Neutral Citation Number: [2021] EWHC 3019 (Admin)

Case No: CO/2288/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 November 2021

Before :

MR DAVID LOCK QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

THE QUEEN (On the application of TVN)

Claimant

- and –

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- -

Ms Emma Fitzsimons (instructed by Duncan Lewis Solicitors) for the **Claimant**
Mr Benjamin Seifert (Instructed by the Government Legal Department) for the **Defendant**.

Hearing date: 29 October 2021

- -

APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII. The date and time for hand-down is deemed to be 10.30am on 11 November 2021.

I direct that pursuant to CPR PD 39A para 6.1 no official shorTd note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

1. This is an application for judicial review on behalf of TVN against a decision made by the Single Competent Authority ("**SCA**"), acting on behalf of the Secretary of State for the Home Department ("**the Secretary of State**") on 21 April 2021 ("**the Decision**") in which the SCA reached the decision that the Claimant was, on the balance of probabilities, not a victim of modern slavery. Permission was granted by Mr Anthony Metzer QC sitting as a Deputy Judge of the High Court on 23 August 2021. For the reasons set out below, this challenge succeeds and the decision will be quashed.

2. The Claimant was represented by Ms Emma Fitzsimons of counsel and the Secretary of State was represented by Mr Benjamin Seifert of counsel. I am grateful to both counsel for their helpful and focused submissions. The case raises issues about how the SCA discharges its duties, the processes followed by the SCA in reaching decisions on behalf of the Secretary of State and the extent to which these are lawful in the light of the decision of the Court of Appeal in series of cases but in particular the seminal decision of *R (MN and IXU) v Secretary of State for the Home Department* [2021] 1 WLR 1956 ("***MN***")

3. Decisions made by the SCA as to whether a person is a victim of trafficking ("**VoT**") have a profound effect on the lives of relevant individuals. Whilst a decision that a person is a victim of modern slavery does not guarantee that the individual will be able to stay in the United Kingdom, it has substantial consequences for an immigration application and also affects the welfare benefits to which the person is entitled. It may also have indirect consequences in relation to criminal convictions. It is equally clear that there is a strong public interest in ensuring that there is no abuse of the VoT system by applicants who claim that they are victims of trafficking but are economic migrants who have no legal right to remain in the UK. The Secretary of State has a legitimate concern that such people may be lying about their background and the circumstances in which they were discovered working illegally in an effort to delay their lawful return to their home country. The Secretary of State has the unenviable task of attempting to identify those who are genuine victims of trafficking and those who are seeking to abuse the system. However, it is important that genuine concerns about bogus VoT applicants should not raise the bar in the decision making process and thus prevent genuine victims from being able to demonstrate their status as victims of trafficking.

4. It is common ground that the route by which a person who is determined not to be a victim of human trafficking can challenge the decision of the Secretary of State is by way of judicial review. The Claimant submits that, when undertaking a review of the decision, that the rationality of a decision that a person is not the victim of trafficking requires a heightened or a more rigorous level of scrutiny than the standard *Wednesbury* approach: see *R (SF) v The Secretary of State for the Home Department* [2015] EWHC 2705 (Admin) at §104 and *MN* at §240 to §246. The Court of Appeal in *MN* accepted an enhanced standard of review was needed and emphasised that "*a high quality of reasoning is required in a conclusive grounds decision*" (see §242). The court in *MN* also approved the observation of Carnwath LJ in *R (YH) v Secretary of State for the Home Department* [2010] 4 All ER 448 where the Judge referred to the "*need for decisions to show by their reasoning that every factor which tells in favour of the applicant has been properly taken into account*" (see §24 of Lord Justice Carnworth's judgment). The provision of proper reasons is an essential part of a lawful decision and thus a decision which contains insufficient or inadequate reasons will be unlawful and, subject to the highly likely test in section 31 of the Senior Courts Act 1981, will generally be quashed.

5. Whilst I accept the Claimant's broad submission that this is an anxious scrutiny case, I also remind myself that this court should not conduct a merits review of the Decision. Responsibility for making this Decision lies with the SCA, acting as the Secretary of State's delegated decision maker. It follows that, provided the SCA acts lawfully, the weight to be accorded to different pieces of evidence are matters exclusively for the SCA.

What is modern slavery?

6. Article 4 ECHR states that:

> *"1. No one shall be held in slavery or servitude.*
> *2. No one shall be required to perform forced or compulsory labour"*

7. The SCA is a public authority for the purposes of section 6 of the Human Rights Act 1998 and thus is bound to act in accordance with the Claimant's convention rights. A

decision as to whether a person is or is not a victim of slavery engages the Claimant's rights under articles 4 and 8 ECHR and that engagement has both substantive and procedural consequences. However, for present purposes, I proceed on the basis that the development of the common law rules on fairness, including the rules about reaching a decision after following a fair procedure, and the giving of reasons has encompassed any procedural obligations imposed by the ECHR. Neither counsel suggested otherwise and, in my judgment, were right to do so.

8. The Council of Europe has adopted a Convention on Action against Trafficking in Human Beings ("**ECAT**"). The purpose of ECAT is described in Article 1 as being to prevent and combat trafficking in human beings along with the protection of the human rights of victims of trafficking, as well as ensuring effective investigation and prosecution of their cases. Article 4 of ECAT defines trafficking in human beings in the following way:

> *"(a) Trafficking in human beings" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."*

9. Article 5 requires the parties to the Convention to take measures to, amongst other things, establish or strengthen effective policies and programmes to prevent trafficking in human beings. Article 10 requires the parties to adopt legislative or other measures as may be necessary to identify the victims of trafficking. Article 12 requires the parties to give assistance to the victims of trafficking in various ways so as to support their wellbeing. These provisions have, to a limited extent, been brought into domestic law by the Modern Slavery Act 2015 ("**the 2015 Act**") but in general the Secretary of State's decision making process to identify and support VoTs is non-statutory.

10. Despite the fact that the system is essentially administrative, the Secretary of State has published statutory guidance to assist SCA to identify who is and is not a victim of trafficking, namely "*Modern Slavery: Statutory Guidance for England and Wales (under section 49 of the Modern Slavery Act 2015) and non-statutory Guidance for Scotland and Northern Ireland*" ("**the Guidance**"). The Guidance provides extensive material to guide the SCA when making decisions under the Convention. There are two key points that appeared to be common ground. First, there is no challenge to the Guidance. The Claimant's counsel relies upon it in the sense that she submits that the SCA failed to apply the Guidance when following the decision making process leading to this decision. Secondly, a public law decision maker will act unlawfully if the decision maker either misunderstands statutory guidance or fails to act in accordance with it, save for a case where the decision maker has consciously departed from the guidance for a good reason. The position was summarised by the Court of Appeal in *MN* at §84 where the Court of Appeal said:

> *"The NRM as embodied in the Guidance is for practical purposes the primary source of the obligation to support victims of trafficking. The Guidance does not itself have the status of law, but it represents a formal statement of Government policy and practice, and failures to comply with it may on ordinary principles be the subject of challenge by way of judicial review: see para 20 of the judgment of Baroness Hale in MS (Pakistan) [2020] 1 WLR 1373"*

11. It is thus accepted on behalf of the Secretary of State that it is unlawful for the SCA to have departed to any material extent from the Guidance when making this Decision. The Secretary of State's case is that the SCA has followed the Guidance. It is not suggested that the SCA has consciously departed from the Guidance at any point or had any reason to do so. However, as noted above, the SCA will not necessarily act lawfully solely by making a decision that follows the Guidance. The SCA must also follow the common law rules about fairness in decision making, including the giving of adequate reasons.

Human smuggling and human trafficking.

12. It can be important to distinguish between "human smuggling" and "human trafficking". The Statutory Guidance provides at §2.54 and §2.55:

"Human smuggling occurs when an individual seeks the help of a facilitator to enter a country illegally, and the relationship between both parties ends once the transaction ends. Many of those who enter the UK illegally do so by this route. Human smuggling is not a form of modern slavery.

The purpose of human smuggling is to move a person across a border illegally, and it is regarded as a violation of state sovereignty. The purpose of bond slavery is to exploit the victim for going or other benefit and is regarded as a violation of that person's freedom and integrity.

There are several factors which help distinguish smuggling and modern slavery (trafficking)

- *with smuggling, a victim's entry into a state can be legal or illegal but smuggling is characterised by illegal entry.*
- *Trafficking can take place both within and across national borders but international travel is required for smuggling.*
- *In the case of adults, trafficking is carried out with the use of force and/or deception – smuggling is not, which indicates it is a voluntary act on the part of those being smuggled.*
- *Trafficking involves the intended exploitation of people on arrival while the service of smugglers usually end when people reach their destination and the transaction ends"*

13. The key part of this this Guidance for present purposes is that smuggling is a "*voluntary act on the part of those being smuggled"* and that "*the services of smugglers usually end when people reach their destination and the transaction ends"*. There are a variety of potential scenarios. A person who pays to be "*smuggled*" into the UK as an economic migrant and his relationship with those who transported him ends when he arrives in the UK. He[1] is not a victim of trafficking. Further, a person who has

[1] I have referred to the victim of trafficking as "he" in the general part of this judgment. The decision maker is also referred to as "he" because this decision was taken by a man. The observations apply equally regardless of the gender of either person.

"voluntarily" gone into an arrangement under which he is smuggled into the UK and agrees to work for a period without pay to repay back those who transported him may well also not be a victim of trafficking, despite the fact that this person is in debt bondage to his minders for a defined period. However, a combination of debt bondage plus force, coercion or menaces is highly likely to result in the individual being a victim of trafficking.

14. The Statutory Guidance makes it clear at §2.57 that trafficking victims may start out believing that they are being smuggled voluntarily and end up being trafficked because either they are subject to exploitation by those who have *de facto* control over them or have experienced undue force as part of the journey or find that they are not free to go about their business once they arrive at the intended destination. This part of the Guidance recognises that, whatever may have been agreed at the outset of a journey, those who are smuggled have no effective means of holding those who are transporting them to the terms of the original agreement and that any deemed consent of the trafficked individual is irrelevant. As the VoT is passed from person to person across the globe, new demands backed up by threats can easily take such a person over the line from being smuggled to being a victim of trafficking.

Forced labour.

15. Deciding whether an individual is a victim of trafficking will usually depend to a substantial degree on whether an individual's economic activity is voluntary or is "*forced labour*". Forced labour is defined in the Guidance as:

> *"All work or service which is extracted from any person under the menace of any penalty and with the person has not offered himself voluntarily"*

16. The Guidance explains that forced labour is not the same thing as work at low wages or in poor working conditions. Working in a criminal enterprise is also not, of itself, necessarily forced labour. The Guidance suggests that one of the key questions for any decision-maker is whether a person is "voluntarily" working in any given situation or is doing so involuntarily, often under the "menace" of one or more penalties. That "*menace*" can take many forms. The Guidance and the expert evidence in this case explains that it can include physical assaults on the individual threats to take reprisal

action against a person's family back in their home country. Decision-makers thus have to determine, based on all the evidence, whether the individual was working voluntarily or whether the individual was subject to forced labour.

17. Decision-makers are inevitably in a difficult position in making these decisions because there is likely to be limited documentary evidence to support an account of events given by a person who claims to have been a victim of human trafficking. The circumstances in which the individual came to the attention of the UK authorities may not be in dispute, but what happened before that may be unclear. The individual's personal account of events leading up to their discovery by the UK authorities will be important evidence as to how the individual came to find themselves in that situation. An individual who has been investigated by the police, may have been prosecuted and is then subject to immigration control will have been asked to tell their personal story on multiple occasions.

18. It follows that, by the time the trafficking decision comes to be taken by the SCA, the individual's account is likely to have been given on multiple occasions to different audiences in different contexts over a period of a number of years. That evidence will be mediated through interpreters who may not share the individual's particular dialect and the Guidance cautions that a person in a vulnerable state may hold material back or say things that are incorrect for many reasons. The expert evidence in this case from Mr Steve Harvey, who has long experience in the police and in Europol in trafficking matters, is that he has never known a trafficking case where there were no inconsistencies in the account of events given by the victim. Inconsistencies may, of course, be evidence to suggest that a person is lying but in this context it is important decision makers recognise that there are many other potential explanations for inconsistencies.

Assessing Credibility.

19. A simple approach would be for a SCA to look at the various accounts given by a person over time as to what happened to them and how they came to be working illegally in the UK, and then adopt a working hypothesis that an honest person would always give a consistent account of events without any inconsistencies, and a dishonest person would give an account with some inconsistencies. That approach might be

underpinned by a belief that an honest person can be assumed to give the same account of all relevant facts on multiple occasions and a dishonest person will give inconsistent accounts because a dishonest person would not be able to remember to tell the same lies on multiple occasions. Adopting that approach, a SCA could use inconsistencies as a basis for making a decision that a person was lying and reject their other evidence in its entirety and thus conclude that the person was not a victim of trafficking.

20. A slightly more sophisticated approach would be for the decision maker to put any supposed inconsistencies to the person, consider the response and then decide whether there was a reasonable explanation or a reasonable excuse for any inconsistency. Then, in the absence of a reasonable explanation or whether there was no other mitigation for the inconsistencies, the decision maker could decide that the inconsistencies showed the person was lying. Those lies could then be used as a basis to reject other evidence from the victim in its entirety and thus lead the SCA to conclude that the person was not a victim of trafficking. In broad terms, this latter approach appears to have been part of the method used by the SCA in this case. In the light of the Court of Appeal decision in *MN* it is necessary to identify whether this approach is lawful and/or whether it accords with the approach recommended by the Guidance.

21. The Guidance has an extensive section on assessing credibility. The material parts are:

> ***"Assessing credibility and other evidence during the decision-making process***
> *14.1. SCA staff need to assess whether a potential victim's account of modern slavery is credible when making a Reasonable Grounds and Conclusive Grounds decision.*
>
> *14.2. Good practice in working with victims who have experienced trauma should be observed. See the section on Working with vulnerable people for more information. However, the need to take into account the impact trauma is likely to have on the individual's ability to recall events does not remove the need to assess all information critically and objectively when considering the credibility of a case.*

Assessing credibility

14.3. The SCA is entitled to consider credibility as part of their decision-making process at both the Reasonable Grounds and Conclusive Grounds stages. When SCA staff are assessing the credibility of an account, they must consider both the external and internal credibility of the material facts.

14.4. If they fit the definition of human trafficking or slavery, servitude, and forced or compulsory labour, there is reliable supporting evidence and the account is credible to the required standard of proof, the SCA should recognise the person as being a victim of modern slavery.

Mitigating circumstances

14.5. It is important for the SCA to assess all information critically and objectively when the SCA considers the credibility of a case, but it is also vital for SCA to have an understanding of the mitigating reasons why a potential victim of modern slavery is incoherent, inconsistent or delays giving details of material facts.

14.6. Throughout this process it is important to remember that victims of modern slavery have been through trauma, and that this may impact on the information they provide. Due to the trauma of modern slavery, there may be valid reasons why a potential victim's account is inconsistent or lacks sufficient detail. Staff at the SCA should have account of any relevant factors set out in the Working with vulnerable people section when making a decision as this section outlines some of the challenges victims may face in providing a clear and consistent account of their experiences. The SCA should take these reasons into account when considering the credibility of a claim.

Materiality

14.8. In assessing credibility the SCA should assess the material facts of past and present events (material facts being those which are serious and significant in nature) which may indicate that a person is a victim of modern slavery. It is generally unnecessary, and sometimes counter-productive, to focus on minor or peripheral facts that are not material to the claim.

14.9. The SCA should assess the material facts based on the following:

- *are they coherent and consistent with any past written or verbal statements?*
- *how well does the evidence submitted fit together and does it contradict itself?*
- *are they consistent with claims made by witnesses and with any documentary evidence submitted in support of the claim or gathered during the course of your investigations?*

.....

Consistency

14.13. It is also reasonable to assume that a potential victim who has experienced an event will be able to recount the central elements in a broadly consistent manner. A potential victim's inability to remain consistent throughout their written and oral accounts of past and current events may lead the SCA to disbelieve their claim. However, before the SCA comes to a negative conclusion they must first refer back to the First Responder, support provider, other expert witnesses, or the potential victim themselves to clarify any inconsistencies in the claim.

14.14. Due to the trauma of modern slavery, there may be valid reasons why a potential victim's account is inconsistent or lacks sufficient detail. The SCA should take account of any evidence of mitigating circumstances that could explain the inconsistency"

22. This Guidance is consistent with a wider understanding that, leaving aside the pressures and difficulties faced by a vulnerable person in the Claimant's position, it can be unrealistic to expect an honest person to give precisely the same account of past events from his or her memory when asked about them on different occasions months and

years after the events. The difficulties about equating a lack of consistency with a lack of honesty have been frankly confronted by the courts in recent years. The issues were explored by Mr Justice Leggatt as he then was in *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560 (Comm). The Judge said:

> *"**Evidence based on recollection***
>
> *....*
>
> *16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.*
>
> *17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory)"*
>
> *18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our*

present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth"

23. Those observations were made in the context of a commercial case. However, they have been applied in a series of further cases in very different contexts, notably in two decisions of Mostyn J, namely *Lachaux v Lachaux [2017] EWHC 385 (Fam) [2017] 4 WLR 57* and *Carmarthenshire County Council v Y [2017] EWFC 36 [2017] 4 WLR 136* and were also summarised by Stewart J in *Kimathi v Foreign and Commonwealth Office [2018] EWHC 2066 (QB).* They were also considered by Mr Justice Warby, as he then was, in *R (Dutta) v General Medical Council* [2020] EWHC 1974. These observations can thus be treated as having influenced the approach of decision makers in a wide variety of contexts.

24. The Guidance goes part of the way to recognising the complexities about treating the reliability of human memory as a primary basis on which to make decisions about whether someone is telling the truth. That challenge is as relevant to human trafficking claims as it is in civil litigation. In this case, the Claimant was asked about the material events relating to events leading up to his discovery by the police in the cannabis factory in September 2017 on a series of different occasions. Those interviews were all conducted through an interpreter and a record was made of the answers given by the Claimant. He was thus, in effect, being asked about the same series of events on multiple occasions, albeit the questions were framed differently and he was not the person recording his answers. In doing so, the Claimant was relying on his memory of those events in circumstances where, even if he was being totally honest, the above cases recognise that a decision maker should be extremely cautious before drawing adverse inferences from the absence of total consistency on every occasion on which he was asked to recount the same events.

The Guidance with respect to persons who have experienced trauma.

25. Annex D to the Guidance sets out the recommended approach for SCA where the person who may be a victim of trafficking is or may be a vulnerable person. A "vulnerable person" is someone who is defined as someone "*who ha[s] experienced trauma*". Paragraph 13.6 provides:

> *"A common factor of trafficking is that the trafficker will present a scenario in which the potential victim can improve the quality of their life and that of their family. Vulnerable people are often targeted as they are seen to be easier to coerce into a situation where they can be manipulated"*

26. Thus, the Guidance recognises at §13.6 that victims of trafficking may not recognise themselves to be a victim of modern slavery may be reluctant to identify as such. It then sets out a series of reasons why vulnerable victims might be reluctant to disclose details of their experience, including that they may be distrustful of authorities or may provide inaccurate or incomplete accounts when questioned at various stages through the process. The Guidance makes specific reference to Post-Traumatic Stress Disorder. It provides:

> ***"Post-traumatic stress disorder***
> *13.12. Victims may experience post-traumatic stress disorder, which can result in the following behaviours:*
>
> - *re-experiencing traumatic events as intrusive thoughts, flashbacks and nightmares*
> - *avoidance of reminders or triggers of the trauma – more extreme manifestations may include avoiding talking about the trauma they have*
>
> *experienced at all costs even when it would be in the victim's 'best interests' to do so, such as in a police or asylum interview*
> - *negative alterations in cognition and mood – this may lead a victim to have strong beliefs about self-blame, guilt, shame or fear of others,*

which
may affect their ability to give an (accurate) account of their history.

- *alterations in arousal and reactivity – this may contribute to victims being perceived as hypervigilant or 'on edge', or as irritable or aggressive. If people are interrupted during a flashback they are likely to be disorientated, confused or act as they did during the trauma.*

13.13. Complex PTSD is more likely to occur in the aftermath of multiple and repeated trauma over long periods, which is often the case for victims of modern slavery. It is also more likely to occur if trauma is experienced during childhood"

27. The Guidance includes a section on the specific difficulties faced by vulnerable individuals in recalling specific facts about their past experiences. It provides:

"Difficulty recalling facts

13.19. Research demonstrates that normal, autobiographical memory for everyday things such as dates or non-traumatic events is fallible and becomes less reliable with time.

13.20. Memories laid down during traumatic events are not processed or recalled in the same way as ordinary, everyday memories. As a result of the way trauma memories are processed trauma memories often have little narrative around them as peripheral contextual details are not stored. Instead memories are often vivid snapshots and are often of sensory details such as smells or sounds. As such, people with PTSD often have difficulty in recalling contextual details of their traumatic experiences and it can be very difficult for the individual to consciously access or narrate a detailed and coherent account of their traumatic experience.

13.21. Memories for traumatic events are not easily narrated on demand and victims might not be able to recall concrete dates and facts. Their initial account might contain inconsistencies, discrepancies or contradict their later statement.

13.22. Research also indicates that difficulties in recounting traumatic experiences may be particularly marked where the trauma had a major sexual component"

28. The Guidance thus recommends that SCA fully appreciate that persons who experience trauma may find that the trauma has a substantial psychological effect on the ability of the individual to recount past events in a reliable and consistent manner. In this case, to take an example, the Claimant alleged that he was the victim of an acid attack to his eyes when he resisted the demands of this minders that he should work in a cannabis factory. There was medical evidence to support his account that he had been a victim of an acid attack. The Guidance thus recommends that, in making any decision about whether the Claimant was subjected to this attack, a decision maker would need to first direct himself that he had to look at the evidence which was external to the Claimant's account of events as well as his statements in order to decide if this happened. He would thus need to base any decision on the Claimant's statements and the medical evidence, and give appropriate weight to all the evidence before reaching a decision whether this event happened. In deciding whether the Claimant was telling the truth about this event, the Guidance explains that the decision maker would need to appreciate that, if this event happened, the continuing psychological consequences of the attack, which means the way in which a victim's brain processes the memories of the attack, would be affected by the fact of the attack. The SCA would need to direct himself specifically that "*it can be very difficult for the individual to consciously access or narrate a detailed and coherent account of their traumatic experience"* and "*memories for traumatic events are not easily narrated on demand and victims might not be able to recall concrete dates and facts"* before deciding that any absence of consistency should be treated as evidence that the Claimant was lying.

The need for a *Lucas* form of self-direction.

29. The Claimant in this case also makes the complaint that the SCA jumped from rejecting the Claimant's factual account on limited and specific details to reaching the conclusion that the Claimant's evidence about all aspects of his case history should be disbelieved. It is also a common law rule of decision making that a decision maker needs to take special care to make the jump from concluding that an individual is lying on one issue

to a conclusion that other parts of an individual's evidence about what happened to him should be rejected as lies.

30. An SCA can properly decide that a person's inconsistencies about part of their evidence mean that, in respect of that incident or event, the person's evidence cannot be accepted or even that he is lying. However, it is a huge jump of logic for the SCA to then use that conclusion to decide that the entirety of the person's evidence should be rejected as lies. Making the jump from saying that a person is lying about detail A, B or C, to disbelieving the person on everything he asserts is not a straightforward process. This question was recently considered by the Court of Appeal in *Uddin v Secretary of State for the Home Department* [2020] 1 WLR 1562. Ryder LJ said as follows at §11:

> *"I note in that regard the conventional warning which judges give themselves that a person may be untruthful about one matter (in this case his history) without necessarily being untruthful about another (in this case the existence of family life with the foster mother's family), known as a " Lucas direction" (derived in part from the judgment of the Court of Appeal (Criminal Division) in R v Lucas (Ruth) [1981] QB 720 , 723C, per Lord Lane CJ). The classic formulation of the principle is said to be this: if a court concludes that a witness has lied about one matter, it does not follow that he has lied about everything. A witness may lie for many reasons, for example, out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure. That is because a person's motives may be different as respects different questions. The warning is not to be found in the judgments before this court. This is perhaps a useful opportunity to emphasise that the utility of the self-direction is of general application and not limited to family and criminal cases"*

31. The Guidance provides extended and clear advice to SCA to caution them that victims of trafficking can lie for a number of complex reasons, largely emerging out of the state of powerlessness that they find themselves in. Ryder LJ classified a *Lucas* direction as being "*of general application"*. In my judgment he was right to do so. It is an essential standard of fairness to be observed by anyone who is having to make a judicial, quasi-judicial or even administrative decisions.

Does a finding of lack of credibility inevitably mean that a person should be automatically determined not to be a victim of trafficking?

32. The question the SCA has to answer is whether the person is likely to be a victim of trafficking; it is not whether the person is telling the truth about what happened to them prior to discovery. Whether a person is or is not considered to be telling the truth about their personal journey and what happened to them may, of course, have a substantial influence on the decision as to whether the person is a victim of trafficking. But these are different questions. There may well be evidence which, entirely aside from the account of events given by the applicant, shows that the person is likely to be a victim of trafficking. In a case where a person has suffered substantial trauma from repeated beatings and other unspeakable behaviour at the hands of those who controlled him, the psychological consequences of those events may result in the applicant's recollection of events being entirely incoherent and thus of no value at all in deciding what had happened to him or he may continue to be so fearful of those who were controlling him that he may deny there was any abuse, coercion or forced labour. This is expressly recognised in the Guidance. In such a case, the applicant may be lying or his account of events may have no value whatsoever but the evidence of the physical or psychological condition of the individual will nonetheless be more than sufficient evidence that the person was a victim of trafficking.

A summary of the approach recommended by the Guidance.

33. In preparing this judgment I have carefully re-read the decision of the Court of Appeal in *MN* about assessing the credibility of victims. It is helpful to set out the conclusions reached by the Court at §121 on the way in which the SCA was required to assess all of the evidence in the case. The Court said:

> *"In our view the law as appears from those authorities (so far as relevant to the issues in these appeals) can be summarised as follows:*
>
> *(1) The decision whether the account given by an applicant is in the essential respects truthful has to be taken by the tribunal or CA caseworker (for short, the decision-maker) on the totality of the evidence, viewed holistically— Mibanga .*

(2) Where a doctor's opinion, properly understood, goes no further than a finding of "mere consistency" with the applicant's account it is, necessarily, neutral on the question whether that account is truthful—see HE (Democratic Republic of Congo) , but the point is in truth obvious.

(3) However, it is open to a doctor to express an opinion to the effect that his or her findings are positively supportive of the truthfulness of an applicant's account (i e an opinion going beyond "mere consistency") [25] *; and where they do so that opinion should in principle be taken into account— HK ; MO (Algeria) ; and indeed, though less explicitly, Mibanga . In so far as Keene LJ said in HH (Ethiopia) that the doctor in that case *2000 should not have expressed such an opinion (see para 117 (1) above), that cannot be read as expressing a general rule to that effect.*

(4) Such an opinion may be based on physical findings (such as specially characteristic scarring). But it may also be based on an assessment of the applicant's reported symptoms, including symptoms of mental ill-health, and/or of their overall presentation and history. Such evidence is equally in principle admissible: there is no rule that doctors are disabled by their professional role from considering critically the truthfulness of what they are told— M ; HK ; MO (Algeria) ; SS (Sri Lanka) . We would add that in the context of a decision taken by the CA on a wholly paper basis, a doctor's assessment of the truthfulness of the applicant may (subject to point (5) below) be of particular value.

(5) The weight to be given to any such expression of opinion will depend on the circumstances of the particular case. It can never be determinative, and the decision-maker will have to decide in each case to what extent its value has to be discounted for reasons of the kind given by Ouseley J at para 18 of his judgment in HE (Democratic Republic of Congo) .

(6) One factor bearing on the weight to be given to an expression of opinion by a doctor that the applicant's reported symptoms support their case that they were persecuted or trafficked (as the case may be) is whether there are other possible causes of those symptoms. For the reasons explained by Ouseley J, there may very well be obvious other potential causes in cases of this kind. If the expert has

not considered that question that does not justify excluding it altogether: SS (Sri Lanka) . It may diminish the value that can be put on their opinion, but the extent to which that is so will depend on the likelihood of such other causes operating in the particular case and producing the symptoms in question"

34. I will, of course, follow the above approach in considering the Decision. However, for present purposes, it may also be helpful to draw the following ten key relevant elements from the Guidance about the recommended approach for SCA who are considering relying on the statements made by the person who claims to be a victim of trafficking as part of the decision making process to determine whether that person is or is not a victim of trafficking, and how they should take account of a person's potential vulnerability:

(i) The primary question that the SCA is required to address and answer is whether the person is or is not a victim of trafficking. Deciding whether a person is telling the truth about all or any aspect of their personal journey is part of deciding what evidence the SCA can rely upon to answer that question but an assessment of credibility alone cannot, of itself, provide a complete answer to the question as to whether the person is or is not a victim of trafficking;

(ii) Any assessment of credibility must be approached cautiously because the Guidance recognises that, irrespective of whether the person has suffered past trauma, victims of trafficking may not tell the truth for a huge variety of reasons, may not feel able to tell the truth and may even lie for a number of different potential reasons connected to their experience as victims of trafficking;

(iii) The SCA is required to base his or her final decision on all of the available evidence, including (but not limited to) the SCA's assessment of the accounts of events provided by the person but also the expert evidence to the extent that it (a) offered views of the experts on the person's credibility and (b) offered independent evidence to support the matters alleged by the person;

(iv) The SCA is entitled but not obliged to consider the person's credibility as part of the decision-making process;

(v) If the SCA decides that forming a view as to a person's credibility will assist in determining whether the person was a victim of trafficking, the SCA should limit his or her consideration of facts asserted by the person which are both "*serious and significant in nature*" or which are "*central elements*" to a person's claim. Assessing credibility based on non-central element facts which are not both serious and significant would be a departure from the Guidance;

(vi) Assessments of credibility should not generally be based on "*minor or peripheral facts that are not material to the claim"*. That approach was emphasised by the Court of Appeal in *MN* which criticised the SCA for his approach in that matter as follows at §168:

> *"The significance attached to these minor discrepancies is rather troubling inasmuch as it suggests a hyper-critical mindset on the part of the decision-maker where he was positively looking for reasons to discount the evidence of the expert"*

(vii) If the SCA decides that there is an inconsistency in facts asserted by the person on different occasions, the SCA needs to decide what significance to attribute to any evidence of inconsistency. The Guidance reminds the SCA that there may be "*valid reasons why a potential victim's account is inconsistent or lacks detail*" in all cases, not just those where the person has suffered trauma. It follows that a conclusion should not be reached that the person is deliberately lying unless other reasons have been considered and discounted as being less probable than outright lying;

(viii) Where victims have suffered trauma, additional caution must be exercised when considering the weight to be attributed to any inconsistencies because inconsistencies can arise "*due to the impact of trauma*";

(ix) SCA must pay particular care reaching the conclusion that inconsistencies should be treated as being lies where there is evidence that the SCA accepts that the person suffers from PTSD because the SCA must give due weight to the fact that one effect of this psychological condition is that the person may be unable to give an accurate account of their past personal history; and

(x) Where the SCA accepts that a person suffers from complex PTSD, the SCA should assume that it is "likely" that the person has experienced multiple and repeated trauma over long periods and thus it may be necessary to address and answer the question as to whether it is more likely than not that the person experienced multiple and repeated trauma over long periods at the hands of his traffickers.

Is there an onus of proof?

35. The Guidance makes it clear that any decision must be made on the balance of probabilities but the Guidance does not suggest that the SCA should apply an onus of proof either way. §14.85 of the Guidance provides:

> "In *reaching their decision the SCA must weigh the balance of probabilities by considering the whole modern slavery process and the different and interrelated actions that need to have taken place. To make their decision, they must weigh the strength of the evidence presented, including the credibility of the claim, and use common sense and logic based on the particular circumstances of each case"*

36. As I read the Guidance, there is no onus placed on the potential victim to prove that he or she is a victim of trafficking. Thus the SCA should not approach the issues on the basis that, if the victim of trafficking has not proved his or her case, the claim should be dismissed. Instead the Guidance suggests that the SCA should ask the question whether it is more probable than not that the person is a victim of trafficking, without there being a burden of proof on either side. That approach seems to me entirely appropriate within a decision making system where the question is not whether the SCA believes the version of events put forward by the person, but the different question as to whether the person is a victim of trafficking, irrespective of the truth or otherwise of the account of events put forward by the person.

37. I will now seek to apply these principles to the Claimant's challenge in this case.

The material events before and after the Claimant's discovery in September 2017.

38. The Claimant's present account of events is set out in his witness statement. His account is that he paid a smuggler about $12,000, which he raised from the sale of land, to smuggle him to France and he expected to be provided with work there by those who were smuggling him. It seems reasonably clear that the Claimant was under considerable pressure from the authorities in Vietnam but nonetheless this was a voluntary decision he took in order to start a new life as an economic migrant in Europe. Hence, if he had been delivered to France, or possibly even to England, and then been free to make his own decisions about where he would work (albeit illegally), he would not have been a victim of human trafficking.

39. However, he explains how he was subject to coercion on the journey and when he arrived in France and was not free to work as he pleased. He states that he was told that if he wanted to move on, he had to sign a "loan agreement" with a Mr T resulting in him owing the sum of £70,000 to Mr T. The Claimant was also required to provide details of the address of his parents-in-law in Vietnam. He explains how he was subject to considerable punching and kicking and that he was extremely scared. He said he felt that he had no choice but to sign a loan agreement. He was then put into a fresh fruit lorry and was transported to England, but he was discovered and returned to France. This appears to have been on 24 October 2015.

40. Mr T collected him when he was released in France and he was then transported to England in a small boat. He estimates that he arrived in the UK in November 2015 and was put to work by a "Mr D". This was unpaid work but, after 3 or 4 months, he was told that he had to manage a cannabis factory. He explains how, when he refused, Mr D and two white men started kicking him and a painful liquid was thrown in his face. This caused him considerable pain and he was eventually taken to Moorfields Hospital for treatment.

41. The Claimant was required to manage cannabis plants in a house. He was mostly left alone but explained:

> *"They would often come to the house - every 2 or 3 days - to check up on me. They would hit me with their hands and anything that was nearby when they*

thought I wasn't doing the job properly. They would often bring a baseball bat when they came and hit me with that. I was left with lots of bruises but no scars"

42. The Claimant remained in the house and did not leave it because he was afraid of those who were controlling him. He explained that there was CCTV and he feared this, and was also worried that if he left the house, the traffickers would harm his family in Vietnam.

43. The house was raided by the police on 14 September 2017 and the Claimant was arrested along with another Vietnamese man who was working at the house. The Claimant is a national of Vietnam and was discovered by the police at a residential property in London on 14 September 2017. The house was used for growing cannabis plants and the police discovered the Claimant along with another man at the property. It was clear that the Claimant and the other man were tending the plants on behalf of whoever owned the property. The Claimant was arrested for his role in being charge of a cannabis factory. He was immediately referred into the "National Referral Mechanism" ("**NRM**") which is a part of the Home Office that makes decisions about whether individuals are victims of modern slavery and provides support to such persons.

44. The first stage in the process is for the NRM to take a "*reasonable grounds*" decision. A reasonable grounds decision indicates that the individual was recognised to be a potential victim of slavery, but it is not a final decision in favour of such a person. A reasonable grounds decision was made in respect of the Claimant on 21 September 2017, namely 1 week after he was arrested. Despite the existence of the reasonable grounds decision, the Claimant was subject to prosecution for his role in minding the cannabis factory and appeared before the Crown Court on 10 November 2017. He was represented by solicitors and counsel but it is in dispute that, at that point, he had no understanding about the NRM process and was not advised by his then lawyers that he may have a defence to the criminal charges on the basis that he was a victim of slavery. He was advised to plead guilty to the offences and did so. He was then remanded in custody.

45. The NRM made its first Conclusive Grounds decision that the Claimant was not a victim of trafficking on 28 February 2017. For reasons that are not entirely clear, there was a significant delay in the Claimant's sentencing hearing. On 6 April 2018 the Claimant received a sentence of 18 months' imprisonment for the offences to which he had pleaded guilty. It appears likely that the sentencing Judge relied on the conclusive grounds decision to sentence the Claimant on the basis that he was not a victim of trafficking.

46. By June 2018 the Claimant had served the appropriate part of his criminal sentence and, on 16 June 2018, he was transferred from prison to the Colnbrook Immigration Removal Centre ("**the IRC**") where he was kept in immigration detention. The Claimant remained in immigration until 31 October 2019 when he was released on bail.

47. After being transferred to the IRC, the Claimant was seen by an IRC doctor, Dr Sayed, on 30 July 2018. Dr Sayed produced a report under Rule 35 of the Detention Centre Rules 2001. Rules 35(1) to (3) provide:

> *"(1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.*
>
> *(2) The medical practitioner shall report to the manager on the case of any detained person he suspects of having suicidal intentions, and the detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State.*
>
> *(3) The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture"*

48. It follows that the overall purpose of the rule 35 report was to advise the Secretary of State whether continued detention of the Claimant was likely to be injurious to the health of the Claimant. The records made by Dr Sayed state as follows:

"He was attacked and beaten on many occasions in a house in England - he does not know where he was. He was kept and forced to work would be attacked if he was not compliant. He was punched and kicked and had watery acid on his face and says he cannot see from his left eye. He was beaten with sticks also.

This occurred over 2 years ago a period of a few months"

49. The medical report states that the Claimant reported he could not see from his left eye. It also said:

"He has nightmares and depression and feels an increase in his symptoms since being detained with flashbacks also.

My opinion is that continued detention, with the uncertainty of his status and the restriction of his freedom , his mental health is likely to suffer further"

50. The Home Office responded this report in a letter dated 10 August 2018 which set out the Secretary of State's decision that the Claimant should remain in immigration detention. It explained that, notwithstanding the matters related to the Claimant's health as detailed by Dr Sayed which made the Claimant vulnerable, the Secretary of State had decided that the Claimant would not be released because of the risk of further offending and the risk that the Claimant would abscond. There was no challenge to that decision and the Claimant remained in immigration detention.

51. On 2 July 2018, shortly after the Claimant arrived at the IRC, an application was made on his behalf by his then solicitors, NK Legal, for asylum. The Claimant was interviewed in relation to this asylum claim on 3 August 2018 and again on 29 October 2018. On 4 January 2019 the Claimant's application for asylum was refused. NK Legal lodged an appeal on his behalf against that decision to the tribunal. NK Legal did not have legal aid but appear to have been put in funds to act for the Claimant by those connected to the Claimant prior to his arrest.

52. The Claimant's asylum appeal came before the Tribunal on 11 February 2019 and the Claimant's claim for asylum was refused. The tribunal decision is not amongst the

considerable volume of papers provided to this court. However, I am told that the Claimant's application for asylum was refused and, as part of that decision, a finding was made by the Tribunal that the Claimant had not been trafficked to the UK as part of that decision. The SCA refers to that tribunal decision as support for his conclusion. The relevant paragraph of the Decision[2] is as follows:

> *"Consideration has also been given to the First-tier Tribunal decision of 11/02/2019. This casts further credibility doubts on your clients claim and paragraph 47 states "I find it not to be the be that [sic] he was trafficked from Vietnam as claimed". Likewise, paragraph 48 to 53 further damages your clients credibility in that his account was not accepted at the tribunal. Paragraph 54 goes further stating "All of these matters I find points to the Appellant being a willing participant in the enterprise which gave rise to is [sic] convictions". Paragraph 55 further states "whilst I appreciate that the decision of the Competent Authority was made on the balance of probabilities, looking at the evidence before me and having regard to the lower standard applicable I have not been satisfied that the Appellant was trafficked from France for the purpose of criminality and/or forced labour. Nor do I accept that he is indebted to Mr T or his cohorts all that he would be at risk of serious harm at their hands on return to Vietnam"*

53. I have not seen the material that was put before the tribunal and which was relied upon by the tribunal to reach its conclusion that the Claimant was not a trafficked person. However the parties made submissions during the hearing about the extent to which the SCA was entitled to rely on the tribunal decision to ground his decision that the Claimant was not a victim of trafficking. Counsel for the Claimant did not submit that the SCA was not entitled to place some weight on the decision of the tribunal. That is plainly correct following the decision in *MN* where the Court of Appeal said at §23 that the SCA was entitled to consider the FTT decision in the round along with the rest of the evidence. However, counsel for the Claimant submitted that the SCA was only entitled to give weight to that decision as part of an overall assessment, and that full account needed to be given to that fact that the decision was taken without the tribunal

[2] I have not sought to correct the punctuation errors.

having the benefit of any of the medical or other expert evidence which has now been served. She said it is relevant that this expert evidence supports and corroborates the Claimant's factual account. She also submits that the SCA is required to temper any reliance upon the Tribunal decision to the extent that the Tribunal decision itself relied upon the earlier Conclusive Grounds decision which the Secretary of State has now agreed to quash. She submits it would be illogical and unlawful for the Secretary of State to rely upon the Tribunal decision if that, in turn, was built on the foundation of a Conclusive Grounds decision which the Secretary of State later abandoned.

54. Counsel for the Claimant also refers to the fact that the Claimant has made a fresh claim for asylum and submitted that the material now relied upon more than met the fresh claim test in rule 353 of the Immigration Rules. That fresh claim has not yet been adjudicated upon by the Secretary of State and Ms Fitzsimons submits that, if the Secretary of State rules against the Claimant, he will have a further merits appeal against that decision to the tribunal. She thus argues that only limited weight should be accorded to the first tribunal decision because it may well be overturned by a later decision and/or the way the decision was treated in the Decision was unlawful because of a lack of reasoned qualification.

55. Counsel for the Secretary of State does not suggest that this decision has any binding effect. He put the Secretary of State's case on the basis that the SCA did no more than give this decision some weight as part of the overall history of the case and submitted that the SCA did not need to note any of the factors which qualified the weight to be attached to this decision.

56. In my judgment, the SCA has erred in law in this part of the Decision because the requirement for a decision with a high level of reasoning requires the SCA to recognise the limited weight which the tribunal decision can bear. That absence of reasoning means that simply treating this decision as having unqualified status as evidence tending to undermine the Claimant's case is unlawful.

57. In my judgment, counsel for the Claimant must be correct that the SCA cannot place any weight on the part of the Tribunal which decision relies upon the first Conclusive Grounds decision. Any later reliance by the SCA on the Tribunal decision ought, in my judgment, to have been specifically qualified by a clear recognition that its findings

were in part reached in reliance upon a decision that the Secretary of State now accepts should be quashed. The Secretary of State cannot have it both ways. If the Secretary of State agrees to quashing the first Conclusive Grounds decision, it must be quashed for all purposes. That does not mean that the rest of the Tribunal decision is required to be ignored but, if the SCA seeks to rely on the Tribunal decision, the SCA must acknowledge the limitations arising out of the fact that the Tribunal relied upon a decision by the Secretary of State that the Secretary of State subsequently abandoned.

58. I also accept the Claimant's submission that the SCA treated this decision as damaging the Claimant's credibility without giving any recognition to the fact that the Tribunal decision was taken without the benefit of the considerable body of expert evidence now available to the SCA. The reasoning in a Conclusive Grounds decision must show that "every factor which tells in favour of an applicant has been properly taken into account": see *MN* at §242. Further, no decision on whether evidence does or does not damage the Claimant's credibility can properly be taken before all the evidence has been considered in the round, including the expert evidence: see *Mibanga* (considered in detail at §105 below. In this case, the SCA erred in law in reaching the decision that the Tribunal decision damaged the Claimant's credibility without recognising the difficulties in treating the tribunal decision as having weight and before taking account of other evidence which was supportive of the Claimant's credibility. That decision-making process is unlawful because it reaches an adverse decision on the Claimant's credibility before taking proper account of supportive or exculpatory evidence.

59. I therefore accept the broad submission made at §70 to §73 of the Grounds that the SCA erred in law in the way that the SCA treated the decision of the Tribunal.

60. I next return to the chronology. NK Legal appear to have stopped assisting the Claimant after the Tribunal made its decision and on 29 May 2019 the Claimant received notification that the Secretary of State intended to deport him. He was introduced to his present solicitors on 10 June 2019 and they have represented him with the benefit of legal aid funding since that time. On 13 June 2019, Duncan Lewis lodged a judicial review to challenge the proposed removal of the Claimant and that removal was cancelled by the Secretary of State. The Claimant's solicitors also commenced judicial review proceedings to challenge the first Conclusive Grounds decision which had been made by the Secretary of State on 28 February 2017. On 19 November 2019 the

Secretary of State responded to that challenge by agreeing to quash the first decision. By this point the Claimant had been released on immigration bail and was being provided with accommodation and support by the Secretary of State.

61. A second Conclusive Grounds decision was made by the Secretary of State on 23 June 2020. The substance of that decision followed the first decision, namely that the Claimant's case to be a victim of trafficking was rejected because the Claimant's case lacked credibility. On 23 September 2020, the Claimant's solicitors issued a second set of judicial review proceedings to challenge the second decision. Those proceedings were compromised on 22 December 2020 when the Secretary of State agreed to set aside that decision and to make a fresh decision within 4 months. The Secretary of State of then made a third Conclusive Grounds decision on 21 April 2021. It is this Decision which is the subject of these proceedings.

The evidence presented by the Claimant to support his application.

62. As part of the Claimant's evidence presented to support his claim to be a victim of trafficking, the Claimant's solicitors served a psychiatric medical legal report from Dr Heather Dipple dated 18 July 2019. This report diagnosed the Claimant as suffering from severe depression and complex PTSD. This report recorded that the Claimant was hearing voices of "*the perpetrators of the abuse*" he claimed to have suffered. Dr Dipple accepted that these symptoms came on when the Claimant was in immigration detention but said that "*it is highly unlikely that detention is the sole cause of his PTSD*".

63. The ICD10 definition of PTSD is as follows:

> *"Arises as a delayed or protracted response to a stressful event or situation (of either brief or long duration) of an exceptionally threatening or catastrophic nature, which is likely to cause pervasive distress in almost anyone. Predisposing factors, such as personality traits (e.g. compulsive, asthenic) or previous history of neurotic illness, may lower the threshold for the development of the syndrome or aggravate its course, but they are neither necessary nor sufficient to explain its occurrence. Typical features include episodes of repeated reliving of the trauma in intrusive memories ("flashbacks"), dreams or nightmares, occurring against*

the persisting background of a sense of "numbness" and emotional blunting, detachment from other people, unresponsiveness to surroundings, anhedonia, and avoidance of activities and situations reminiscent of the trauma. There is usually a state of autonomic hyperarousal with hypervigilance, an enhanced startle reaction, and insomnia. Anxiety and depression are commonly associated with the above symptoms and signs, and suicidal ideation is not infrequent. The onset follows the trauma with a latency period that may range from a few weeks to months. The course is fluctuating but recovery can be expected in the majority of cases. In a small proportion of cases the condition may follow a chronic course over many years, with eventual transition to an enduring personality change"

64. It follows that anyone who is correctly diagnosed with PTSD must be assumed to have experienced a stressful event or situation of an exceptionally threatening or catastrophic nature of such severity that it is likely to cause pervasive distress in almost anyone. Dr Dipple diagnosed the Claimant as suffering from a serious form of PTSD, namely "*Complex PTSD*". Dr Dipple explains at §6.3:

"Complex PTSD is a syndrome first described by Herman (1992) and occurs in people who have been exposed to recurrent traumatic events in the situation they were unable to escape. [The Claimant] described being kept locked in a house, recurrent beatings and threats to kill him which he did not think he could escape. I would expect his symptoms to continue or increase if he was forced to go to a place he fears. He informed me that he fears a return to Vietnam as he thinks he would be in danger from the police and the people who brought him to the UK"

65. The report provided the doctor's assessment of the Claimant's credibility. It said at 6.13:

"I found no indication that [the Claimant] was feigning or exaggerating his symptoms. He gave a negative response to several questions such as current self-harm thoughts. When he described his experiences of flashbacks he did recognise what these were. On the self-report measure he gave a range of responses, from not experiencing a particular symptom to experiencing level of symptom. His demeanour and my observations were in keeping with the symptoms he described"

66. That passage does not use a formal Istanbul Protocol approach to assessing the doctor's views on the Claimant's credibility. However, in my judgment, the use these words provide evidence that the doctor was doing more than reporting the symptoms described by the Claimant. It appears to me to be reasonably strong evidence to support an assessment that the Claimant was genuinely suffering from the described symptoms. Dr Dipple then tackled the issue of inconsistencies. The report said at §6.22:

> *"It is my opinion that [the Claimant] will have difficulty giving a coherent account in relation to past experiences of abuse due to the problems with his memory and concentration. If he is in court in a situation which he would find stressful and he is asked questions about the traumatic parts of his history, he is likely to make more errors. There is also a risk of retraumatisation. Retraumatisation can occur when someone is exposed to an environmental situation when there is a perceived threat, the possibility of harm may be enough to precipitate unpleasant memories in an intense form . This would have an impact on [the Claimant's] ability to give a coherent account "*

67. This evidence should have been treated by the SCA as significant evidence in the context of a case where the SCA was relying on inconsistencies as the basis for deciding that the Claimant's account of what happened to him should be rejected. The evidence was required to be treated as being important for three overlapping reasons. First, this is evidence that the Claimant had experienced trauma at the hands of the traffickers. Secondly, the fact that the Claimant was found by the doctor to be credible and not to exaggerate his symptoms is, of itself, evidence of his credibility of his account in saying he had experienced trauma. Thirdly, this report provides an alternative explanation for any inconsistencies in the Claimant's accounts of events. It suggests that, instead of inconsistencies leading to a decision that the Claimant was lying, his inability to give a coherent and consistent account is more likely to be result of the psychological trauma from which he suffered.

68. The SCA was, of course, entitled to form his own views on the weight to be given to the evidence presented in Dr Dipple's report. However, the diagnosis of complex

PTSD, if accepted as a medical fact by the SCA, should have led the SCA to conclude that something of an exceptionally threatening or catastrophic nature had happened in the Claimant's life which had led to him presenting with this psychological condition. An acceptance that the Claimant suffers from complex PTSD does not, of course, mean that the Claimant's factual account as to what happened to him must be correct. But, in my judgment, if the SCA accepts this evidence, he is required to accept that something had happened to the Claimant in the past of an exceptionally threatening or catastrophic nature which has led to this psychological condition. The SCA has to ask himself what is more likely to have happened to the Claimant.

69. If a victim of trafficking gives an account of trauma at the hands of those who are controlling him which fits this description, the diagnosis of PTSD provides corroborative evidence to support that account. Further, as explained above, where a diagnosis of complex PTSD is accepted, the Guidance recommends the SCA should accept that it is likely that the person has suffered from multiple and repeated trauma over long periods. The SCA is, of course, entitled to reach the view that notwithstanding that the Claimant suffered multiple and repeated trauma over long periods, the trauma he has described at the hands of his traffickers was not the cause of his complex PTSD. However, if the SCA makes that decision in the context of a Conclusive Grounds decision, the requirement for "high quality reasoning" (see *MN* at §242) means that the SCA has to give reasons for reaching this conclusion.

70. The Claimant's solicitors also served a medico legal report by Dr Frank Arnold dated 18 February 2020. This report describes the evidence of physical injuries suffered by the Claimant. It uses the well-known Istanbul Protocol classifications to describe the correlation between medical evidence and accounts given by the alleged victim. In this case the Claimant gave evidence of being hit on his head with a rod or stick. Dr Arnold found a scar and concluded that this was "*typical*" of a blow as described. He also considered the scarring on the surface of the Claimant's left eye and said that this was *typical* of "*damage due to a corrosive liquid*". Evidence that physical features present on the body of a person are "typical of" a given account of abuse means that the scarring is of a type that is usually found as a result of this type of inflicted injury. Whilst it is never possible to rule out other unidentified causes of the injury, classifying scarring as "typical" of an account provides evidence to support the truth of the oral

account given by the victim as to how the scar was caused. As the Court of Appeal made clear in *MN*, the SCA was not obliged to accept the evidence in Dr Arnold's report. However, the SCA did need to explain in his reasons whether he accepted the evidence or not and, if he rejected it, why he was rejecting it.

71. The Claimant also provided experts reports that explained that the overall experiences of the Claimant were entirely consistent with the published data about other individuals who had been trafficked from Vietnam. Thus, in broad terms, there was a body of evidence to support the Claimant's claim to be a victim of trafficking arising from:

    (i) His account of being trafficked and being required to undertake unpaid, forced labour over a 2 year period;
    (ii) The evidence of the psychiatric effects of the trauma which the Claimant had experienced;
    (iii) The evidence of the scarring on his body as a result of the trauma which the Claimant had experienced; and
    (iv) The expert evidence of those with long experience of dealing with trafficking cases that his account fitted a pattern that was typical of those who had been trafficked.

72. The experts were also hugely critical of the approach taken by the police and border force who failed to follow Guidance in identifying the Claimant as a victim of trafficking. This, they suggested, undermined the reliability of the information obtained from the authorities. However, despite all this evidence, the SCA made a third decision that the Claimant was not a victim of trafficking.

The overall structure of the Secretary of State's decision.

73. One of the perhaps inevitable features of this case is the extent to which the three conclusive Grounds decisions are remarkably similar. It appears clear that the second decision was an edited and expanded version of the first decision and the Decision was an edited and expanded version of the second decision. All three decisions follow the same essential structure. Whilst I will concentrate on the Decision, since that is the one that is under challenge in these proceedings, the approach of using the earlier decision as a template and simply adding to it or amending it in relatively minor respects has the

inherent danger that the legal flaws which were accepted when earlier decisions are challenged (and where lawyers for the Secretary of State agreed to the decisions being quashed) may simply have been repeated in later decisions. A very similar form of decision also raises the question as to whether the new decision is genuinely the result of a new decision making process or simply the result of an existing decision maker trying to find reasons to confirm a decision that has already been taken. I do not need to examine those issues in this case.

74. The Decision lists the material that the SCA has considered in reaching its decision and then records the chronology of events from documents in the SCA's possession. It next records the substance of the Claimant's account of events. The Decision next refers to a section marked "Evidence Consideration" regarding modern slavery in Vietnam, France and United Kingdom. It states as follows:

> *"The Conclusive Grounds decision applies the standard of proof "on the balance of probabilities". This means that to accept your account, it needs to be established that it is more likely than not that your version of events occurred as claimed and that these events constitute modern slavery (human trafficking and or slavery, servitude and forced/compulsory labour).*
>
> *Careful consideration has been given to the assessment of the available information in your case. Looking at the available sources of information [as listed earlier in the decision], it is recognised that your account is broadly in line with wider external evidence on victims of modern slavery from Vietnam.*
>
> *The following issues are noted on your account"*

75. The following 5 pages of the Decision then consider a series of differences in the way that a defined series of factual matters have been related by the Claimant in different interviews he has given since September 2017. The method adopted by the SCA appeared to proceed by a series of steps. The first step was to raise each inconsistency. Step two was to consider the explanation offered by the Claimant's solicitors for the inconsistency. Step three was to decide whether an explanation was "reasonable explanation" of the inconsistency or whether there was no reasonable explanation of

the inconsistency. Step four was to decide how important the inconsistency was said to be and whether the inconsistency would be "*held against you*". I interpret that wording as meaning that the decision maker has reached the conclusion that the Claimant had lied in his account of this detail.

76. Step five arose in respect of those inconsistences where it was decided that they would be "*held against you*". That step was to ask whether each individual piece of evidence in favour of the Claimant "*mitigated*" the damage done to the Claimant's credibility by the inconsistency. Step six was to weigh the damage to the Claimant's credibility arising from all of the inconsistencies against each piece of positive evidence led by the Claimant to support this account. This asked whether, in effect, each piece of positive evidence cancelled out the damage done to the Claimant's credibility by the inconsistencies. The SCA then set out the same "boiler-plate" paragraph on repeated occasions. It said as follows:

> *"However, it is not considered that the evidence outlined above mitigates the vast array of inconsistencies in your account, especially given the lack of an in-depth assessment of your credibility"*

77. The overall conclusion was then as follows:

> *"The information that is considered to go against your case is the information provided by the police and the internal inconsistency of the account you have provided as detailed above"*

78. The SCA then reached the conclusion that the Claimant's account is "*rejected in its entirety*" and that led the SCA to conclude that the Claimant was not a victim of trafficking.

The challenges to this decision.

79. The Claimant's lawyers have structured his claim around a number of grounds. However, as the argument developed, it became clear that there was a measure of overlap between the grounds. I will deal with what I regard to be the main areas of

challenge because these are sufficient to reach a conclusion on the lawfulness of the decision.

Ground 1.

80. The Claimant's case under Ground 1 starts with the uncontroversial proposition that a lawful decision on whether a person is a victim of trafficking is required to be taken after proper regard is had to all of the evidence before the SCA. In this case the SCA framed the question he was asked to address as set out at paragraph 74 above. The Claimant submitted in oral argument that, in this paragraph, the SCA asked himself the wrong question. The complaint is that the SCA asked himself whether "*your version of events occurred as claimed*" as a way of answering the question as to whether the Claimant was a victim of trafficking. That is said to be an error of law because the Claimant submits the SCA was required to ask himself whether, on the balance of probabilities, the Claimant was or was not a victim of trafficking. It is submitted that this is a different question as whether the SCA believed the Claimant was telling the truth about what had happened to him.

81. The response from counsel for the Secretary of State was to tacitly accept that this initial paragraph was perhaps not terribly well expressed. However, he submitted that this paragraph should not be seen in isolation and that, looking at the decision as a whole, it is clear that the SCA made the decision based on all the evidence. In particular he relied on the paragraphs at the end of the decision which expressed the SCA's conclusions. Counsel for the Secretary of State argues that there was no error of law because (a) the SCA did take account of the other evidence and (b) the weight to be ascribed to that evidence is a matter for the SCA. Accordingly, even if the SCA has wrongly elevated the issue of the Claimant's credibility to being the sole factor, other evidence was considered and thus there was no overall error of law in the decision, even if the way the issues were set up was perhaps not described entirely correctly at the outset of the decision letter and in the final conclusions. Thus, it is argued, there was no overall error of law.

82. In my judgment, that submission is inconsistent with the decision making process used by the SCA in the Decision. There is, in my judgment, merit in the criticism that the SCA started off by asking himself the wrong question, namely that he primarily asked

himself whether he believed the account given by the Claimant and not whether the evidence as a whole showed whether, on the balance or probabilities, the Claimant was a victim of trafficking. However, it is important not to read a decision letter as if it was a statute and thus, even if this error had been made at the beginning, it would not be fatal to the overall decision if the SCA had shown that he had reached his overall decision by reference to a proper regard to the entirety of the evidence.

83. However, the error of primarily asking himself if he believed the Claimant's factual account repeats itself at the end of the decision where the final conclusions are expressed. The conclusions are all in similar terms and I thus only need to refer to the conclusion in respect of the question whether the Claimant had been subject to coercion by someone having control over him. The conclusion was:

> *"As noted above, your account is rejected in its entirety, therefore it is not accepted that you experienced a threat or use of force or other form of coercion.."*

84. That conclusion, reached without any form of *Lucas* direction, thus follows the way in which the SCA set up the initial inquiry, namely to ask whether the Claimant's account of events was true and, if it was rejected, to assume his claim to be a victim of trafficking must be rejected. The error of law arising in such an approach is that it limits the SCA's conclusion to a decision taken on only part of the evidence, as opposed to deciding the case on the entirety of the evidence. In this case, there was evidence entirely outside of the Claimant's own account of what had happened to him which supported his claim to have been subject to force, trauma and coercion. That evidence was set out in the medical report from Dr Dipple namely (a) the diagnosis of complex PTSD which made it likely that the Claimant had suffered from multiple and repeated trauma over long periods, (b) the medical evidence of the scars on his body which he said came from beatings and which Dr Arnold said at least in part was "typical" of a beating and (c) the evidence of his sight problems which he said arose from the acid attack on his eye which was again "typical" of the type of acid attack complained of by the Claimant.

85. In my judgment, the SCA erred in law in primarily asking himself whether he believed the Claimant's account of events. That was not the right question. The SCA ought to

have asked himself whether, irrespective as to whether he considered that the Claimant was being truthful, the evidence as a whole showed that the Claimant was a victim of trafficking.

86. Ground 1 includes a submission of a second legal error, namely that the SCA adopted a decision making process which was not permitted by the Guidance in reaching his decision. The Guidance provides that assessments of credibility should only be made in relation to material facts which were "*serious and significant in nature*" [see §14.8]. The Guidance also recommends that issues about consistency must be focused on "*central elements*" of the person's account [§14.13]. The Claimant submits that the SCA failed to follow this part of the Guidance because the SCA focused on "*minor or peripheral issues*" to reach conclusions on the Claimant's credibility [§14.8]. The SCA thus took the "hyper-critical" approach which was criticised in *MN*.

87. The first issue identified by the SCA revolved around the Claimant's statement that he was not allowed to leave the house where the cannabis plants were grown. He had said that he was locked into the house and did not have a key but the police suggested that the windows were not locked and a key was found at the property. The Claimant said this key had been brought by the second man who arrived just before the Claimant was arrested. Thus the "inconsistency" was said to be that the Claimant could physically have left the house in the last few days if he wanted to (as he could have left via the windows or using the key) and could have left by the windows at any time. The SCA thus suggested he was lying in saying that he was locked in the house.

88. The SCA also placed reliance on the fact that someone had turned off the CCTV for periods in the 7 days prior to the Claimant's arrest, and that no one else was seen entering and leaving the property. The SCA concluded that the only person who could have turned on and off the CCTV was the Claimant as he was the only person in the house for some of those periods. The expert evidence submitted on behalf of the Claimant suggested that it is common for those running cannabis factories with Vietnamese trafficked workers to use the CCTV to intimidate the trafficked workers.

89. The problem in my judgment with this approach is that it entirely focuses on a small part of the explanation advanced by the Claimant for his confinement at the house and it fails to look at the central elements of the factual case put forward by the Claimant as

to why he remained at the house under coercion. There was no evidence that the Claimant had left the property at any point and no evidence to contradict his account that he was, in effect, required by those who ran the cannabis factory to remain there for as long as those who were giving him instructions told him that he was required to stay. There was no evidence he "lived" anywhere else and there was evidence from the food at the house that he effectively lived at the property. Further, the Claimant did not know anyone in the UK and, in practice, could not leave the house because he would have nowhere to go. The SCA also did not make reference to the evidence that the Claimant was told that his family in Vietnam would be harmed if he left, despite the experts saying that was a common method of securing compliance. In those circumstances, the SCA rejected the Claimant's account that he was forcibly kept at the house and concluded this should be rejected because the Claimant was someone who had "*the ability to leave the premises should you have chosen to do so*". It thus decided that:

> *"As such, your credibility has been damaged"*

90. It seems to me that there are two fundamental problems with this conclusion. First, the main reasons advanced by the Claimant for being trapped in the house were that he was frightened of his captors as a result of the physical and psychological trauma he had endured at the hands. The expert evidence explained how CCTV was routinely used to scare victims of trafficking. The question about whether or not the CCTV was actually set up to trap the Claimant is secondary to the question as to whether he believed that it was set up in this way. It seems to me that the conclusion that the "inconsistency" around whether the Claimant was able to leave the house needed to engage with all of the reasons why the Claimant said he was afraid of leaving the house, and not a selection of those reasons.

91. I also find it hard to see how the precise details about whether the Claimant was controlling the CCTV or would switch it off when instructed to do so could be said to be a detail which was "*serious and significant in nature*" in the context of someone whose main claim was that he was subject to coercion to stay at the premises. This seems to me to be an example of the SCA focusing on minor or peripheral facts,

contrary to the way that the SCA is required to focus his inquiry under §14.8 of the Guidance.

92. Thus, in my judgment, it was not in accordance with the approach set out in the Guidance for the SCA to draw any substantial adverse inferences about the Claimant's ability to leave the property based solely on the CCTV and the locks. The Claimant's case was that the matters which kept him at the property were the threats and the absence of anywhere else he could go. In my judgment, those were the "*central elements*" of his case about being controlled to stay at the property [see §14.13]. Those factors were before the SCA in evidence and ought to have been treated as being far more significant than the question as to precisely who had control of the CCTV.

93. The second matter relied on by the SCA concerns whether the Claimant was paid for his work or was, as he said, working in conditions that were forced labour. The Claimant says that he was not paid and had worked for 2 years unpaid. The SCA made no findings on the issue as to whether this was true or not but instead relied on the fact that the Claimant was wearing a £100 tracksuit and had an iPhone 7 and a Nokia phone to reject his case that he was subject to in conditions of forced labour.

94. The SCA considered that there were discrepancies in the factual accounts given by the Claimant as to how he acquired the tracksuit. I confess I find it very difficult to see how a fair approach to this evidence could identify anything other than the most minor differences in the various accounts. This could not fairly be considered to be anything other than slightly different descriptions focussing on minor or peripheral facts. The expert evidence before the SCA refers to the UNODC Anti-human trafficking manual which states:

> *"Traffickers may make "concessions" to help maintain control and reduce the chances of victims trying to escape. Examples are small amounts of freedom, allowing victims to keep a small amount of money or "privileges" such as making a phone call. Where concessions are made, there is often some kind of powerful threat, implied or direct, in the background"*

95. In the context of someone who claims that he was working without pay for 2 years, the question as to how the Claimant came to have a £100 tracksuit cannot in my judgment

be fairly described as something which was "*serious and significant in nature*". On the contrary, this seems to be an example of the "hyper-critical mindset" approached identified and rejected by the Court of Appeal in *MN* (see §168 of that decision).

96. In my judgment, if the SCA had been following the approach recommended by the Guidance, the main question for the SCA ought to have been whether the Claimant was subject to forced labour or not. His account was that he paid $12,000 from his own money in Vietnam to come to Europe with the aiming of working here, albeit illegally. He then explained how he was exploited by being required to accept a "loan" of £70,000 and to work for nothing to pay off the loan, and that he worked without pay for 2 years before being discovered by the police. At the highest, I consider that the issue over the tracksuit should have been seen as a minor or peripheral matter which was, at most, a minor "concession" offered to the Claimant. I cannot see how it could be treated as being relevant to assisting the SCA to address the central issue as to whether the Claimant was experiencing forced labour. I thus accept the Claimant's submission that this was an example of the SCA focusing on a minor issue which did not go to the heart of his account, and thus, in doing so, the SCA was departing from the approach recommended by the Guidance.

97. The next alleged inconsistency relied on by the SCA is that the Claimant said at different times that he had to leave Vietnam because the police were looking for him and he also said that he had to leave because he was unable to earn enough money in Vietnam. Looking at the Claimant's evidence as a whole, it seems to me that these "reasons" were not separate and inconsistent as the SCA has suggested but were plainly connected. The SCA's response to the explanation offered by the Claimant to this alleged inconsistency also fails to engage with the evidence that trafficked persons can have a distrust of the authorities. If there was any inconsistency here, it was not one which could by any stretch of the imagination be called "serious and significant" in nature and thus it was a departure from the approach recommended in the Guidance to place weight on this matter.

98. The next matter relied upon by the SCA was the details of the arrangement that the Claimant has described with Mr T in France when, in effect, the Claimant says he was coerced into signing an agreement to pay Mr T £70,000. The Claimant explained on various occasions that, after working for those who controlling him on various jobs for

about 2 years, he was told he would be minding a cannabis factory and refused to do so. He says in his witness statement that he was confronted by 2 white men and a Vietnamese man, Mr D, and was kicked and that some liquid was thrown in his face. The Claimant says he was taken to see a Vietnamese doctor at a clinic but no doctor was available. He was given eye wash but this did not improve matters and so he was taken back to the clinic a month later. On this occasion he saw a doctor and the doctor was sufficiently worried that she drove him to Moorfields Eye Hospital. He was returned to Moorfields a few further times by Mr D but continued to suffer pain and could not see out of his left eye. There is considerable medical evidence to support the Claimant's account that he has no sight in his left eye. He reported this attack to the doctor in the IRC and it is referred to in the medical reports submitted on his behalf. Further the expert evidence firmly indicated that an injury of this type was "typical" of the injury he described.

99. The SCA solely focused his inquiry solely on the question as to whether the Claimant had been consistent in his account about which of his minders had sprayed acid in his eye, and not whether he had been subject to this attack. In his witness statement, the Claimant said that the acid was thrown by "*one of the white men*" whereas his earlier statements said it was thrown in his eye by Mr D. His explanation of this inconsistency is that the attack on him was led by Mr D but that the acid was actually thrown by one of the white men. Thus, as I read his evidence, he is saying that the three men were acting together and that Mr D was responsible for the attack albeit the acid was actually thrown by one of the white men.

100. Whilst it could be said that, read literally, there was an inconsistency between the different accounts given by the Claimant as to precisely who threw acid in his eye, I am far from convinced that there was any real inconsistency. However, the central thrust of the Claimant's case, and thus the key question for the SCA ought to have been whether the Claimant had been subjected to this attack at all. The differences in the account about which of 3 men was the person who actually threw the acid could only have had any relevance if the SCA used that discrepancy to conclude that this attack never happened. However, that conclusion could only have been reached if the SCA had grappled with the evidence of Dr Arnold that the Claimant's injury to his eye was "typical" of this type of incident. The SCA would also have to engage with the

evidence of Dr Dipple that the Claimant's complex PTSD would inhibit his ability to give a consistent account of a trauma event. The SCA failed to engage with any aspect of the expert evidence about this incident but instead placed all his focus on the discrepancy as to which of that attackers had thrown acid in his eye and, without making any reference to the other evidence, concluded that the Claimant had failed to "*provide a reasonable explanation for this internal inconsistency*".

101. The Claimant submits that in doing so the SCA breached the *Mibanga* principle (see §105 below) by deciding that the Claimant had failed to provide a "reasonable explanation" for that inconsistency and thus to reach the decision to disbelieve the Claimant's account of the attack. The complaint is that the SCA did so without looking at all the evidence that the Claimant put forward to say that he had been subject to this attack.

102. Counsel for the Secretary of State did not dispute that the method used by the SCA was to treat any inconsistency which did not have a reasonable explanation as being evidence that the Claimant was lying about the facts around the inconsistency and argued that an inconsistency meant that the SCA was justified in concluding that the whole of the Claimant's evidence could be disbelieved. Counsel submits that the SCA considered the evidence "in the round" and that he balanced evidence which supported the Claimant's account with that which was inconsistent. I reject that submission because it is inconsistent with the decision making structure in the Decision. In this case the SCA made a decision that the Claimant was telling lies (by concluding his credibility was affected) by relying on minor or peripheral details when the Guidance instructed the SCA to focus on main aspects of the Claimant's case. Further the SCA made decisions adverse to the Claimant's credibility before the SCA considered evidence that offered an alternative explanation for any failure by the Claimant to present a consistent account on each occasion on which the Claimant was asked about a matter.

103. The issue can be considered by asking what inferences were or could have been drawn by the SCA from this inconsistency. There are, as I see matters, two possible inferences the SCA could have drawn from this inconsistency. First, the SCA could have concluded that this inconsistency meant that the SCA could not be sure which of the men had thrown acid in the Claimant's eyes during this attack. The SCA might

even have concluded that the Claimant had been lying when he said it was Mr D who threw the acid when he knew that it was one of the white men who threw acid in his eye. If that was all that the SCA drew from this inconsistency then it seems to me that the SCA would have been bound to have concluded that the question as to identity of the attacker was largely irrelevant because, whichever of the three were responsible for this attack, it was evidence that the Claimant was being subjected to physical trauma by those who were controlling him. That would be very strong evidence to support his claim of being trafficked.

104. However, reading the decision as a whole, in my judgment this was not how the SCA approached the matter. Instead, the SCA relied on this inconsistency to reach decisions about the Claimant's overall credibility and thus, in effect, he decided that the inconsistency in his descriptions about which of three men threw acid in the Claimant's eyes meant that the SCA treated the absence of a reasonable explanation of this inconsistency as grounds for disbelieving the Claimant's account that he had had acid thrown in his eyes by anyone. I thus read the Decision as saying that the SCA disbelieved that the Claimant had been subject to an acid attack by anyone.

105. The Claimant submits that this is an impermissible approach having regard to the decision of the Court of Appeal in *Mibanga v Secretary of State for the Home Department* [2005] EWCA Civ 367. In that case the Court of Appeal affirmed the need for a SCA to look at all of the evidence on an issue before reaching a decision on a person's credibility. Mr Justice Wilson (as he then was) considered whether it was lawful for a SCA to reach an adverse conclusion on a person's credibility, and then go on to consider whether that conclusion was affected by medical evidence which provided corroborative support for the person's account of the material events. The issue before the court was summarised by the Judge at §20 where he said:

> *"… it is one of the central features of the argument before this court that the adjudicator fell into legal error in appraising parts of the evidence adduced on behalf of the appellant bit by bit and, in particular, in addressing the doctor's evidence only after she had conclusively rejected the central features of the appellant's case as incredible"*

106. That complaint was upheld. The Judge said at §24:

"It seems to me to be axiomatic that a fact-finder must not reach his or her conclusion before surveying all the evidence relevant thereto……

What the fact-finder does at his peril is to reach a conclusion by reference only to the appellant's evidence and then, if it be negative, to ask whether the conclusion should be shifted by the expert evidence"

107. That approach was affirmed by the Court of Appeal in *MN*. The central issue that the SCA needed to consider was whether the Claimant had been subject to coercion, namely that when he objected to work required by his minders, he was subject to an acid attack to his left eye. If he had been subject to this attack by 3 men working together it was, of course, largely irrelevant which of the men had been individually responsible for the acid attack. There was considerable corroborative evidence to support the Claimant's account that he had been subject to this coercion, namely the medical evidence relating to his eyes, his account of this to the IRC doctor and the expert evidence that this was typical (in the sense used in the Istanbul Protocol) of that type of attack. Thus, in my judgment, it was impermissible for the SCA to reach a decision on whether this attack happened at all without having regard to the evidence which supported the Claimant's account that he had been subject to this attack.

108. This issue highlights the problem with the way in which the SCA set out the issues as set out above. The almost total focus on the Claimant's credibility meant that the SCA made the decision by asking himself "*do I believe the Claimant's account*" as opposed to asking "*was the Claimant a victim of trafficking*". Thus, as I read the decision, the SCA felt that it was sufficient to disbelieve the Claimant's account that he had been subject to an acid attack because of the discrepancy in the identification of the attacker. That was an error of law because the evidence that the Claimant had been subject to an acid attack was substantially wider than the Claimant's own account.

109. The next "inconsistency" relied upon by the SCA was whether, after being returned by the UK police to France, it was a "few days" or a "few weeks" before the Claimant was put onto a dingy so he could cross the channel to return to England. The SCA said:

"This inconsistency is considered to damage your general credibility however, as it is not core to your trafficking claim, it has been given limited weight"

110. There are two problems with this part of the decision. First, the question as to whether there was a gap of a few days or a few weeks before the Claimant was put on dingy was, as the SCA accepted, nothing more than a minor matter of detail. Accordingly, applying the Guidance, no weight at all should have been given to this inconsistency. Relying on this inconsistency to undermine the Claimant's credibility to any extent departs from the approach recommended by the Guidance. Secondly, this part of the decision breached the *Mibanga* principle as a conclusion that the Claimant's credibility was undermined based on part of the evidence. By way of example, the Claimant suffered from complex PTSD and as so, as the Guidance recognised, that can cause difficulties in recounting past events. Hence no decision should or could have been made that this inconsistency undermined the Claimant's credibility until the SCA had decided whether the inconsistency could be better explained by the psychological consequences of the Claimant's PTSD than a deliberate lie.

111. The remaining inconsistences relied upon by the SCA concerned a series of matters but none went to the central account given by the Claimant, such as how the Claimant described coming to the UK to work. The complaints about the SCA focusing on minor details in a way that is not permitted by the Guidance seems to me wholly justified.

112. The response from counsel for the Secretary of State to the claim that the SCA had departed from the Guidance was to assert that this was nothing more than a merits attack on the decision. It does not seem to me that this response properly engages with the twin problems that (a) the SCA relied on minor and peripheral matters to reach conclusions on the Claimant's credibility when that was precisely what the Guidance said should not happen and (b) the SCA reached adverse views on the Claimant's credibility before considering other explanations which could account for inconsistencies. Thus, in summary, in my judgment the Claimant has made good his case on ground 1.

Grounds 3 and 4.

113. It is convenient to take grounds 3 and 4 together since the claims are inter-related. In summary, having reached adverse conclusions on the Claimant's credibility, the SCA next considered whether those conclusions were "mitigated" by the expert evidence filed on behalf of the Claimant. The Court of Appeal in *MN* rightly explained the mistake of law involved in an approach which sees the expert evidence as having the limited function of "mitigating" any flaws in the Claimant's credibility. The Court said at §126:

> *"In our view, although the particular points made in that passage are valid and important, their categorisation as "mitigating circumstances" is not apt, and indeed Mr Irwin, who argued this part of the case for the Secretary of State, accepted as much. It is not simply that that phraseology has an inappropriate echo of criminal proceedings. More substantially, it implies an approach under which the decision-taker first identifies the defects in the account of a putative victim and then tries to decide whether they can be excused for reasons of the kind given. That risks being over-mechanistic and does not reflect the real nature of the exercise. As is made clear in Mibanga , what is required is a single process in which the decision-maker assesses the credibility of the core account given by the putative victim. In doing so it will be necessary to take into account features which potentially call their credibility into question, such as incoherence, inconsistency or delay, alongside factors which may explain those features"*

114. I have already explained how, in my judgment, this decision making method looked at the expert evidence in a way that was not permitted by *Mibanga.* No decisions could or should have been made about the truth of the Claimant's factual account without looking at the evidence as a whole. However, the Claimant's complaints go further. They submit that the reasoning in the decision is deficient because it does not engage with those parts of the expert evidence which provide positive support for the Claimant's case that he was subject to trauma and was hence a victim of trafficking.

115. The SCA first referred to Dr Dipple's report of 18 July 2019. This report provided evidence that the Claimant suffered from complex PTSD. Accordingly, if the SCA accepted the report, he was required to assess the Claimant in accordance with Annex D of the Guidance. The Decision does not specifically say whether the SCA took issue

with Dr Dipple's diagnosis that the Claimant suffered from complex PTSD but I was assured by counsel that it was not part of the Secretary of State's case that there was any dispute that the Claimant presented with symptoms of complex PTSD.

116. In those circumstances, the SCA was required to grapple with the issues set out at §13.13 of the Guidance, namely that complex PTSD was "likely" to occur in the aftermath of multiple and repeated trauma over long periods. This was, of course, exactly what the Claimant had asserted happened to him. The key issue that the SCA was required to determine was whether it was likely on the balance of probabilities that the Claimant had been subject to conditions which satisfied the definition of modern slavery. Regardless as to any view the SCA may have reached on the truth of the events described by the Claimant, in my judgment the SCA needed to reach a view about evidence which suggested that it was likely that this Claimant had experienced multiple and repeated trauma over long periods. The response from the SCA to this evidence was as follows:

> *"However, it is not considered that the evidence outlined above mitigate[s] the vast array of inconsistencies in your account, especially given the lack of an in-depth assessment of your credibility. Furthermore, it is noted that the authors of the reports have not had access to the range of information that the Home Office has access to"*

117. No real explanation was offered by either party as to what was meant by "*an in-depth assessment of your credibility"* but I assume that is a reference to the fact that the Claimant had not given evidence about these matters in a trial. That phrase concerning "*an in-depth assessment of your credibility"* is repeated by the SCA on multiple occasions in this part of the report but it does not seem to me to go anywhere. The SCA had to make a decision based on the evidence that was before him. It was no answer to that process to say that a different process might have produced a different form of evidence.

118. In grounds 3 and 4 the Claimant makes a series of criticisms of the treatment by the SCA of this evidence. The first criticism made by the Claimant is that this evidence was only treated by the SCA as being relevant to the Claimant's credibility whereas it ought to have been treated as being evidence which demonstrated that it was likely that

the Claimant had been exposed to multiple and repeated trauma over long periods. The case for the Secretary of State is that the SCA properly weighed the evidence but found that there were too many inconsistencies in the Claimant's evidence to make it credible that he was a victim of trafficking.

119. In my judgment, the Claimant has made good this case. Read as a whole, the SCA failed to engage with the approach recommended by the Guidance in that (a) he failed to treat the evidence that the Claimant suffered from complex PTSD as being evidence that it was likely that the Claimant had been exposed to multiple and repeated trauma over long periods and (b) he failed to engage with the physical evidence of scarring that was supporting of the Claimant's account that has was a victim of bearings, and (c) if the SCA did understand this evidence and had engaged with it (which is unclear from the Decision) he failed in his duty to provide a high quality reasoned decision in that he gave no reasons for rejecting it.

120. The Claimant's account was that this trauma originated from those who were controlling him. Hence, whether the Claimant's account was credible about the details which caused the SCA concerns, this report amounted to evidence the Claimant had experienced multiple and repeated trauma over long periods. The SCA was, in my judgment, required to ask himself whether the medical evidence meant that it was more likely than not that the Claimant had suffered trauma at the hands of those who he alleges were controlling him. There is no indication from the Decision that the SCA appreciated that this was the effect of the evidence or engaged with the question as to whether the Claimant had indeed suffered trauma. Treating the expert evidence as solely "mitigation" for a decision that the Claimant had no credibility misses the point. This was evidence the Claimant had experienced multiple and repeated trauma over long periods and the SCA was obliged to engage with that evidence in deciding whether the Claimant was a victim of trafficking. His failure to do so was thus unlawful.

121. There were, however in my judgment, more fundamental problems with the method adopted by the SCA. First, the SCA identified a series of "inconsistencies" in details about the Claimant's evidence where he was not satisfied with the explanations. Even assuming that these inconsistencies related to matters that were serious and significant

in nature, which in my judgment they were largely not, if the SCA was to go on to conclude that these amounted to lies, the SCA needed to explain why he had discounted other potential explanations for any inconsistencies. It is unclear from the decision why the SCA decided the inconsistencies were not the result of the Claimant's complex PTSD as opposed to being deliberate lies by the Claimant. The SCA is the decision maker and is entitled to weigh the evidence and reach a conclusion. But the need for a "high standard of reasoning" means that the SCA has to explain why he reached the conclusion that inconsistencies were evidence of lies as opposed to being the product of a disordered mind which was responding to having been exposed to sustained trauma.

122. The submission in response from the Secretary of State was that that there was no obligation on a SCA to give reasons as to why the SCA has concluded that lying is more probable than other explanation. I found that submission slightly surprising in the light of the approach identified by the Court of Appeal in *MN* at §240ff which was accepted by the Secretary of State to be the leading case on this topic.

123. I do not accept that the SCA was entitled to reach the decision that the Claimant was lying without explaining why he had reached that decision as opposed to any of the other explanations of the inconsistencies. In *Mibanga* the Court considered the extent to which an immigration SCA had to give reasons why the SCA departs from views expressed by an expert who has provided evidence to assist the SCA. This issue was addressed by the Judge at §26 which I quote in full as follows:

> *"26. … In my view certain of the adjudicator's findings have cumulatively to be surveyed and then contrasted with the views of the professor:*
>
> *(a) The adjudicator found that the appellant's account of his second escape/release was wholly not credible. The professor, however, had offered a view that the reasons why he had been enabled to escape on this second occasion were very plausible. Although I have already accepted that issues of credibility were for the adjudicator, it was relevant for the professor to point out (as, notwithstanding the submissions of Mr Tam, I construe him to have done) that this second escape indeed occurred at the time of riots; and that the appellant and the alleged guard were members of a tribe which was not affiliated with the*

Mai-Mai and which had no particular sympathy with it. It was, to put it mildly, bold of the adjudicator to say that, notwithstanding the professor's view, the appellant's account of this incident was wholly not credible; and it seems to me that, although she had in principle the right so to do, she had to venture a reason not just for rejecting his view but indeed for placing it outside the spectrum of rational views.

(b) The adjudicator also found it wholly not credible that the appellant's wife would have been permitted to visit him in prison and in hospital. She did admittedly remind herself that her conclusion in this respect differed from that of the professor, who had, without qualification, stated that RCD-Goma allowed families to visit detainees. If he was thereby making a statement directly inconsistent with any of the other, objective material before her, the adjudicator has not identified it. Again in my view she owed the appellant a reason for finding that his expert's view was beyond the pale of credible views.

(c) The adjudicator's conclusion that the appellant's account of being detained and tortured for almost three years was incredible also ran wholly counter to the professor's view that his account of detention and torture was believable. I am yet again perplexed that the adjudicator, who of course did not need to express herself in such vivid terms, felt able to sideline the professor's view in this regard as worthless; and, as before, it seems to me that a proper fact-finding enquiry involves explanation as to the reason for which an expert view is rejected and indeed placed beyond the spectrum of views which could reasonably be held.

124. Hence, whilst it is open to an immigration adjudicator to depart from expert evidence which suggests that the Claimant's account is credible, it is necessary for the adjudicator to give reasons for doing so. Where reasons are required as part of a lawful decision, any failure to give reasons will mean that the decision is potentially unlawful. In *Dover District Council v CPRE Kent* [2017] UKSC 79, Lord Carnwath concluded that, following *R v Home Secretary, ex parte Doody* [1994] 1 AC 531, the purpose of a requirement to give reasons is to enable the courts to scrutinise the underlying decision effectively. Here, no reasons were given by the SCA as to why the SCA decided that it was more likely that the Claimant was lying than any of the other explanations was the

cause of the inconsistency. The failure of the SCA to give reasons, in my judgment, meant that the conclusions were unlawful for precisely the reasons identified in *Mibanga* and in *MN.*

125. A further area where it seems to me the decision is legally deficient is the unexplained "jump" that the SCA made from disbelieving the Claimant on certain, limited but specific details to a finding that the entirety of the Claimant's evidence should be disregarded. This question was recently considered by the Court of Appeal in *Uddin v Secretary of State for the Home Department* [2020] 1 WLR 1562 as I explained above. The Guidance provides extended and clear advice to SCA to caution them that victims of trafficking can lie for a number of complex reasons, largely emerging out of the state of powerlessness that they find themselves in.

126. I accept that a *Lucas* direction "*is of general application"* and should be clearly appreciated by anyone who is having to make a judicial, quasi-judicial or even administrative decision. In this case the SCA jumped from concluding (without giving reasons) that the Claimant was not telling the truth about relatively minor details of his account of events to concluding that he had lied about everything. There is no indication in the Decision that the SCA gave himself a *Lucas* direction that, even if he reached the decision that the Claimant had lied about one matter, he may still be telling the truth about other matters. Accepting the Guidance from Ryder LJ in *Uddin* that a *Lucas* direction is of general application, I consider that it was an error or law to make that jump without shown that the SCA had examined the possibility that the Claimant was lying about some matters but was telling the truth about others, especially given the extensive expert evidence which provided independent support for the core aspects of his case.

127. The Claimant submits that the next problem with the way the SCA approached the evidence is that the SCA considered the effect of the various pieces of evidence constantly referred to the expert evidence being deficient because the experts did not have access to information that the Home Office had seen. Unfortunately, this additional "information" was not identified in the Decision but the clear impression was given that the Home Office had additional material about this Claimant which led them

to decide that the expert evidence provided on behalf of the Claimant was insufficient to rebut the conclusion that this Claimant had lied.

128. When this issue was raised in these proceedings, the Secretary of State's answer was slightly unexpected. The only document identified by the Secretary of State which was not in the possession of the Claimant's experts was a US State Department Report on Trafficking [see §13 of the Detailed Grounds of Resistance]. This was part of the material that supported the Claimant's case since it showed that his account of being trafficked from Vietnam via Russia was a well-known trafficking route and was acknowledged by the SCA to support the Claimant's case. Counsel for the Secretary of State was not able to offer any assistance in understanding how the information in the US State Department Report could properly have assisted the SCA to come to conclusion that the evidence offered by the Claimant's experts should be rejected and the SCA's preliminary decision that the Claimant had lied should be maintained.

129. That factual situation raises quite a difficult question of public law, namely whether it is unlawful for a public body to assert that it relied on information to make an adverse decision against a person when, in reality, there was no such information that could have been relied upon by the public body to reach that conclusion. The Secretary of State is not able to offer any real explanation as to why the SCA asserted that he relied on additional material to reject the Claimant's credibility when the only additional material supported the Claimant's case. It may be that that sentence is an example of a "boiler-plate" type of paragraph which is inserted in decisions without necessarily being relevant to the present case. However, in as much as it was genuinely part of the Decision, it seems to me that it is irrational for a SCA to rely on exculpatory evidence as a basis for concluding that the Claimant's account of events should be rejected.

130. Finally, it seems to me that the SCA could be legitimately criticised for not having considered the overall effect of the expert evidence as opposed to considering the effect of each expert report on the Claimant's credibility separately. The real issue was the cumulative effect of the reports, not their individual weight. However that was not a ground advanced by the Claimant and I say no more about it.

131. Those conclusions are sufficient to lead me to quash the Decision. It is thus not necessary for me to make findings on the remaining grounds raised by the Claimant but

I expressed preliminary views in argument that ground 2 appeared to have difficulties for the Claimant because it was premised on an assumed factual conclusion that the SCA was supposed to have made when, in my judgment, it is far from clear that any such finding was in fact made. I also could not see how anything was added by ground 5 which concerned an alleged misapplication of the standard of proof. However it is not necessary to reach final conclusions on those ground because I am prepared to quash the decision for the reasons set out above. I invite counsel to make submissions in writing within 7 days on consequential matters.