tameside grounds?

50. The Claim Form did not, as I have said, identify the *CG decision* as the decision to be judicially reviewed. No relief was sought in relation to it. Ms Childs did try to persuade me that what was said in the JR Grounds (see paragraphs 20 and 47(i) above) were sufficiently broad to bring into play a discrete challenge to the CG decision itself, irrespective of the validity of the CG reconsideration refusal decision, so as to remove the need for any amendment. I reject that submission. Insofar as she applied to amend the claim form in order to attack the CG decision, I refuse that application. Changing or adding to the decision which is the target of a judicial review claim is a significant procedural step. Any application to do so should have been made at an early stage, not orally (and in response to questions from the Court) on the day of the hearing.

51. Mr Way submitted that, even if there *had* been a properly pleaded claim against the CG decision, that would have been precluded by the principle of "*alternative remedy*". He referred to In re McAleenon [2024] UKSC 31 at paragraph 50. He contended that the Claimant had failed to use his alternative remedy, in that he had failed to submit a relevant reconsideration request in time. The short answer to this objection is that it proceeds on a premise that I have just rejected, and/or reject now; in my view the Claimant *had* in this case exhausted his alternative remedies. He had tried to secure a reconsideration decision and had been prevented from doing so by a decision which I have found to be legally unsound: see paragraphs 41-45 above. Had the Claimant's challenge to the CG reconsideration refusal decision failed, an analysis of the

alternative remedy point might be different (although, as Mr Way fairly accepted, whether to refuse a judicial review claim purely because a person has a suitable alternative remedy is ultimately a matter for the Judge's discretion).

52. As to the substantive question (whether there was a *Tameside* error at the Conclusive Grounds stage), again this issue is no longer material, since I have found that there *was* a *Tameside* (or similar) error at the reconsideration stage. Had it not been for the unlawful way in which the asylum claim had been treated, I doubt that the other factors relied upon by the Claimant in this claim would have persuaded me that the Defendant had acted in breach of the *Tameside* duty. The Defendant would, on that premise, have done what was reasonably required to acquaint himself with the relevant information, before making the CG decision. I agree with Mr Way's observation that the Claimant's submissions to the contrary tended to conflate (a) not having enough information to *make a decision about something*, with (b) not having enough information to justify *making a finding on the balance of probabilities that a particular proposition or contention has been established*. The Defendant's CG decision in this case was an instance of (b) not (a). It was not something that called out *by its nature* for further investigation, as Ms Childs suggested.

Conclusion

53. I grant permission to apply for judicial review on Ground 2. The claim succeeds, to the extent I have indicated.

54. In a draft of this Judgment circulated to counsel I indicated my preliminary view about the relief that might be thought appropriate, bearing in mind the conclusions I had reached. In the event the parties have agreed with that preliminary view. There is no application for permission to appeal. So the Order which I will make will do the following: (i) grant permission on Ground 2; (ii) quash the CG reconsideration refusal decision; (iii) record that the CG decision will be reconsidered by the Defendant no later than 13 February 2025; (iv) award the Claimant his costs of Ground 1, but make no order as to costs in relation to Ground 2; and (v) deal with anonymity (see further Postscript below).

Postscript: Anonymity

55. The Claimant did not initially apply for anonymity. Following my own enquiry to the parties, he did apply for anonymity, after the hearing. I accept the submissions of Ms Childs on this point to the effect that, balancing the fundamental requirement of open justice on the one hand against the risk to the Claimant as a potential victim of trafficking and/or ill-treatment on the other, the balance comes down in favour of anonymity. I will therefore make the order as requested. As it happens there was no reference at the hearing to the Claimant's name, his address or any other identifying information. But there could have been, and that would have been problematic for obvious reasons. It seems to me that it is very important for those who advise persons who may fall into this vulnerable category to consider the issue of anonymity carefully at the outset of the proceedings, and certainly well before the matter is listed in Court, rather than leaving the issue to be picked up by the Court at or after a hearing.