Neutral Citation Number: [2022 EWHC 601 (Admin)

Case No: CO/2953/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/03/2022

Before :

LORD JUSTICE FULFORD
MR JUSTICE DOVE

- -

Between :

COL	**Claimant**
- and -	
Director of Public Prosecutions	**Defendant**

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- -

Benjamin Douglas-Jones QC and Chris Buttler QC and Katy Sheridan (instructed by **Deighton Pierce Glynn**) for the **Claimant**
John McGuinness QC and Andrew Johnson (instructed by **CPS Appeals and Reviews Unit**) for the **Defendant**

Hearing dates: 23RD February 2022

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Approved Judgment

Mr Justice Dove :

Introduction

1. This claim is an application for judicial review of the decision made on behalf of the defendant not to prosecute two individuals in respect of allegations made by the claimant to the police in January 2014. The decision under consideration was made on 28th May 2021. All references to the defendant hereafter should be treated as references to those representatives of the Crown Prosecution Service ("the CPS") who have authority to reach delegated decisions in cases such as these.

2. Subject to any further order, the court directs that nothing shall be published in respect of this claim that might identify the claimant either directly or indirectly.

The claimant's case

3. The claimant is a national of the Philippines. In March 2012 she obtained employment via an employment agency with a Mr and Mrs Aljaberi in Abu Dhabi to undertake domestic and childcare work in their household, working from 7am until 10pm each day for US$400 per month (although in fact she was paid US$200). The salary of US$400 is recorded in a document from the Department of Labor and Employment in the Philippines. Detailed conditions relating to the claimant's employment by the employment agency, designed amongst other matters to safeguard the claimant from exploitation, were set out in an Employment Agreement which was officially verified.

4. Later in 2012 Mr Aljaberi obtained a diplomatic posting to the United Arab Emirates Embassy in London. As a result, he needed to move his household to London and wished for the claimant to move with them. The claimant contends that she was promised that if she moved to London with Mr and Mrs Aljaberi and their children, she would be required to work a 40-hour week and be paid £1000 per month. She agreed to these terms which appeared to her beneficial and was persuaded by the offer to relocate with the family to London. A Tier 5 visa was obtained for the claimant as an overseas domestic worker on the basis of a Certificate of Sponsorship ("the Certificate") which reflected the promise as to terms and conditions which the claimant says were made to her and provided that she was to be paid a salary of £1000 per month. It was pointed out in the claimant's submissions that this figure was just over the operative minimum wage. The claimant's immigration status was, by virtue of the visa, tied to her employment with Mr and Mrs Aljaberi: if she left that employment, she would have no right to remain in the UK.

5. Mr Aljaberi moved to London and in due course his wife and children followed. On 1st February 2013 the claimant arrived in the UK.

6. After her arrival in the UK, the claimant contends that the promise she was made as to working hours and remuneration by Mr Aljaberi and which was set out in the Certificate were not honoured. In addition, she states she was mistreated by Mr and Mrs Aljaberi. She claims that as matters played out in London she was required to work 14-15 hours each day and was only remunerated between £100-£200 per month. Her passport was taken from her. Her movement was sometimes restricted in that she was sometimes locked in the family home when Mr and Mrs Aljaberi were out, and other times she was

prevented from leaving the family home without permission. She did not have access to medical care when sick.

7. Ultimately, she escaped her employers on 1st May 2013 and was referred through the National Referral Mechanism to the Home Office for consideration of whether or not she was a victim of trafficking. On 20th September 2013 a reasonable grounds decision was made by the Home Office as the competent authority, and on 19th November 2014 the Home Office concluded on the balance of probabilities that the claimant had been a victim of trafficking. This decision was based on the conclusion that she had been recruited for the purpose of domestic servitude and deceived as to the salary that she would receive and the hours she would be required to work in the UK.

The history of the decision to prosecute

8. As set out above, in January 2014, alongside the consideration of her case by the Home Office, the claimant made a report to the police. The police investigated whether Mr and Mrs Aljaberi may have committed any offence in relation to their treatment of the claimant. The claimant was interviewed as part of that investigation.

9. Initially the police decided that they could take no further action in relation to the investigation because they considered Mr and Mrs Aljaberi had diplomatic immunity. That decision was in fact in error, and subsequent to the threat of judicial review proceedings on behalf of the claimant the police agreed to reopen the investigation. The claimant was interviewed again in early 2015, and on 8th July 2015 the police decided to discontinue the investigation on the basis that the evidence was of insufficient weight to justify continuing with it. That decision was challenged by judicial review proceedings which were compromised by the police agreeing to reconsider the matter.

10. During the course of the police investigation, on 19th September 2016, the Military Attaché's office in the UAE Embassy wrote to the Foreign and Commonwealth Office in response to being notified by the Foreign and Commonwealth Office of the investigation that the police were conducting. The letter contained a categorical denial of the allegations made by the claimant and contended that the claimant "was paid as agreed and she never raised any issue in relation to payment". It was said that the claimant had nothing to complain about and never complained: it was therefore a surprise to Mr and Mrs Aljaberi when she left their home and disappeared.

11. On 27th March 2017 the matter was referred by the police to the CPS, but on 21st February 2018 they decided not to charge Mr and Mrs Aljaberi because they considered that diplomatic immunity applied and had not been waived. That decision was upheld on review on 4th December 2018. The claimant requested a second, independent, review of that decision. A review was undertaken, and a further decision sent to the claimant on 20th June 2019. It was now accepted that Mr and Mrs Aljaberi did not have the benefit of diplomatic immunity. However, the decision was made not to prosecute them on the basis that the evidence was insufficient. Following receipt of a letter before action in relation to the decision of the 20th June 2019 the CPS made a further decision dated 13th August 2019, again concluding that it was not appropriate to instigate a prosecution in this case.

12. That decision was the subject of a challenge by way of judicial review which succeeded before a Divisional Court of Hickinbottom LJ and Sweeney J: *R (on the application of*

L) v DPP [2020] EWHC 1815 (Admin). At paragraphs 33–37 of the judgment of Hickinbottom LJ (with which Sweeney J agreed) he concluded that the decision of the 13th August 2019 was "fundamentally flawed" as the decision maker had failed to consider the possibility that an offence may have been committed by Mr and Mrs Aljaberi under section 4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, and in particular an offence under section 4(1) arising as a consequence of the relevant definition of exploitation under section 4(4)(c)(i). The full details of the judgment and this legislation are set out below.

13. Following the quashing of the defendant's decision by the Divisional Court in *L,* on 9th July 2020, a further review occurred and, on 14th August 2020, the defendant notified the claimant that a decision not to prosecute Mr and Mrs Aljaberi had been reached. The claimant made a further application for permission to judicially review this decision. This application was granted. Following the grant of permission to apply for judicial review that decision was withdrawn leading to another review by the defendant and the decision which is presently under challenge which was made on 28th May 2021.

The decision

14. In considering whether or not Mr and Mrs Aljaberi should be prosecuted three particular offences were considered by the defendant as possible charges. Firstly, the defendant considered an offence contrary to section 71 of the Coroners and Justice Act 2009; secondly, an offence under section 4 of the 2004 Act was assessed; finally, the defendant examined an offence contrary to section 1 in breach of section 4 of the Fraud Act 2006.

15. At the outset of the review, having set out the scope of the decision and the criteria to be deployed, the defendant identified that the case relied almost exclusively upon the evidence of the claimant. Whilst making allowance for not expecting the accounts she gave to be entirely consistent about everything at all times, the defendant nonetheless formed the view that having considered all the evidence in the case there were such inconsistencies and contradictions in her accounts that any prosecution based upon it would not be likely to lead to a conviction.

16. Not all inconsistencies relied upon were listed in the decision but in summary those that were identified, and which are considered below, were as follows:

(a) Dealing with events in the UAE, the decision recorded an inconsistency in relation to the account the claimant gave in a statement of January 2015 as to how she secured her contract to work for Mr and Mrs Aljaberi. A second inconsistency was noted between an account given in a Trafficking Expert Report of June 2014 from a Ms Kenny commissioned to consider the claimant's case, stating the claimant did not have any communication with Mr Aljaberi before she left the Philippines, contrasting with other accounts in which she stated that she was told she would be paid US $400 per month before she left the Philippines.

(b) In relation to the UK, the decision noted that whilst in interview with the police the claimant gave evidence that Mr Aljaberi had promised her £1000 per month if she came to the UK, in the Trafficking Expert's Report it was recorded that she was not told what her salary in the UK would be but was aware of the monthly salary of £1000 stated on the Certificate.

(c) Also, whilst in the UK the defendant noted that in a Facebook message to a Ms Wells (a person to whom she chatted on social media) the claimant, when addressing the question of her remuneration, did not say that Mr Aljaberi had promised to pay her £1000 per month. She also failed to mention the promise of payment of £1000 per month in a written account to Kanlungan (a charity that she was put in touch with and which is dedicated to assisting victims of trafficking), as well as in subsequent emails to them. Further, in her interview with the police in August 2013, she made no reference to the promise to be paid £1000 per month. Additionally, in the summary of the conclusive grounds decision no mention was made of the salary of £1000 per month being promised before she came to the UK.

(d) The defendant recorded an inconsistency between the claimant stating that she was told she would only work eight hours each day and 40 hours each week with a day off: if she was working six days for 8 hours that would be 48 hours rather than 40.

(e) There were inconsistencies regarding the frequency of payments and amounts paid by Mr Aljaberi and the circumstances in which she was given money to buy clothing.

17. The decision rejected the notion that there was a realistic prospect of a conviction in relation to the offence under section 71 of the 2009 Act. That is not the subject matter of this challenge. In relation to the offence under section 4(1) of the 2004 Act the defendant focused upon whether there was sufficient admissible and reliable evidence to prove that Mr and Mrs Aljaberi deceived the claimant with the intention of inducing her to travel to the UK to work for them as a domestic worker. The conclusions of the decision were expressed as follows:

> "On all the available evidence, it is not possible to be sure exactly what the suspects may (or may not) have said to Ms L in the UAE in relation to salary and hours. There are contradictory accounts from her. Even if Ms L could be relied on as a reliable and credible witness about low pay and long working hours once in the UK this does not mean that any intention of the suspects to deceive can be proved from this.
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> The mere fact that a case consists of one person's word against another does not necessarily mean that the case can go no further, but it is helpful to identify any potential persuasive supporting or undermining evidence either way.
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> I have considered the Certificate of Employment which stated that her salary was US $400 a month in the UAE and the Certificate of Sponsorship to support her application for her visa to work in the UK stated that she was to be paid £1000 a month. This evidence of an apparent deception, if proved, would be of the authorities in order to procure Ms L's entry to the UAE and subsequently the UK. In itself, this is insufficient to prove that the suspects also deceived Ms L.
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> I acknowledge that Ms L's account is that she had seen the Certificate of Sponsorship and it stated that she was to be paid £1000 a month. However, Ms L has provided conflicting

> accounts to third parties as to whether the suspects told her, whilst she was in the UAE, what she would be paid in the UK.
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> …
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> On her account, Ms L had therefore been aware that the suspects had apparently put a higher wage figure in an official document in order to obtain her previous visa to work in the UAE. I have considered whether Ms L's evidence of what the suspects told her set out in the previous paragraph; and/or the evidence of the visa document could be introduced and relied on as demonstrating a predisposition by the suspects to deceive Ms L when they carried out a similar exercise upon entry to the UK. I have concluded that it is unlikely that it could demonstrate such a deceit.
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> Even if it could be proved, on her own account, that Mr A promised a salary of £1000 it is clear that Ms L had known full well why the suspects had put a higher figure in her UAE visa, having asked and been told, that it was to facilitate her visa entry from the Philippines into the UAE. The fact that the suspects may have repeated the same exercise and put a certain salary amount on the immigration document connected with her entry to the UK, without more, does not prove a deception had operated on the mind of Ms L. It may have amounted to a deception of the authorities to facilitate her entry into the UK but given the clear knowledge of how her entry to the UAE had been facilitated, it is unlikely to have deceived Ms L into believing it represented the whole amount she would be paid.
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> I have also considered the position of possible deception in relation to the hours that Mr A told Ms L she would work namely 40/48 hours. The issue here in relation to this offence is not what Ms L was paid or what hours she worked but whether the suspects arranged or facilitated the arrival in, or entry into, the UK of Ms L intending to exploit her. In my assessment, is it not likely that the evidence is such that it could be proved to the required standard that the suspects had arranged Ms L's arrival in the UK intending to exploit her. Firstly because it is not possible to be sure what was said to Ms L and by whom before she left the UAE to come to the UK and secondly, even if we could be sure what was said, it is not possible to prove that the suspects had at the time the intention to exploit her."

18. In relation to the offence in breach of section 4 of the 2006 Act the defendant determined that there was no basis to bring a charge for the following reasons.

> "This is where the suspect occupies a position in which he was expected to safeguard, or not to act against, the financial interests of another person and abused that position, dishonestly,

> intending by that abuse to make a gain/cause a loss. That is not the case in relation to employer and employee.
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> The position was discussed in *R v Valujevs and Mezals* [2014] EWCA Crim 2888 where the defendants were accused of defrauding migrants who had travelled to the UK voluntarily, and had signed up under the promise of well-paid work. The workers found out that their accommodation was a condition of their being given work for which they paid excessive rent, earnings were withheld and financial penalties were imposed. The defendants used fear and debt to exploit the agricultural workers. They were charged with fraud by abuse of position. This is distinguishable from the present case. The suspects are employers and Ms L was an employee. They were not in a position where they were expected to safeguard, or not to act against, the financial of Ms L and owed no fiduciary duty. The critical factor in the instant case was that there was evidence that the gangmasters has assumed control of, and responsibility for, collecting the workers' wages or that they controlled the wages when they were handed over."

19. Further reasons upon which the defendant relies in this case were provided in the defendant's response to the Pre-Action Protocol letter sent by the claimant. In particular the following passages were contained in that letter, firstly in respect of the conclusions which were reached in relation to credibility:

> "Inconsistent accounts – The relevant inconsistencies I was addressing were not only concerned with the name of the agency but related to Ms L's contact with the agency, the payment of agency fees and who paid for her flights to the UAE.
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> As I explained in my letter, Ms L's core claim is that she was promised £1000 a month to work in the UK but was only paid £200 a month. Mr A's account is that she was paid as agreed and she did not raise an issue about what she was paid. Whilst I acknowledge that Ms L's circumstances were such that she could not be expected to provide documentary proof of how much she was paid, her various accounts, as set out in my letter, were confusing and contradictory and in my view are very likely to be considered unreliable."

20. Further, in relation to the question of the prospects for Mr and Mrs Aljaberi being prosecuted under section 4 of the 2006 Act, the Pre-Action Protocol response provided as follows:

> "7. Section 4 of the Fraud Act 2006 – I do not agree that my decision contains a misdirection on the application of section 4. The evidence in Valujevs & Mezals was such that the Court of Appeal held it was open to the jury to find as a fact that the defendants in the case (who were gangmasters) occupied a position in which they were expected to safeguard the financial

> interests of the workers they were supplying to do the work in circumstances where there was evidence a) the workers were provided with accommodation as a condition of being given work; b) they charged grossly excessive rent to inflate in the indebtedness of the workers; c) they withheld work until a worker had accrued a significant debt; d) they withheld legitimately earned moneys (or deducted moneys before handing them over) to recoup the workers suggest indebtedness; and e) they impose unwarranted financial penalties to inflate a workers indebtedness, thereby enabling them to justify withholding earnings or simply to take a worker's money.
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> My assessment of the admissible evidence in this case was that the suspects were not in a comparable position of control in respect of Ms L. It would be for the prosecution to prove the suspects occupied a position in which they were expected to safeguard the financial interests of Ms L. In my judgment, there was not a realistic prospect – even on the basis that Ms L was not paid what she was promised or worked longer hours than she had been told she would be expected to work – that the suspects would be convicted of a section 4 offence."

21. In conclusion, the defendant reached the decision that the tests which needed to be met before a prosecution against Mr and Mrs Aljaberi could be launched had not been met.

The grounds

22. The claimant's case is advanced on the basis of two grounds. Ground 1 is that the defendant's assessment of the credibility of the claimant's account was so flawed and riddled with error and misconception that it is incapable of withstanding scrutiny and is therefore unlawful. This is particularly relevant to the conclusions which the defendant made in relation to the possible offence under section 4 of the 2004 Act. A variety of issues are raised in relation to the defendant's assessment which are set out in greater detail below. In particular, the claimant draws attention to the defendant's fundamental misconception that the Certificate was capable of evidencing only deception of the UK authorities and not of the claimant. Further, the claimant contends that the individual instances of "inconsistencies and contradictions" relied upon by the defendant were in reality nothing of the kind.

23. A subsidiary feature of this ground is the contention made by the claimant that, bearing in mind the context of this decision and its relationship to article 4 of the ECHR, the appropriate standard which the court should apply is one of anxious scrutiny. This is a submission which is resisted by the defendant, who submits that the appropriate standard for the court's review is already well established in the authorities. The defendant also submits that the assessments which were made by the defendant in this case fell within the bounds of an appropriate and lawful assessment of the background to the offence under the 2004 Act.

24. Ground 2 is the claimant's contention that the defendant failed to properly understand and apply the legal framework in relation to the offence in breach of section 4 of the 2006 Act. The claimant contends that the defendant rejected the suggestion that Mr and

Mrs Aljaberi could be prosecuted under section 4 of the 2006 act solely on the basis that the employer/employee relationship did not qualify as one bringing the relationship between the claimant and Mr and Mrs Aljaberi within the scope of the offence. The claimant contends that this understanding of the legal framework is misconceived, and that the defendant was wrong to cease examination of the relationship at that point.

25. On the basis of the observations of the Court of Appeal in *R v Valujevs & Mezals* [2015] QB 745; [2014] EWCA Crim 288 there were other features of the position of Mr and Mrs Aljaberi which warranted the conclusion that section 4 of the 2006 Act was engaged which were simply never considered. The claimant contends that the decision was therefore made following a misdirection in law. Furthermore, the defendant failed to go on to consider, having established that the offence under section 4 of the 2006 Act was engaged, whether the facts of the case justified prosecution. The factual conclusions in respect of the question of whether the claimant was deceived were of no materiality in relation to this possible charge. The defendant resists this ground on the basis that the analysis of the defendant was sound, and that the employer/employee relationship was insufficient to establish a relationship able to found the offence under section 4 of the 2006 Act.

26. At the hearing the claimant advanced the grounds in reverse order, commencing with ground 2. The defendant responded adopting the same approach. This judgment also deals with ground 2 first, followed by ground 1.

The law

27. The general principles in relation to the approach to be taken in respect of a judicial review of a decision not to prosecute is well established. In the case of *R v DPP ex P Manning* [2001] QB 330 the Divisional Court considered an application for judicial review in respect of a decision not to prosecute an alleged offence of unlawful act manslaughter arising from a death in custody. In the judgment of the court handed down by Lord Bingham of Cornhill CJ the essence of the Code for Crown Prosecutors' policy addressing decisions as to whether or not a prosecution should be instituted was distilled as providing for a two-stage test. The first stage is the "evidential test", which requires there to be sufficient evidence to provide a realistic prospect of conviction. If that test is passed, then the second stage is the "public interest test". This is the question of whether or not the commencement of a prosecution would be in the public interest. The role of the court in relation to a challenge to such a decision was set out by Lord Bingham in paragraph 23 of the judgment:

> "23 Authority makes clear that a decision by the Director not to prosecute is susceptible to judicial review: see, for example, *R v Director of Public Prosecutions, Ex p C* [1995] 1 CrAppR 136. But, as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no one else. It makes no difference that in practice the decision will ordinarily be taken by a senior member of the Crown Prosecution Service, as it was here, and not by the Director personally. In any

> borderline case the decision may be one of acute difficulty, since while a defendant whom a jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial. If, in a case such as the present, the Director's provisional decision is not to prosecute, that decision will be subject to review by senior Treasury counsel who will exercise an independent professional judgment.
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> The Director and his officials (and senior Treasury counsel when consulted) will bring to their task of deciding whether to prosecute an experience and expertise which most courts called upon to review their decisions could not match. In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied."

28. Lord Bingham returned to these principals in the case of *R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening)* [2009] AC 756. His observations in that case were in turn quoted by the Divisional Court in the case of *R (Monica) v DPP* [2019] QB 1019; [2018] EWHC 3508 (Admin) in the following passage in which the principles were again reiterated:

> "44. The circumstances in which this court will intervene in relation to prosecutorial decisions are rare indeed. The principle of the separation of powers leads, as Sir John Thomas P put it in L v Director of Public Prosecutions [2011] EWHC 1752 at [7]; 177 JP 502, to the adoption of a "very strict self-denying ordinance".
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> 45. An authoritative statement of this principle, and its application to cases of this type, was given by Lord Bingham of Cornhill in *R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening)* [2009] AC756, 840—841, paras 30—32:
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> "30. It is common ground in these proceedings that the Director is a public official appointed by the Crown but independent of it. He is entrusted by Parliament with discretionary powers to

investigate suspected offences which reasonably appear to him to involve serious or complex fraud and to prosecute in such cases. These are powers given to him by Parliament as head of an independent, professional service who is subject only to the superintendence of the Attorney General. There is an obvious analogy with the position of the Director of Public Prosecutions. It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator: *R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr AppR 136, 141; R v Director of Public Prosecutions, Ex p Manning [2001] QB 330, para 23; *R (Bermingham) v Director of the Serious Fraud Office* [2007] QB 727, paras 63—64; *Mohit v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343, paras 17 and 21 citing and endorsing a passage in the judgment of the Supreme Court of Fiji in *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712, 735—736; *Sharma v Brown-Antoine* [2007] 1 WLR 780, para 14(1) - (6). The House was not referred to any case in which a challenge had been made to a decision not to prosecute or investigate on public interest grounds.

31. The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend.

Secondly, the courts have recognised (as it was described in the cited passage from *Matalulu v Director of Public Prosecutions*) _the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits'. Thirdly, the powers are conferred in very broad and unprescriptive terms.

32. Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them.

He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. In the present case, the claimants have not sought to impugn the Director's good faith and honesty in any way."

46. We distil the additional propositions from the authorities and the principles underlying them:

> (1) Particularly where a CPS review decision is exceptionally detailed, thorough, and in accordance with CPS policy, it cannot be considered perverse: L's case 177 JP 502, para 32.
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> (2) A significant margin of discretion is given to prosecutors: L's case, para 43.
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> (3) Decision letters should be read in a broad and common-sense way, without being subjected to excessive or overly punctilious textual analysis.
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> (4) It is not incumbent on decision-makers to refer specifically to all the available evidence. An overall evaluation of the strength of a case falls to be made on the evidence as a whole, applying prosecutorial experience and expert judgment.
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> 47 Lord Bingham recognised that prosecutorial decisions may be corrected for error of law, and a rare example of such a case was cited to us. In *R (F) v Director of Public Prosecutions* [2014] QB 581 the claimant, who did not wish to become pregnant, consented to her husband having sexual intercourse with her on the basis only that he would withdraw before ejaculating. During intercourse he stated that he would not do so. He ejaculated before she could object or do anything about it, and she became pregnant as a result. The Director's decision not to prosecute was quashed by this court because the decision-maker had misconstrued consent within section 74 of the 2003 Act. This was a question of legal analysis rather than of evidential evaluation. We will need to return to this authority because Ms Kaufmann relies on it in support of her over-arching submission on her first ground. What it demonstrates is that prosecutorial decisions are not immune from challenge in a sufficiently clear-cut case."

29. A further exposition of the relevant principles is to be found in the decision of the Divisional Court in *R (Campaign Against Anti-Semitism) v DPP* [2019] EWHC 9 (Admin). This case was subsequent to the decision in *Monica*. Hickinbottom LJ set out the relevant principles as follows:

> "14. The circumstances in which this court will intervene in respect of prosecutorial decisions by the DPP has been considered by this court in a long series of cases, most recently by Lord Burnett of Maldon LCJ and Jay J in *R (Monica) v Director of Pubic Prosecutions* [2018] EWHC 3508 (Admin) at [44] and following. It is unnecessary to consider these authorities in detail, because, as Sir John Thomas PQBD said in *R (L) v Director of Public Prosecutions* [2013] EWHC 1752 (Admin) at [3], the relevant law is very clear and uncontroversial.
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> 15. The following propositions are relevant to this case.

i) A prosecutorial decision is amenable to challenge by judicial review but only on conventional public law grounds, e.g. if the policy upon which the decision was based was unlawful or if the decision-maker did not follow relevant lawful policy or if the decision is irrational in the sense that it was a decision not reasonably open to the decision-maker on the available material (*R v Director of Public Prosecutions ex parte C* [1995] 1 Cr App R 136 at page 141C-E; *L* at [4]; and *R (Purvis) v Director of Public Prosecutions* [2018] EWHC 1844 especially at [75]-[81]). "Irrationality", as used in *C* and *L*, includes the raft of conventional Wednesbury grounds for public law intervention, including where the decision-maker incorrectly applies the law (e.g. *R (F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin)) or where his approach is wrong as a matter of law (*R (B) v Director of Public Prosecutions* [2009] EWHC 106 (Admin); [2009] 1 WLR 2072).

ii) If the decision-maker asks the right questions and informs himself properly, challenges to prosecutorial decisions will succeed "only in very rare cases" or "only in exceptionally rare circumstances" (*L* at [5] and the cases the referred to, and at [7]; see also *Monica* at [44], "rare indeed"). This is because Parliament has given the relevant function to the DPP as an independent decision-maker with particular experience and expertise in making such decisions which involve the exercise of judgment in relation to (e.g.) how disputed evidence is likely to be received at trial and whether a prosecution is in the public interest (*R v Director of Public Prosecutions ex parte Manning and Melbourne* [2000] EWHC 342 (Admin); [2001] QB 330 at [23] per Lord Bingham of Cornhill LCJ, citing *C*; and *R (Corner House Research) v Serious Fraud Office* [20018] UKHL 60; [2009] 1 AC 756 at [30]-[32] per Lord Bingham, cited with approval in *Monica* at [45]). Consequently, prosecutorial decision- makers have "a significant margin of discretion" (*L* at [43]; and *Monica* at [46(2)]). The result is that this court, whilst intervening if the decision is irrational or otherwise unlawful, has adopted a "very strict self-denying ordinance" (*L* at [7]).

iii) However, as Mr Grodzinski submitted, the margin allowed to the decisionmaker (and, hence, the deference this court gives to his decision) depends upon the issues with which he has to grapple and the circumstances of the case. The issues in this context often involve disputed evidence of primary fact, where the decision- maker's experience and expertise in considering how that evidence will be received at trial and predicting the verdict at trial will be a particularly powerful factor; and this court will be slow to hold that the decision- maker's assessment is irrational. Similarly, where the issue involves an assessment of the public interest. However, if the issue is essentially one of law, the decision- maker's experience and expertise are of less

> force, and this court will more readily be prepared to find that his conclusion was wrong in law.
>
> iv) Whilst the exercise of the court's power to intervene will always be exceptional, because a decision *not* to prosecute is final subject only to judicial review, the exercise of the court's powers will be less rare in those circumstances than in the case of a decision to prosecute because the defendant is then free to challenge the prosecutor's case in the criminal court (*B* at [52]-[53] per Toulson LJ).
>
> v) Prosecutorial "decision letters should be read in a broad and common-sense way, without being subjected to excessive or overly punctilious textual analysis" (*Monica* at [46(3)])."

30. Section 1 of the Fraud Act 2006 provides the person is guilty of fraud if they are in breach of any of sections 2–4 of the 2006 Act. Section 4 creates an offence of fraud by abuse of position. The terms of section 4 are as follows:

> "**4 Fraud by abuse of position**
>
> (1) A person is in breach of this section if he–
>
> (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,
>
> (b) dishonestly abuses that position, and
>
> (c) intends, by means of the abuse of that position–
>
> (i) to make a gain for himself or another, or
>
> (ii) to cause loss to another or to expose another to a risk of loss.
>
> (2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act."

31. The correct approach to the question of the position defined by Section 4(1)(a) was considered by the Court of Appeal in the case of *R v Pennock* [2014] 2 Cr. App. R. 10; [2014] EWCA Crim 498. At paragraphs 4 and 6 of the judgment the court analysed that both the terms of the statute and the ingredients of the offence under section 4 in the following terms:

> "4. There is no statutory explanation of what constitutes the circumstances set out in s.4(1)(a), so it must depend upon the facts of each case. Neither is the word "abuses" in s.4(1)(b) defined in the Statute. A good working meaning might be: "uses incorrectly" or "puts to improper use" the position held in a manner that is contrary to the expectation that arises because of that position. That appears to be the proposition which is accepted in the current edition of *Archbold* at para.21–386.

> …
>
> 6 Thus, in general terms, in respect of an offence charged under s.4 of the Fraud Act 2006, the prosecution has to prove four matters:
>
> (1) that the defendant at the relevant time occupied a position in which he is expected to safeguard or, at least, not act against the financial interests of another. The current edition of *Archbold*, at para.21–385, suggests that the "expectation" in s.4(1)(a) is that of the reasonable member of the public as personified by the jury. For present purposes we would accept that definition;
>
> (2) that the defendant "abuses" that position, ie. he uses that position incorrectly or he puts it to improper use contrary to the expectation resulting from the position held;
>
> (3) that the defendant's abuse of that position is dishonest; and
>
> (4) that the defendant intends, by means of his dishonest abuse of that position, either to make a gain for himself or another person; or that he intends to cause loss to another or to expose another person to a risk of loss. As is clear from s.5 of the Act, the gain or loss must relate to money or any other property, but it can be a temporary gain or loss or a permanent one. But there does not have to be an *actual* gain or an actual loss."

32. In the case of *Valujevs* the defendants were charged on indictment with an offence under sections 1 and 4 of the 2006 Act. They were gangmasters and it was the prosecution's case that they had abused that position as an unlicensed gangmaster to make unwarranted deductions from their workers' legitimate earnings, as well as charging excessive rental payments for their accommodation and imposing unwarranted fines. The case was the subject of a successful submission of no case to answer at the close of the prosecution case based upon the proposition that the position of a gangmaster did not amount to a position within section 4(1)(a) of the 2006 Act. The gangmaster was not expected to safeguard, nor act against, the financial interests of the workers to whom work was supplied by them. The appeal against that terminating ruling was allowed. The analysis of the court given in the judgment of Fulford LJ was as follows:

> "40. We stress, we have focused on the regulatory scheme that applies to gangmasters and whether or not the approach taken on this appeal will apply in future cases as regards others who, in different roles, take on the responsibility for collecting the wages of a worker, employed or self-employed, is not for this court to determine.
>
> 41. Although the statute does not provide any assistance on the issue, in our view the "expectation" in section 4 of the 2006 Act is an objective one. It is for the judge to assess whether the position held by the individual is capable of being one "in which he is expected to safeguard, or not to act against, the financial

interests of another person". If it is so capable, it will be for the jury thereafter to determine whether or not they are sure that was the case. It would be untenable to suggest that the expectation should be that of either the potential victim (the test would, in all likelihood, be too low) or the defendant (the test is likely to be set too high). Therefore, this is an objective test based on the position of the reasonable person.

42. We are unpersuaded by the defendants' contentions that unlicensed gangmasters are not caught by this "expectation". In this regard we accept the submission of the prosecution that, although the defendants were allegedly acting as gangmasters without a licence, they do not fall outside the ambit of section 4. If they are guilty of count 1 then the expectation potentially applies with as much force as if they had been operating under a licence. There is plainly a strong link between the two alleged offences. The facts that underpin count 1 are equally relevant to the jury's assessment of count 2. We would suggest that the jury should be directed to consider count 1 first and that count 2 is dependent on a conviction on count 1, albeit the jury would then have to go on to consider the various additional elements of count 2.

43. The prosecution has relied on other forms of questionable financial behaviour on the part of the defendants as part of its reliance on section 4 of the 2006 Act, such as the general device of charging excessive sums for rent, withholding work in order to ensure that the worker in question was indebted to the gangmaster, or lending money to workers for which claims are later made for repayment (as opposed to deducting sums from wages). In our judgment, potentially reprehensible behaviour of this kind falls outside the financial interests of a person the gangmaster could properly be expected to safeguard or not to act against. Individuals do not commit a criminal offence under section 4 of the 2006 Act if they seek rental payments in excess of the market rate and gangmasters are not under an obligation to provide employment for those seeking work. Gangmasters are entitled to ask for repayment of moneys that they have lent to workers. Although we recognise that these can be difficult situations, the individual is able to look for accommodation or employment elsewhere and we are unpersuaded that this suggested behaviour on the part of the defendants arguably provides the basis for inclusion as particulars of a section 4 of the 2006 Act offence. In this critical sense we agree with the judge in the court below that to establish an abuse of position for the purposes of section 4 of the 2006 Act it is necessary for the prosecution to demonstrate a breach of a fiduciary duty, or a breach of an obligation that is akin to a fiduciary duty. This can conveniently be described, for instance, as a breach of trust or a breach of a privileged position in relation to the financial

> interests of another person. Section 4 does not apply to those who simply supply accommodation, goods, services or labour, whether on favourable or unfavourable terms and whether or not they have a stronger bargaining position. Therefore, the fact that an individual is a gangmaster who o›ers work or accommodation on particular terms, or lawfully requests the repayments of debts incurred by workers, does not ipso facto involve the abuse of a relevant position as regards the financial interests of another person.
>
> 44. We therefore concur with the conclusion of the judge that section 4 should not apply in "the general commercial area where individuals and businesses compete in markets of one kind or another, including labour markets, and are entitled to and expected to look after their own interests". We repeat, the critical factor in this case is that there is evidence that the defendants arguably assumed control of, and responsibility for, collecting the wages of the workers, or they controlled the wages at the moment that they were paid over, and the fact that they were acting as gangmasters merely provided the vital context relied on by the prosecution in which that role was assumed."

33. Turning to the offence created by section 4 of the 2004 Act, at the relevant time for the purposes of these proceedings the pertinent parts of section 4 provide as follows:

> "**4 Trafficking people for exploitation**
>
> (1) A person commits an offence when he arranges or facilitates the arrival in, or entry into, the United Kingdom of an individual (the passenger) and –
>
> (a) he intends to exploit the passenger in the United Kingdom or elsewhere, or
>
> (b) he believes that another person is likely to exploit the passenger in the United Kingdom or elsewhere.
>
> …
>
> (4) For the purposes of this section a person is exploited if (and only if) –
>
> (a) he is the victim of behaviour that contravenes Article 4 of the Human Rights Convention (slavery and forced labour),
>
> (b) he is encouraged, required or expected to do anything as a result of which he or another person would commit an offence under the Human Organ Transplant Act 1989 (c.31) or under section 32 or 33 of the Human Tissue Act 2004,

> (c) he is subjected to force, threats or deception designed to induce him –
>
> (i) to provide services of any kind."

34. In reaching conclusions in relation to the antepenultimate decision in respect of prosecution and prior to the one being considered in the present case, Hickinbottom LJ was satisfied that the decision was infected with legal error on the basis that the defendant failed to address the definition of exploitation contained within section 4(4)(c) at all, focusing instead exclusively on the definition contained within section 4(4)(a) and whether the claimant was a victim of behaviour contravening article 4 of the ECHR. Hickinbottom LJ expressed his conclusions in the following paragraphs:

> "33. As quoted above (at paragraph 21), the decision maker said in this letter that "exploitation is narrowly defined" – itself a moot point (see, e.g., *R v Karemera* [2018] EWCA Crim 1432; [2019] 2 Cr App R 14 at [44] per Hallett LJ) – and he continued that the relevant parts of the definition were slavery and forced labour (as defined in section 4(4)(a)); and, "the use of force designed to induce a person to provide services, provide another person with benefits or enable another person to acquire benefits". These words, Mr McGuinness submitted, although not referring to "threats" or "deception", were clearly a reference to section 4(4)(c). However, if they were, "deception" is a most notable absentee. The decision maker noted the Claimant's complaints of "her hours of employment were extremely long; she was paid significantly below what was due"; but, he said, there had been "no deception as to the nature of the work that would be undertaken" and the Claimant had been "remunerated for her services, albeit in sums alleged to be significantly less than agreed". The references here to hours and pay, and to "deception", however, were clearly made in the context of section 4(4)(a).
>
> 34. As indicated above (paragraph 23), in the August decision letter, the decision maker said that he had "considered each potential route through which the offence could be made out", which would on its face include the section 4(4)(c) route – but then went on to consider *seriatim* those potential routes, not mentioning any section 4(4)(c) route, before concluding that the evidential test was not met. This is a clear indication that, in the August decision letter at least, the section 4(4)(c) route was not in his mind at all.
>
> 35. Therefore, although the June decision letter asserts that there is an insufficiency of evidence to sustain charges against Mr & Mrs Aljaberi on the basis that they deceived the Claimant to induce her to come to provide services in the UK, there is simply no indication in the June or August decision letter that the decision maker considered at all the relevant available evidence. There is no indication in either letter that the decision maker

> considered the available evidence as to (i) deception (notably the terms as to pay and hours settled prior to the Claimant's departure for the UK compared with the actual hours required and payments made in respect of the Claimant's work in London, including whether this amounted to deception on the part of Mr and/or Mrs Aljaberi), and (ii) if it were deception, whether the Claimant was induced by it to come and work in the UK; or that he considered the extent to which that evidence might support such a charge. As to (i), the Claimant's evidence was clear and (with the exception of one occasion when she referred to 48 – rather than 40 – hours per week) consistent; and, at least as to required hours, confirmed in the CoS.
>
> As to (ii), the Claimant said in her interview that the proposed terms as to pay and hours were "the reason I came here" (ABE Interview Transcript, page 20); and, in her January 2014 statement, she said that she had only accepted the job in London "because it seemed that my working conditions in the UK would be better" (paragraph 20). Whilst I accept that, even though the decision maker's starting point was to accept the Claimant's evidence as credible (and, despite his concerns about inconsistencies etc, he drew no conclusion that her version of events was generally not credible), the decision maker might have considered that the evidence was still not sufficient to give a realistic prospect of conviction; but that is an issue with which the decision maker appears not to have wrestled.
>
> 36. In my view, although we were referred to authorities on the adequacy of reasons in public law decision making, this is not a reasons case: as Mr Douglas-Jones submitted, there is simply no evidence that the decision maker grappled with the assessment of the sufficiency of the available evidence against the elements of the offence by way of section 4(4)(c). In the absence of evidence, there is no basis for finding that he did. The decision maker's approach was thus fundamentally flawed."

35. The claimant developed submissions as part of the argument in relation to ground 1 that, in the light of the decision of the Supreme Court in *Kennedy v Charity Commission* [2015] AC 455 (in particular at paragraph 51 of the judgment of Lord Mance JSC), the standard of scrutiny to be applied in an application for judicial review is variable, and the test to be applied in each case depends upon its context. Here the context includes article 4 of the ECHR, and as is identified in the decisions of the European Court of Human Rights in *Chowdury & others v Greece* (application 21884-15 30th March 2017) and *SM v Croatia* [2021] 72 EHRR 1, the article 4 duty includes a procedural duty. This duty encompasses not simply the investigation of cases in which article 4 is engaged, but also their prosecution (bearing in mind when considering these questions that the duty corporates a requirement of means and not result). These principles were recognised in the recent decision of the Court of Appeal in *MN v Secretary of State of the Home Department* [2021] 1 WLR 1956. In each of these authorities dealing with circumstances engaging article 4 the court required the application of an approach

involving a particularly thorough or anxious scrutiny being given to the question of whether or not the procedural duty had been satisfied.

36. In response to these submissions the defendant contends that neither the decision in *Chowdury* or *SM* are directly engaged in the present decision, and they can be distinguished. The case of *MN* was concerned with a different question related to the court's scrutiny of a conclusive grounds decision. Such a decision is capable of giving rise to particular rights to which the person who is recognised as a victim of trafficking is entitled: this context clearly distinguishes the facts of the present case. The defendant draws attention to the recent decision of this court in *R (Canham) v DPP* [2021] EWHC 3361, a case concerning a failure to prosecute a homicide, which involved similar submissions in respect of article 2 which were dismissed by Whipple J (as she then was). Whipple J concluded that the approach comprised in the line of authority commencing with *Manning* and set out above was the appropriate framework for considering cases of this kind.

37. For reasons which will become apparent in due course I do not propose to resolve the issues raised by these submissions since they do not arise for determination in the light of my findings set out below.

Submissions and conclusions

38. The claimant's contention under ground 2 is that it is clear from the decision that the defendant formed the conclusion that section 4(1)(a) of the 2006 Act could not be engaged in relation to the position of an employer and an employee. The decision says as much in terms. Notwithstanding reference to it, the defendant failed to properly understand and apply the principles to be derived from the case of *Valujevs,* and examine the particular features of the relationship which had been established between Mr and Mrs Aljaberi and the claimant in considering whether section 4(1)(a) applied. Instead, the consideration of the position between them was effectively drawn to a close by the assertion that a position under that subsection could not arise "in relation to employer and employee". In response it is submitted on behalf of the defendant that, in effect, the decision-maker cut to the chase in respect of this point and chose to analyse it on the basis of what was considered to be the height of the claimant's case, namely the differences in terms of salary and hours. In that context, and in the context of the findings of the defendant as a whole, the conclusion that section 4(1)(a) was not engaged was realistic and properly applied the conclusions of the Court of Appeal in *Valujevs*.

39. The characterisation of the defendant's decision by the claimant, when it is read both in the original decision and further amplified in the Pre-Action Protocol letter, is appropriate and represents a fair and straightforward reading of the decision. It is clear that the defendant considered that the fact that the claimant and Mr and Mrs Aljaberi were in the relationship of employer and employee meant that section 4(1)(a) could not be engaged and thus the other elements of the offence did not arise for examination. Casting around other parts of the decision does not assist the defendant: the operative part of the decision drew the examination of the question of the position between the claimant and Mr and Mrs Aljaberi to a close after noting their relationship was that of employee and employer.

40. This approach was a clear misdirection of law and a failure to recognise and apply the principles established by the Court of Appeal in *Valujevs* in particular at paragraphs 34, 41 and 44. The relationship of employer and employee is not, when applying the principles set out in *Valujevs*, dispositive of the question of whether or not a relationship upon which section 4(1)(a) bites arises. It will, of course, be relevant but it may not in every case be the end of the determination of the matter. It is necessary to examine whether there are any particular features of the case beyond that relationship which might take that relationship out of the general commercial arena, and give rise to an expectation, objectively assessed, that the suspect should safeguard, or not act against, the financial interests of the complainant.

41. As the claimant in the present case submits, there were, on the basis of the material before the defendant, clear features of the case which would entitle the conclusion that section 4(1)(a) of the 2006 Act was engaged. These features bear particularly upon the vulnerable nature of the claimant both generally, and also in the context of her relationship with Mr and Mrs Aljaberi. The evidence of the employment agreement in relation to her engagement by the employment agency in the UAE provides confirmation of her vulnerable position as a foreign worker in that country, in that it included various undertakings relating to the risks of financial abuse both by the employment agency and also by the persons for whom she was working. These vulnerabilities were compounded by her relocation to the UK on the basis of the Tier 5 visa application. As a consequence of the system of immigration regulation to which she was subject under the Tier 5 visa she was particularly beholden to Mr and Mrs Aljaberi since it was a condition of the visa that she should remain in their employment. Her status in the UK was heavily dependent upon Mr Aljaberi as her sponsor, a position which is of particular significance within the Tier 5 system of immigration regulation which applied at the time of these events.

42. Further potential vulnerability to exploitation arose in the circumstances of this case from the fact that Mr Aljaberi, by virtue of his position, had the potential to invoke diplomatic immunity in relation to any allegations against him of mistreatment or financial abuse. All of these features were quite absent from the defendant's consideration of the question of whether the relationship between the claimant and Mr and Mrs Aljaberi engaged section 4(1)(a) of the 2006 Act. This material appears not to have been assessed because the conclusion had been reached that since their relationship was one of employer and employee that put an end to the matter. In fact these features clearly supported the contention that in the particular relationship with which this case is concerned Mr and Mrs Aljaberi did occupy a position in which they would be expected to safeguard, and certainly not act against, the financial interests of the claimant bearing in mind the evidence which they provided of her potential vulnerability. In short, this was not simply a relationship of employer and employee: it was a particular relationship in which not only the question of employment, but also the provision of accommodation, and most pertinently the dependency of her immigration status in the UK on her sponsor and continued employment were integral elements of their relationship. The potential for exploitation in these circumstances was clear and these were features well beyond the simple relationship of employer and employee clearly capable of giving rise to an expectation of the kind envisaged in section 4 of the 2006 Act.

43. I am satisfied that the approach taken by the defendant to this issue was a clear misdirection and involved a failure to apply the relevant legal principles from the case of *Valujevs* to the particular circumstances of the claimant. This was a misdirection of law and, like the failure in the earlier decision in this case, a fatal flaw in the decision-making process. It led the defendant to finish the consideration of the case without completing an assessment of the evidence in relation to the other issues pertinent to the offence under section 4 of the 2006 Act. This conclusion is sufficient to lead to the decision in this case being quashed.

44. Turning to ground 1 a key feature of the defendant's decision, in particular in the light of the quashing of the earlier decision in *L*, was the question of whether or not there was evidence that the claimant had been deceived, in particular in relation to the salary that she was to be paid in the UK, so as to justify the prosecution of Mr and Mrs Aljaberi under section 4 of the 2004 Act. The claimant draws attention to the passage in the decision set out above in which the defendant considers the Certificate provided as part of the visa process, and concludes that even if it were right that the claimant was the subject of low pay and long working hours the Certificate could not provide evidence of deception of the claimant and would, if proved, solely amount to a deception of the authorities in the UK and be insufficient to prove that the claimant was also deceived. This conclusion was bolstered by a further finding that whilst the claimant had said she had seen the certificate she had provided conflicting accounts to third parties as to whether the subjects told her whilst in the UAE what she would be paid in the UK, and therefore this element of the evidence could not be accepted.

45. The claimant submits that these conclusions, which were a key plank of the defendant's decision in relation to the question of deception, are fundamentally misconceived. The claimant draws attention to the Home Office's UK Border Agency Guidance on Tier 5 visas under the Points-Based System which applied at the time when the claimant's visa was granted. The claimant also draws attention to the extracts available to the court from the Home Office's file on the claimant's visa, which were provided to the claimant pursuant to a subject access request. The extracts are incomplete for reasons which it has not been possible for the court to be conclusively satisfied about. Nonetheless certain features of the evidence are clear and essentially incontrovertible. Firstly, the application for the Tier 5 visa was completed and the visa obtained prior to the claimant travelling to the UK at the start of February 2013, it having been issued on 30th October 2012. It appears from the documentation that it was issued at the British Consulate in Abu Dhabi in the UAE. According to the notes in the document check undertaken prior to issuing the visa, the Certificate was seen along with terms and conditions of employment signed by the employer.

46. The Certificate itself is not contained within the documentation obtained from the Home Office. However, the nature of the Certificate and accompanying documentation which would have had to be completed in order for the visa to be granted can be discerned from the Tier 5 Policy Guidance. The Guidance in respect of private servants in diplomatic households, who are part of the category of Tier 5 applicants qualifying as coming to the UK under contract to provide a service covered by international law, set out the following requirements in relation to such applications:

> "131. In assigning a Certificate of Sponsorship to private servants in diplomatic households, the sponsor will have guaranteed that you:

- are aged 18 years or over;
- will be employed as a private servant by, and in the household of;

(a) a named member of staff of a diplomatic or consular mission who has diplomatic privileges and immunity as defined by the Vienna Convention on Diplomatic relations; or

(b) a named official employed by an international organisation with certain privileges and immunities under United Kingdom or international law;

- intends to work full-time in domestic employment for that named employer;
- will not take up any other form of job for the sponsor other than private servant in the specified household; and
- will leave the United Kingdom when your permission to stay has expired.

Please note that you must provide written evidence of the terms and conditions of your employment in the United Kingdom in the form set out in the table below. This must be signed by you and your employer, who must be a diplomat."

47. In addition, the Guidance provided a proforma to be competed in relation to the terms and conditions of employment. The proforma required both the employer and the employee to sign the document. The proforma required specification of the key elements of the terms and conditions of employment in addition to the identities of the parties and the address where the employee would be working. The contents were also required to include specification of the rate of pay, hours of work, accommodation provided and holiday entitlement as part of the contract of employment.

48. Once the nature and content of the Certificate alongside the documentation relating to the terms of the employment and sponsorship are understood, the defendant's conclusion that this documentation could only prove a deception of the UK authorities is misconceived and unsustainable. These were documents that the claimant was required to sign as part of the visa process and as part of a sensible system of documenting the substance of the employment contract pursuant to which she and Mr Aljaberi sought entry clearance for her. The inclusion of the payment of £1000 a month within that documentation was capable of amounting to not simply a deception of the UK authorities but also the claimant, who was required to sign the documentation and would have been aware, therefore as she said, of what she was promised to be paid in the UK.

49. The proper understanding of the visa documentation, and the Certificate in particular, further completely undermines the conclusion of the defendant that there was no reliable evidence as to what the claimant was told would be her salary whilst she was

still in the UAE. The misconception in these key conclusions in respect of the implications of the Certificate contained within the decision are, in my view, a clear-cut basis for concluding that the defendant fell into legal error in suggesting that there was no evidence to support the claimant having been deceived as to her salary in the UK, a conclusion which was simply not sustainable.

50. During the course of argument, it was suggested on behalf of the defendant that she may not have known of the salary provision at the time when she signed the documentation. I am not satisfied that that is a submission which is realistically open to the defendant on the basis of the material shown to the court by the claimant in relation to the correct procedure for obtaining the Tier 5 visa, and it is certainly not a theory which is reflected in the defendant's conclusions in relation to the Certificate in the decision. It was also submitted (as was suggested in the decision) that it might be open to Mr and Mrs Aljaberi to run as a defence that the claimant must have known that she was going to be paid less than £1000 a month, and that she was therefore a party to the deception. In my view it is appropriate to observe that this would amount to an extremely unattractive defence, to put it as neutrally as possible, and would further require Mr and Mrs Aljaberi to explain why it was that the UAE Embassy had written during the course of these matters being investigated to indicate that the claimant had at all times been paid in full by Mr and Mrs Aljaberi.

51. It is a striking feature of the decision that it does not completely engage with the question of which aspects of the claimant's evidence or her case are accepted as part of the factual framework and which are not. It suffices to say, in respect of this point, that the defendant's conclusions appear to be predicated on the basis that her evidence about low pay and long working hours in the UK are accepted. In that case, a proper understanding of the nature of the Certificate demonstrates a deception operating not only on the UK authorities but also on the claimant as a signatory to documents containing a false representation as to the salary to be paid.

52. This conclusion also impacts upon the second passage from the decision quoted above, and whether or not the claimant was aware of the promise of a salary of £1000 per month prior to leaving the UAE. Knowledge of the reality of the visa documentation casts a very different light upon the low pay and long hours which were experienced by the claimant in her employment in the UK.

53. As set out above, at an earlier part of the decision the defendant set out eight points in support of the contention that the core of the claimant's account that she was promised £1000 per month to work in the UK but only paid £200 per month were "confusing and contradictory". During the course of the claimant's submissions each of these points was tackled on the basis that they appeared to amount to the justification for the defendant's repeated observation that the claimant's account was not reliable.

54. The first point relies upon the fact that in her ABE interview of the 30th January 2014 the claimant is recorded as saying that Mr Aljaberi told her she would be earning £1000 per month, whereas in the report of the trafficking expert Ms Kenny (which was based on information gathered during meetings held with the claimant and information provided by her legal representatives), the claimant is reported as stating that "she was not informed what her salary in the UK would be but was aware that the Certificate of Sponsorship stated that she would receive a monthly salary of £1000". The claimant submits, firstly, that this material should be read in context: both the

contemporaneously recorded ABE interviews and the interview provided to the competent authority are identical in recording the claimant being told by Mr Aljaberi of her monthly salary whilst in the UAE. Further, even if this were an inconsistency, it neither undermines the key point that the claimant was deceived nor does it provide a promising topic of cross-examination for the defence, bearing in mind that the claimant's account recorded in Ms Kenny's report is clear that she was deceived by the contents of the Certificate. I accept the submissions made on behalf of the claimant. In context this is hardly a point at all, and at best a minor forensic blemish against the backdrop of the wealth of other evidence bearing upon the consistency of the claimant's account.

55. The second point is that in exchanging texts with Ms Wells in 2013 the claimant indicated that she was disappointed by only being paid £200 per month, but made no mention of the promise of £1000 per month. The claimant submits this has to be seen in context. Firstly, this is an observation in an informal exchange of texts over Facebook rather than the claimant providing some kind of formal account of her history. Even on its own the claimant submits that it neither contradicts nor confuses the claimant's account. I agree. In reality the Facebook messages are neither confusing nor contradictory, and indeed they reinforce the claimant's overall account of her being grossly underpaid when working in the UK.

56. The third and fourth points relied upon by the defendant were related to Facebook messages between the claimant and the Kanlungan charity on 23rd March. The claimant states that she is being paid £200 per month but, the defendant observes, makes no reference to having been deceived or any agreement that she would be paid £1000 per month being entered into before she left the UAE. On 29th March 2013 and 12th April 2013, she again references being paid the £200 per month without mentioning deception or the agreement she would be paid £1000 per month. On 12th April 2013 the claimant says that her employer "only gives me £200 instead of £1000 I wish for". In response, the claimant points out that the defendant does not refer to the contents of the following message on 22nd April, in which the claimant records that the certificate stated that her salary would be £1000 but she was only paid £200. Again, I agree with the claimant that these messages are simply not capable of being read as being either confusing or contradictory: they are all, when read together and in context as informal communication, entirely consistent with the claimant's account.

57. Fifthly, the defendant asserts that in August 2013 when the claimant gave an account to a police officer she provided details of her poor working conditions and pay, but again did not mention being deceived or that she would be paid £1000 per month. In fact, this entry is from the 13th March 2014 and taken from the CRIS report, and the claimant submits that when read in context it does not contradict her account nor is it in any way confused. Again, I accept these submissions.

58. Sixthly, the defendant relied upon the summary from the conclusive grounds decision in which it was recorded that the claimant stated her employer did not tell her much about going to the UK "but she was told she would get a new contract and would work 40 hours per week". The defendant observes that the claimant did not say that she would receive a salary of £1000 per month before travelling to the UK. The quotation relied upon by the defendant is taken from paragraph 3(b) of the summary in the conclusive grounds decision. As the claimant submits, it is surprising that the defendant makes this point when in paragraph 3(a) of the same document just above the extract relied upon

there is explicit reference to the Certificate stating that her salary was to be £1000 per month. I have formed the view that this is a bad point, and that when the document is read as a whole it is perfectly clear there is no contradiction in the claimant's case nor any confusion. Furthermore, as the claimant points out, the promise of the payment of £1000 per month is contemporaneously recorded in terms in the record of the trafficking interview which underlies this document.

59. The seventh point relied upon by the defendant is that there is an inconsistency between the claimant stating she would work 40 hours per week and that she would be required to work eight hours per day for six days a week. The claimant accepts there is a mathematical error, but again submits that the answer to this point is firstly that this would be specified in the certificate and secondly that it is not fundamental to the credibility of the claimant's case. I agree that this is an inconsistency in the claimant's account but the question to be assessed is the impact that it would have upon whether there is a reasonable prospect of a conviction of the suspects in the light of that contradiction. I consider this impact on any reasonable view to be at most negligible.

60. Finally, the defendant asserts that the claimant was inconsistent in relation to the frequency and amount of payments made by Mr and Mrs Aljaberi and the circumstances in which she was given money to purchase winter clothes. As part of the preparation of the case the claimant has prepared a detailed schedule of each of the main themes of the claimant's case and how they are recorded on the various occasions when the claimant has provided an account. That schedule does not demonstrate any inconsistency in relation to the provision of £200 to the claimant to purchase winter clothes. Similarly, the various accounts of what she was paid are essentially consistent.

61. Whilst, as noted above, in the Pre-action Protocol response the defendant took the opportunity to augment the inconsistencies relied upon, as matters emerged in the hearing these contentions do not take the defendant's case any further forward. One of the major points raised alongside a failure to keep appointments with the police in the early stages of the investigation was the suggestion that after a meeting on 2nd July 2014, for a period of nearly a year, the claimant did not pursue her case. On behalf of the defendant at the hearing it was conceded that this was an error, and that in fact on 29th September 2014 a Pre-action Protocol letter had been sent to challenge the decision to close the investigation.

62. Ultimately, it is of course accepted that the long-established principles in relation to questions of this sort encourage the affording of deference to the specialist prosecutor and their assessment of the potential merits of the case. In the light of the submissions made by the claimant under ground 1, the question is whether or not the reasons provided in the decision justify the conclusion that the defendant's assessment that there was no reasonable prospect of a conviction in this case was one reasonably open to the defendant. As the defendant properly stressed in submissions to us, the question is not whether this court would have reached the same decision, but whether the decision was properly open to the defendant taking account of all the circumstances and the available evidence. That is a question which falls to be addressed taking account of the reasons given for the defendant's ultimate conclusion and bearing in mind all of the available material. Having scrutinised the defendant's reasons in the light of the concerns expressed by the claimant I am satisfied that the justification for the defendant's decision was so fundamentally flawed it was not open to the defendant. The explanations offered simply do not justify the conclusions. In particular, for the reasons

set out above, the defendant's conclusion that the Certificate could only mislead the UK authorities was not open to him and was based on a misconception or misunderstanding as to the nature of the Certificate and the documentation supporting the visa. With the exception of some very minor points none of the matters set out as reasons for concluding that the claimant's evidence was unreliable amounted to any inconsistency or confusion in her account when scrutinised. The reasons provided are not capable of substantiating the defendant's conclusions and I am driven to the assessment that the defendant's decision infringed Wednesbury principles and must be quashed. I am satisfied that this is one of the very limited number of cases where there is a clear-cut basis for concluding the defendant erred in law.

63. The conclusions which I have reached are based upon the application of standard public law review standards and principles without the need for any additional fine tuning or intensification of the court's scrutiny of the decision. This is a case which does not turn upon the submissions made by the claimant as to the standard of review. In those circumstances I do not propose, as set out above, to embark upon seeking to resolve the issues raised by the claimant in respect of the appropriate standard of review.

64. It follows that I have reached the conclusion that the claimant's contentions under both ground 1 and 2 are made out and therefore, in my view, the decision of the defendant in this case must be quashed.

Lord Justice Fulford VP

65. I agree.