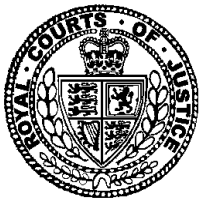

Neutral Citation Number: [2019] EWHC 3346 (Admin)

Case No: CO/4606/2018, CO/4608/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 December 2019

Before :

THE HONOURABLE MR JUSTICE MURRAY

- -

Between :

THE QUEEN ON THE APPLICATION OF JP	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
THE QUEEN ON THE APPLICATION OF BS	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr Chris Buttler (instructed by **Deighton Pierce Glynn Solicitors**) for the **Claimants**
Ms Joanne Williams (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 2 May 2019

- -

Approved Judgment

Mr Justice Murray :

1. Each of the claimants, JP and BS, is a victim of human trafficking and has also claimed asylum in the United Kingdom. Each claimant seeks to challenge the decision of the defendant, the Secretary of State for the Home Department, not to determine her application for a residence permit under Article 14(1) of the Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005 ("ECAT") before determining her claim for asylum. In the case of JP, the relevant decision is dated 21 September 2018 ("the JP Decision"). In the case of BS, the relevant decision is also dated 21 September 2018 ("the BS Decision").

2. Each of JP and BS also seek to challenge the lawfulness of the Secretary of State's policy that, in the case of a victim of trafficking who is also making an application for asylum, the Secretary of State will not determine the victim's application for a residence permit under Article 14(1) of ECAT before making a decision on the asylum application.

Procedural history

3. JP's claim (CO/4606/2018) for judicial review of the JP Decision was issued on 19 November 2018. BS's claim (CO/4608/2018) against the BS Decision was also issued on 19 November 2018. There are some factual differences in the background to each claim, but the claims raise the same issues. The same solicitors, Deighton Pierce Glynn ("DPG"), act for each of JP and BS in these proceedings.

4. On 29 November 2018 Garnham J granted anonymity to each of JP and BS and ordered that JP's claim and BS's claim should be managed together.

5. By order dated 16 January 2019 (sealed on 17 January 2019) HHJ Bidder QC, sitting as a Deputy Judge of the High Court, gave BS permission to amend her Statement of Facts and Grounds and the Secretary of State permission to amend her Summary Grounds of Defence in relation to BS's claim.

6. By order dated 17 January 2019 (sealed on 23 January 2019) HHJ Bidder QC, sitting as a Deputy Judge of the High Court, gave JP permission to amend her Statement of Facts and Grounds and the Secretary of State permission to amend her Summary Grounds of Defence in relation to JP's claim. HHJ Bidder QC also ordered that JP's claim and BS's claim be consolidated.

7. By order dated 8 March 2019 (sealed on 13 March 2019) ("the Permission Order"), on a review of the papers, Andrew Baker J gave permission for JP and BS to bring their claims for judicial review, for the reasons appended to his order. He also granted expedition of the claims, to be heard as soon as possible after 30 April 2019. At para 4 of his reasons, Andrew Baker J observed that it would be appropriate to hear the claims even if they became academic, because the issue:

> "raises an argument of real public importance that does not turn on the detailed facts and substantial numbers of other potential claimants are or are likely to be affected. Moreover, that challenge relates to a recent change of policy and there is a strong public interest in the lawfulness of the new policy (since

> open to doubt) being authoritatively considered, if possible, before it becomes too well embedded."

The Secretary of State's applications for adjournment of the hearing

8. Shortly before the hearing, the Secretary of State made an application, supported by detailed written submissions, for (i) a stay of these proceedings behind proceedings relating to the claimants in two other judicial review cases that were being heard together, *R (NN) v SSHD* (CO/1040/2019) and *R (LP) v SSHD* (CO/1039/2019) or (ii) in the alternative, for an order adjourning the hearing of this case, which was then due to be heard on either 2 or 3 May 2019 (and was heard on 2 May 2019), on the basis that the consolidated case of *NN & LP* should proceed as the lead case for various reasons.

9. The claimants, JP and BS, opposed the Secretary of State's stay application. I dealt with it on the papers, refusing it by order dated 26 April 2019. Broadly, I accepted the position of JP and BS that their claims were sufficiently different from those of NN and LP so as to justify proceeding with their claims at the hearing then listed for 2/3 May 2019. The Secretary of State renewed her stay application, with further detailed written submissions, which was again opposed by JP and BS. By order dated 30 April 2019 I refused the renewed application, and the hearing proceeded on 2 May 2019.

After the hearing on 2 May 2019

10. After the hearing on 2 May 2019, I was notified that the Secretary of State had agreed to reconsider the applications made by each of JP and BS for a residence permit under Article 14(1) of ECAT, having refused each application shortly before the hearing by letters dated 23 April 2019. I will revert to the impact of this on the claims later in this judgment.

The obligations of the UK in relation to trafficking victims

11. The United Kingdom is a party to ECAT, having ratified it on 17 December 2008. As a treaty, it does not have direct effect, and it has never been incorporated into the law of any part of the UK, including England and Wales. It has, however, been implemented administratively in the UK by the National Referral Mechanism ("NRM"), a process for identifying and supporting victims of trafficking created in 2009 in light of the UK's obligations under ECAT.

12. The issue of whether ECAT is justiciable arose in the case *of R (PK (Ghana)) v SSHD* [2018] EWCA Civ 98. In that case at [34] Hickinbottom LJ noted that it had been common ground before Picken J in the court below that a failure to give effect to ECAT would be a justiciable error of law. Before the Court of Appeal in that case, counsel for the Secretary of State confirmed that concession. In her Detailed Grounds of Defence for each claim in this case, the Secretary of State stated that "the published policies came into being to give effect to [Articles 10, 12 and 14] of ECAT", which the claimants say is consistent with the Secretary of State's concession on justiciability of ECAT in *PK (Ghana)*. The Secretary of State's position in this case is that she is constrained to follow this concession, but she reserves her position for the future. In any event, she maintains that her published policies are consistent with the

United Kingdom's obligations under ECAT and that they give proper effect to those obligations.

13. Articles 10(1) and 10(2) of ECAT provide as follows:

> "1. Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.
>
> 2. Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2."

14. Articles 10(1) and 10(2) of ECAT require each state that is a party to ECAT to have an appropriate legislative and administrative framework, as well as a procedure and relevant resources, for identifying potential and actual victims of trafficking and, where appropriate issuing victims with residence permits under Article 14(1) of ECAT. Article 10(2) also requires a member state to ensure that, until a conclusive determination has been made whether a potential victim is an actual victim of trafficking, the potential victim is:

    i) protected from removal from the state; and

    ii) entitled to receive the assistance provided for in Articles 12(1) and 12(2) of ECAT (discussed further below).

15. Articles 14(1) and 14(5) of ECAT provide as follows:

> "1. Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or both:

> (a) the competent authority considers that their stay is necessary owing to their personal situation;
>
> (b) the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.
>
> …
>
> 5. Having regard to the obligations of the Parties to which Article 40 [Relationship with other international instruments] of this Convention refers, each party shall ensure that granting of a permit according to this provision shall be without prejudice to the right to seek and enjoy asylum."

16. In the UK, a "renewable residence permit", as referred to in Article 14(1) of ECAT would be in the form of discretionary leave to remain ("DLR") granted to the victim by the Secretary of State, as the competent authority under ECAT and the NRM for victims or potential victims of trafficking who have made an asylum claim or are subject to immigration control. The Modern Slavery Human Trafficking Unit (MSHTU) is the other competent authority under ECAT in the UK, primarily responsible for potential or actual victims of trafficking who are UK or EEA nationals.

17. During the hearing of this matter, DLR granted to a victim by the Secretary of State under Article 14(1) of ECAT was referred to as "ECAT leave" to distinguish it from leave that may be granted following a decision to grant asylum, which, for convenience, was referred to as "refugee leave".

18. ECAT leave is a temporary form of leave that enables a victim of trafficking to receive support (through access to the labour market, education and mainstream benefits) to facilitate recovery from trafficking and/or to facilitate co-operation with a criminal investigation into trafficking. It is generally granted for a period of 30 months, although it can be granted for a longer or shorter period in individual cases. It is not a route to settlement in the UK.

19. Refugee leave is a longer-term form of leave granted, in principle, because the person granted asylum cannot safely return to his or her country of origin. A person with refugee leave is able to access the labour market, education and mainstream benefits. The leave is generally granted for five years, and it is a route to settlement in the UK. Accordingly, refugee leave is a more favourable form of leave than ECAT leave.

20. Prior to 21 February 2018, the Secretary of State would decide whether to grant ECAT leave to an applicant at the same time as he made a decision as to whether there were conclusive grounds for determining that the applicant was, in fact, a victim of trafficking ("a conclusive grounds decision"). Further references in this judgment to a "victim" without other qualification means a person in respect of whom the Secretary of State has made a positive conclusive grounds decision that the person is an actual victim of trafficking.

21. A person who is referred to the NRM as a possible victim of trafficking is first assessed in order to make a decision whether there are reasonable grounds for considering that the person may be a victim of trafficking ("a reasonable grounds decision"). If a positive reasonable grounds decision is made, the person, as a potential victim of trafficking, is entitled to a degree of support under Articles 12(1) and 12(2) of ECAT ("basic trafficking support").

22. Articles 12(1) and 12(2) of ECAT provide as follows:

> "1. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:
>
> a. standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
>
> b. access to emergency medical treatment;
>
> c. translation and interpretation services, when appropriate;
>
> d. counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;
>
> e. assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
>
> f. access to education for children.
>
> 2. Each Party shall take due account of the victim's safety and protection needs."

23. The date of notification of a positive reasonable grounds decision to a potential victim of trafficking marks the start of a 45-day period of "recovery and reflection". Article 13 of ECAT requires this period to be at least 30 days. During the recovery and reflection period, basic trafficking support will be available to the potential victim. According to the Secretary of State's policy guidance "Victims of Modern Slavery – Competent Authority Guidance" (Version 7, published 29 April 2019) ("the Trafficking Guidance"), the expectation is that the Secretary of State's conclusive grounds decision will be made "as soon as possible" following the end of the recovery and reflection period.

24. Basic trafficking support in the UK is provided by the Salvation Army under a contractual arrangement between the Salvation Army and the Secretary of State and includes specialist accommodation (where needed), a support worker to provide

practical and emotional support, access to free healthcare in emergency or other limited circumstances, short-term counselling and financial support at a rate of £65 per week.

25. A person who has made an application for asylum, but who is not a potential or actual victim of trafficking, is entitled to receive financial support and, if needed, assistance with housing from the National Asylum Support Service ("NASS"), a section of the UK Visas and Immigration division of the Home Office. The NASS financial support rate is £37.75 per week, which is £27.25 per week less than the financial support paid to victims or potential victims of trafficking under basic trafficking support.

26. A potential or actual victim of trafficking who has made an application for asylum and has moved out of NRM support into asylum support accommodation is entitled to financial support at the NASS financial support rate of £37.75 per week.

27. If a potential victim of trafficking is "lawfully resident within the territory of" the UK, then he or she is also entitled to support under Articles 12(3) and 12(4) of ECAT ("enhanced trafficking support"). The Explanatory Report to ECAT dated 16 May 2005 makes clear at para 165 that "lawfully resident" victims are those who, if not nationals of the relevant state, have the residence permit referred to in Article 14(1) of ECAT. Accordingly, neither JP nor BS are eligible for enhanced trafficking support.

28. Article 12 of ECAT provides at paras 3 and 4 as follows:

> "3. In addition, each Party shall provide necessary medical or other assistance to victims lawfully resident within its territory who do not have adequate resources and need such help.
>
> 4. Each Party shall adopt the rules under which victims lawfully resident within its territory shall be authorised to have access to the labour market, to vocational training and education."

29. Whereas under basic trafficking support a potential victim is entitled to access medical treatment only in emergency or other limited circumstances, under enhanced trafficking support, pursuant to Article 12(3) of ECAT, a potential or actual victim is entitled to "necessary medical or other assistance to victims … who do not have adequate resources and need such help". Similarly, whereas under basic trafficking support a potential victim is not entitled to access the labour market, vocational training or education in the UK, pursuant to Article 12(4) of ECAT, a potential or actual victim is entitled to that access.

30. If a person receives a positive conclusive grounds decision, basic trafficking support continues for a further 45 days from the date of the decision and then ends ("the 45-day rule"). Prior to 1 February 2019, basic trafficking support continued only for a further 14 days after the date of the positive conclusive grounds decision ("the 14-day rule"). The 14-day rule applied to the claimants. The change to the 45-day rule was announced by the Secretary of State in a policy document entitled "National referral mechanism reform", which was published on 16 October 2018. A victim can ask for an extension of basic trafficking support beyond the 45 days, but there is no guarantee

that the extension will be granted. No material extension of basic trafficking support was provided to JP or BS after the application of the 14-day rule in relation to each of them.

31. As I have already noted, basic trafficking support does not permit the potential victim of trafficking to access the labour market, education or mainstream benefits. It is, however, more generous than NASS support, namely, the support available to applicants for asylum who have not been identified as potential victims of trafficking.

32. After the Secretary of State had issued a notice on 18 January 2018 cutting the rate of support paid to potential victims of trafficking (namely, those in respect of whom a reasonable grounds decision had been made) from £65 per week to the level of the NASS financial support rate of £37.75 per week, Mostyn J in *R (K) v SSHD* [2018] EWHC 2951 (Admin), [2019] HRLR 2 (Admin) at [25]-[30] found that the NASS financial support rate was insufficient to meet the needs of potential victims of trafficking. He noted that the NASS financial support was no more than "the minimum sum needed to stave off destitution", whereas ensuring the "subsistence" of a potential victim of trafficking requires more than that. He therefore quashed the Secretary of State's decision to cut the weekly rate paid to support potential victims of trafficking.

The scheduling rule

33. Since 8 August 2018 the Secretary of State has operated a policy under which he will not make a decision on ECAT leave in respect of a victim of trafficking unless and until it is determined that the victim does not qualify for any other form of leave. The claimants refer to this as "the scheduling rule". The Secretary of State apparently objects to the term as inapt, but Ms Joanne Williams, counsel for the Secretary of State, did not make any submissions as to why the Secretary of State considers the term to be inapt. For convenience of reference, I adopt the term in this judgment.

34. The scheduling rule and the criteria for granting ECAT leave are set out in a policy document published on 10 September 2018 entitled "Discretionary leave considerations for victims of modern slavery (Version 2.0)" ("the Policy"). The scheduling rule is set out in the first sentence of the following paragraph at page 12 of the Policy:

> "*All outstanding asylum decisions should be taken before any consideration is given to whether the victim is eligible for discretionary leave.* If it is decided that a grant of leave is appropriate and the length of that leave is more generous than any discretionary leave grant, that leave should be granted. This may be the case where the person qualifies for a grant of asylum or humanitarian protection or for leave to remain on the basis of family or private life." (emphasis added)

35. The Policy sets out (at pages 6 to 9) three alternative criteria under which ECAT leave may be granted:

    i) leave that is necessary owing to the personal circumstances of the victim, for example, the need to finish medical treatment from a healthcare professional;

ii) leave in order to pursue compensation against the perpetrators of the victim's trafficking through legal proceedings in the UK; and

iii) leave to enable the victim to assist the police in the UK with their investigation or proceedings against the perpetrators or facilitators of the victim's trafficking.

The claimants make no complaint about those criteria.

36. The effect of the scheduling rule is that a victim of trafficking who is also an asylum seeker will not have their application for ECAT leave determined until their application for asylum has been granted and then a decision on refugee leave has been made. A victim of trafficking who is not an asylum seeker (and has not applied for any other form of status that could result in a grant of leave) will have their application for ECAT leave determined at the same time as they receive a positive conclusive grounds decision.

37. Given that it typically takes several months for an asylum decision to be made (as was the case for each of the claimants in this case), an asylum-seeking victim of trafficking is required by the scheduling rule to wait for several months after their conclusive grounds decision for a decision on ECAT leave while a non-asylum-seeking victim of trafficking may have a decision on ECAT leave at the same time as their conclusive grounds decision.

38. A victim of trafficking is not guaranteed to receive ECAT leave, just as a person granted asylum is not guaranteed to receive refugee leave. While acknowledging that point, the claimants say that the effect of the delay in determining ECAT leave has the following consequences for victims of trafficking:

i) The victim loses trafficking support 45 days after receiving a positive conclusive grounds decision and is without that support (typically, for many months) before a decision is made on asylum, on refugee leave or, if refugee leave is not granted, on ECAT leave. The victim remains eligible for NASS support, however that, as already noted, is only a minimal level of support necessary to stave off destitution.

ii) The victim loses the advantages of ECAT leave that would otherwise apply if a favourable ECAT leave decision were made at the time of the conclusive grounds decision, including the right to work or study and the right to access mainstream benefits.

iii) The victim suffers from continuing uncertainty, which can impede their recovery from the trauma they have suffered. The claimants have provided expert evidence on this point, which I will summarise in due course.

The effect of the scheduling rule on trafficking support

39. Before turning to consider the position of the individual claimants, I briefly outline the claimants' case on point (i) in [38] above. The claimants say that the Secretary of State was wrong to contend in her Detailed Grounds of Defence at para 26 that the

Secretary of State takes due account of a victim's safety and protection needs in accordance with Article 12(2) of ECAT by virtue of the fact that:

> "victims, including the Claimant[s], are still able to access the support and benefits conferred under Article 12(1) [of ECAT] pending a decision on asylum and/or DLR … ."

40. The claimants say that this is wrong for the following reasons. Due to the 45-day rule (and the 14-day rule, which applied in the case of the claimants), basic trafficking support ends 45 days after a conclusive grounds decision (and ended 14 days after the conclusive grounds decision in relation to each of the claimants). The Secretary of State provides a weekly drop-in support service for up to six months after the conclusive grounds decision to "all confirmed victims with leave to remain in the UK", but that does not apply to victims, such as the claimants, who do not have leave to remain and are awaiting a decision on ECAT leave.

The interaction of the scheduling rule and the 45-day rule

41. At the time of the hearing, the 45-day rule was under challenge in the case of *NN and LP*, to which I have already referred. On 17 April 2019 Julian Knowles J gave NN and LP permission to challenge the 45-day rule by way of judicial review: *R (NN) v SSHD* [2019] EWHC 1003 (Admin).

42. By consent order dated 28 June 2019 ("the NN-LP Consent Order") NN and LP withdrew their claim for judicial review upon the Secretary of State recognising that the legislative and other measures whose adoption is contemplated by Article 12(1) of ECAT as necessary to assist victims in their recovery may vary from individual to individual and cannot be delimited by time alone, and the Secretary of State agreeing to not cease providing basic trafficking support to NN and LP by reference only to the lapse of time after her conclusive grounds decision in relation to each of them and further agreeing to determine NN's asylum claim within three months of the date of the consent order.

43. In the Statement of Reasons accompanying the NN-LP Consent Order, which was supported by a witness statement dated 6 June 2019 provided by Ms Rachel Devlin of the Home Office, Modern Slavery Unit, the Secretary of State indicated that in response to that judicial review claim the Secretary of State had reviewed the current NRM system and concluded that some aspects of the system were unsatisfactory, recognising that what Article 12 of ECAT contemplates is necessary to assist with recovery may vary from individual to individual and cannot be delimited by time alone. Among other things, the 45-day rule and how it is applied is under review by the Secretary of State.

44. According to the Statement of Reasons, the Secretary of State is "currently formulating a sustainable replacement, needs-based system for supporting victims of trafficking". Pending the completion of that work, the Secretary of State would be making interim revisions to its current policy so that support through the NRM for a victim would not be restricted by reference only to the date of the conclusive grounds decision or the length of time for which such support has been provided. The Statement of Reasons concludes:

> "Pending these interim revisions, the [Secretary of State] has no intention of reapplying the '45-day rule' or reintroducing any provision that restricts support by reference only to such a date or length of time."

45. The claimants accepted that for purposes of this case it has to be assumed that the 45-day rule is lawful. A key issue raised by this case is the interaction between the scheduling rule and the 45-day rule. Before the scheduling rule was introduced, a victim claiming asylum would receive a decision on ECAT leave at about the time the conclusive grounds decision was taken. If it was a positive decision, the loss of basic trafficking support would be replaced by a more comprehensive system of welfare support available to holders of ECAT leave.

46. The introduction of the scheduling rule means that victims losing basic trafficking support after 45 days under the 45-day rule fall to the level of NASS support from that point until the asylum claim and then ECAT leave decisions are taken. As already noted, NASS support involves a weekly payment at a level sufficient only to avoid destitution, as found by Mostyn J in the case of *K*. As Mr Chris Buttler, counsel for the claimants, put it in his skeleton argument, this "has created a lacuna in support for victims of trafficking".

47. This lacuna is significant, say the claimants, because in about half of all cases, the asylum decision-making process takes longer than six months, meaning that a victim, without leave or support on another basis, must survive at the near-destitution level of NASS support potentially for several months, as has happened in this case in respect of each of JP and BS.

48. This claim challenges the legality of the scheduling rule. The claimants do not contend that, in every case of a victim who is also an asylum seeker, the Secretary of State must determine the victim's application for ECAT leave before his or her application for asylum. The claimants simply challenge the blanket nature of the scheduling rule, namely, that an application for ECAT leave should never be determined unless and until the related asylum claim has been rejected.

Factual background relating to JP's claim

49. JP has provided a witness statement dated 15 November 2018, with a number of exhibits. She is a national of Albania. She is 29 years old and has a two-year old son.

50. On 2 August 2016 JP was trafficked into the UK to pay her husband's gambling debts. She was approximately 5-6 months pregnant at the time. She was held captive and forced to have sex with men for two or three weeks before she escaped. The traffickers knew she was pregnant. In her witness statement, JP describes her trauma as a result of these horrific experiences. She has been taking anti-depressants since about September 2017 . She has found it difficult to engage with counselling or other forms of mental health treatment due to the uncertainty of her immigration status.

51. On 8 September 2016 JP made an application for asylum. On 9 September 2016 JP was referred to the NRM as a potential victim of trafficking. By letter dated 13 September 2016 the Secretary of State informed JP that she had made a positive reasonable grounds decision in her case. The letter included standard wording noting

that 13 September 2016 marked the start of a 45-day recovery and reflection period, during which she would be entitled to safe accommodation and support as a potential victim of trafficking and following which the Secretary of State would make a conclusive grounds decision.

52. On 8 February 2017 JP had a full asylum interview. On 28 March 2017 the Secretary of State sent her a letter stating that there was a six-month delay in respect of asylum decisions.

53. On 22 June 2017 JP felt compelled to move to a new location after seeing a man whom she believed to have been involved in trafficking her near where she had been staying.

54. On 24 January 2018 the Secretary of State sent JP a letter informing her that there would be a further delay in making her asylum decision. By letter dated 29 March 2018 JP's solicitors sent a pre-action protocol letter to the Secretary of State alleging an unlawful delay by the Secretary of State in notifying JP of her conclusive grounds decision. In her response dated 5 April 2018, the Secretary of State indicated that a decision would be made within three months, absent special circumstances.

55. On 7 June 2018 JP filed judicial review proceedings challenging the delay in making the conclusive grounds decision. By letter dated 28 June 2018 the Secretary of State confirmed to JP that she had made a positive conclusive grounds decision in her case. The Secretary of State indicated in the letter, however, that a decision on JP's application for ECAT leave was "on hold" pending the Secretary of State's consideration of the Court of Appeal's decision in the case of *PK (Ghana)*. As a result, JP withdrew her challenge to the delay.

56. On 21 September 2018, in the JP Decision, the Secretary of State applied the scheduling rule to JP, stating that it was not necessary to consider her application for ECAT leave until her asylum claim had been determined.

57. On 24 October 2018 DPG sent a pre-action protocol letter to the Secretary of State challenging her delay in making a decision in relation to JP's application for ECAT leave. On 7 November 2018 the Secretary of State replied stating that JP "will be notified in due course".

58. On 19 November 2018, JP issued her application for judicial review of the JP Decision and the policy reflected in the scheduling rule.

59. In a letter dated 23 November 2018 the Secretary of State notified JP that her application for asylum was refused and set out her reasons for that decision.

60. On 12 December 2018 the Secretary of State filed her Summary Grounds of Defence, in which she stated that her decision on ECAT leave had also been made. On 19 December 2018 JP filed her Amended Statement of Facts and Grounds of Judicial Review ("JP Grounds") challenging that contention. On 1 February 2019 the Secretary of State filed Amended Summary Grounds of Defence maintaining her position on that point.

61. On 13 March 2019 the Permission Order was sealed by the court, granting JP permission to apply for judicial review of the JP Decision and the lawfulness of the policy reflected in the scheduling rule. In his reasons for making the Permission Order, Andrew Baker J indicated, among other things, that he considered it properly arguable that the Secretary of State had not yet made a decision on ECAT leave (as opposed to some other form of discretionary leave) in relation to JP.

62. On 2 April 2019 the Secretary of State filed her Detailed Grounds of Defence, in which she stated that she had not decided JP's application for ECAT leave but would do so by 15 April 2019. On 23 April 2019 she issued her decision refusing ECAT leave to JP.

Factual background of BS's claim

63. BS has provided a witness statement dated 15 November 2018, with a number of exhibits. She is a national of Albania. She is 33 years old.

64. On 2014 BS was deceived by a man whom she considered to be her boyfriend, but who was a trafficker, into travelling from Albania to Italy, where she was forced to have sex with numerous men every day for two years.

65. In 2016 traffickers moved BS from Italy via Switzerland and Belgium to Brighton, where she was kept in a house and forced to have sex with men. She was occasionally forced to have unprotected sex, and she became pregnant. The traffickers forced her to have an abortion.

66. BS escaped from the traffickers on 8 February 2017. In the summer of 2018, she underwent eight weeks of counselling at Somerset and Avon Rape and Sexual Abuse Support to help her begin to address the trauma she had suffered as a result of the serious and long-term sexual exploitation I have described. In November 2018 she began a six-month counselling course at Womankind. She has suffered from depression and has been prescribed Mirtazapine, an anti-depressant.

67. Following her escape from the traffickers on 8 February 2017, BS travelled to London, where she went to the police. On 14 February 2017, the police referred her to the Home Office as a potential victim of trafficking. She received a positive reasonable grounds decision on the same day.

68. BS made an application for asylum and attended an asylum screening interview on 22 February 2017. After providing a witness statement dated 3 April 2017 to the Home Office, BS attended a full asylum interview on 15 August 2017.

69. On 29 March 2018 DPG sent a pre-action protocol letter to the Secretary of State, challenging her delay in making a conclusive grounds decision. On 13 April 2018 the Secretary of State responded saying that she would endeavour to make the decision within three months, absent special circumstances. On 15 May 2018 the Secretary of State made a positive conclusive grounds decision in relation to BS. In her letter notifying BS of that decision, the Secretary of State stated that a decision on BS's application for ECAT leave was "on hold" pending the Secretary of State's consideration of the Court of Appeal's decision in the *PK (Ghana)* case.

70. On 21 September 2018, in the BS Decision, the Secretary of State applied the scheduling rule to BS, stating that it was not necessary to consider her application for ECAT leave until her asylum claim had been determined.

71. On 24 October 2018 DPG sent a pre-action protocol letter to the Secretary of State challenging her delay in making a decision in relation to BS's application for ECAT leave. On 1 November 2018 the Secretary of State replied stating that she was actively working on BS's case and aimed to have made a decision within eight weeks, absent special circumstances.

72. On 19 November 2018, BS issued her application for judicial review of the BS Decision and the policy reflected in the scheduling rule.

73. On 12 December 2018 the Secretary of State filed her Acknowledgement of Service and Summary Grounds of Defence to BS's claim.

74. In a letter dated 22 January 2019 the Secretary of State notified BS that her application for asylum was refused and set out her reasons for that decision.

75. On 1 February 2019 the Secretary of State filed her Amended Summary Grounds of Defence, in which she stated that her decision on BS's application for ECAT leave had also been made.

76. On 13 March 2019 the Permission Order was sealed by the court, granting BS permission to apply for judicial review of the BS Decision and the lawfulness of the policy reflected in the scheduling rule. As I have already noted in relation to JP's claim, in his reasons for making the Permission Order, Andrew Baker J indicated, among other things, that he considered it properly arguable that the Secretary of State had not yet made a decision on ECAT leave (as opposed to some other form of discretionary leave) in relation to BS.

77. On 27 March 2019 BS filed her Re-amended Statement of Facts and Grounds of Judicial Review ("the BS Grounds"), challenging the Secretary of State's contention that she had determined BS's application for ECAT leave.

78. On 2 April 2019 the Secretary of State filed her Detailed Grounds of Defence, in which she stated that she had not decided BS's application for ECAT leave but would do so by 15 April 2019. On 23 April 2019 she issued her decision refusing ECAT leave to BS.

Professor Katona's evidence regarding the impact of delay on victims of trafficking

79. The claimants provided as part of their evidence a witness statement dated 18 December 2018 of Mr Adam Hundt, a partner at DPG. One of the exhibits to that witness statement is a witness statement dated 10 October 2018 prepared by Professor Cornelius Katona, a practising psychiatrist and Medical Director of the Helen Bamber Foundation. The Helen Bamber Foundation is a human rights charity based in London, the principal activity of which is to provide, through specialist teams of therapists, doctors and legal experts, integrated care to individuals who have experienced torture, trafficking and other human rights violations.

80. Professor Katona's witness statement was given in another claim raising similar issues, in which JP and BS had proposed to join before receiving their positive conclusive grounds decisions. JP, in fact, was originally a co-claimant in that other claim, but withdrew after receiving her positive conclusive grounds decision, whereas BS had received her positive conclusive grounds decision before the claim was issued. The substance of Professor Katona's evidence, according to Mr Hundt, applies *mutatis mutandis* to these claims and deals with the mental health consequences of delay in determining ECAT leave for victims of trafficking who also have pending asylum applications.

81. Professor Katona explains that a delay in granting ECAT leave (or some other form of leave to remain) to a victim of trafficking makes it much more difficult for the victim to engage fully in and thereby benefit from trauma-focused work. He considers that "prolonged indefinite uncertainty of waiting for a decision is also clinically distressing and destabilising" and that the inability of a victim of trafficking, without some form of leave to remain, to work or study:

> "… can increase survivors' social isolation which is further aggravated by the difficult financial circumstances in which they have to subsist pending the conclusion of the NRM identification process. Even in circumstances where survivors receive some emotional support through the NRM, they nonetheless cannot lead full and free lives and are constrained economically, which increases stress and can increase vulnerability to further exploitation. All these factors can contribute to prolonged mental ill health and worsen long-term prognosis. This may in turn impede their ability to give evidence, either in their own immigration cases, for the purpose of accessing their legal rights and entitlements, or in providing witness evidence for police investigations."

The Policy and the Trafficking Guidance

82. To provide more context for consideration of the Secretary of State's policies at issue in these claims, I set out below relevant provisions from the Policy and the Trafficking Guidance.

83. The Policy provides in relevant part at pages 6 to 7 as follows:

> "**Background to discretionary leave for potential victims of modern slavery**
>
> …
>
> <u>When to consider a grant of discretionary leave</u>
>
> A person will not qualify for discretionary leave (DL) solely because they have been identified as a victim of modern slavery – there must be reasons based on their individual circumstances to justify a grant of DL where they do not qualify for other leave such as asylum or humanitarian protection.

> Where the case involves a child the best interest of the child should always be factored into the consideration. The Secretary of State has the power to grant leave on a discretionary basis outside the rules from residual discretion under the Immigration Act 1971. Discretionary leave is a form of leave to remain that is granted outside the Immigration Rules in accordance with this policy. Applications for DL cannot be made from outside the UK. Part 9 of the Immigration Rules covers the general grounds for refusal and must be consulted and applied before DL is granted.
>
> Discretionary leave may be considered where a Competent Authority has made a positive conclusive grounds decision that an individual is a victim of modern slavery[,] they are not eligible for any other form of leave (such as asylum or humanitarian protection) and either:
>
> • leave is necessary owing to personal circumstances
>
> • leave is necessary to pursue compensation
>
> • victims who are helping police with their enquiries [sic]
>
> …"

84. The section of the Policy in which the scheduling rule appears provides in relevant part at page 12 as follows:

> "**Actions to take following a positive conclusive grounds decision**
>
> Immigration cases
>
> Victims of modern slavery also make asylum claims. Where they do it is for the Home Office to make decisions on the asylum claim once a conclusive grounds decision has been taken.
>
> A positive conclusive grounds decision does not result in an automatic grant of immigration leave.
>
> However, if the Home Office is the Competent Authority it will automatically consider whether a grant of discretionary leave (DL) is appropriate under the following criteria:
>
> • those relating to personal circumstances
>
> • assisting police with enquires [sic]
>
> • pursuing compensation once a positive conclusive grounds decision is issued

> *All outstanding asylum decisions should be taken before any consideration is given to whether the victim is eligible for discretionary leave.* If it is decided that a grant of leave is appropriate and the length of that leave is more generous than any discretionary leave grant, that leave should be granted. This may be the case where the person qualifies for a grant of asylum or humanitarian protection or for leave to remain on the basis of family or private life." (emphasis added)

85. The relevant section of the Trafficking Guidance provides as follows:

> "**Home Office Competent Authority next steps for live immigration cases following a positive Conclusive Grounds decision**
>
> Action 5: make a decision on any outstanding asylum claim
>
> Many victims of modern slavery also make asylum claims. These are usually non EEA nationals although not always.
>
> The Home Office may make a positive decision on an asylum claim whilst a person is being considered under the NRM process. Once a conclusive grounds decision has been taken, any outstanding claim for asylum should be decided when possible.
>
> If a person seeks to rely on being a victim of modern slavery as part of their asylum claim, the information and evidence gathered during the NRM process and the findings in respect of whether a person is a victim of modern slavery will inform the asylum process.
>
> Asylum processes which need to take place prior to taking a decision on asylum but fall short of the decision itself can also be carried out during the NRM process to ensure that asylum decisions do not encounter significant and unjustified delays. The outcome of the reasonable or conclusive grounds decision is not indicative of the outcome of any asylum claim. A positive or negative reasonable or conclusive grounds decision on modern slavery does not automatically result in asylum being granted or refused. This is because the criteria used to grant asylum is not the same as the criteria used to assess whether a person is a victim of modern slavery.
>
> The conclusive grounds decision will be included in any outstanding asylum decision made after that decision as a finding of fact on whether the person was a victim of modern slavery or not; unless information comes to light at a later date that would alter the finding of modern slavery.

> Every asylum claim must be considered on its merits and in line with existing guidance.
>
> Action 6: consider whether the victim is eligible for discretionary leave
>
> If the Home Office is the Competent Authority, a positive conclusive grounds decision does not result in an automatic grant of immigration leave.
>
> However, the Home Office will consider whether a grant of discretionary leave is appropriate following a positive conclusive grounds decision. This consideration will happen automatically where the individual has received a positive conclusive grounds decision from the Home Office Competent Authority teams.
>
> …"

The Upper Tribunal decision in the case of VHH v SSHD *(JR/3134/2018)*

86. In her Summary Grounds of Defence filed on 12 December 2018 with her Acknowledgement of Service in relation to each of JP's claim and BS's claim, the Secretary of State referred to and relied on the Upper Tribunal case of *VHH v SSHD* (JR/3134/2018), an unreported decision of UTJ Kebede made on 21 November 2018 in respect of a judicial review claim brought by VHH, a victim of trafficking. In his claim, VHH challenged the delay in the Secretary of State's making a decision on ECAT leave for him pending resolution of his asylum claim. The grounds of challenge in that case were somewhat different to those in this case, although there is some overlap in the claimant's arguments.

87. The Secretary of State relied on *VHH* in her Summary Grounds of Defence to establish that JP's claim and BS's claim were not arguable and relied, in particular, on the reasoning of UTJ Kebede at [34] to [38] of her decision. At [37] UTJ Kebede held that making a decision on ECAT leave after deciding on an asylum application was not contrary to Article 14(1) of ECAT. She did, however, accept the claimant's submission that the Secretary of State's delay in that case in deciding the asylum application and then making a decision on ECAT leave was unjustified and therefore contrary to then relevant policy guidance and the terms of ECAT.

88. In the first paragraph of his reasons for making the Permission Order, Andrew Baker J said:

> "It is properly arguable that:
>
> (a) the Defendant's current policy (since September 2018) for considering discretionary leave or the purpose of complying with Article 14(1) of the European Convention on Action against Trafficking in Human Beings ('ECAT') mandates the deferral of consideration of such leave, if an asylum or

> international humanitarian protection claim has been made, until after the asylum/protection claim has been determined; and
>
> (b) such a 'blanket' deferral is contrary to Article 14(1) of ECAT.
>
> In that regard, and without limitation, it seems to me well capable of being the case that the personal situation of a trafficking victim, *including her status (if applicable) as an asylum/protection claimant*, may render it necessary that she stay in the country where she has been rescued from trafficking and claimed asylum/protection (if she has). On the face of things, Article 14(1)(a) of ECAT calls for an assessment of the necessity *of the victim staying in that country* owing to their personal situation (and mandates the grant of a residence permit where such necessity is assessed to exist), not an assessment of the necessity of granting residence under Article 14(1) to enable her to stay. The view to a contrary effect expressed, *obiter*, in the Upper Tribunal in *R (VHH) v SSHD*, 21 November 2018, seems to me open to doubt." (emphasis in original)

The grounds of challenge

89. There are three grounds of challenge that are maintained by each of JP and BS in their respective claims, which can be dealt with together. JP's grounds of challenge are set out in her Amended Statement of Facts and Grounds of Judicial Review dated 18 December 2018. BS's grounds of challenge are set out in her Re-Amended Statement of Facts and Grounds of Judicial Review dated 25 March 2019. Other grounds of challenge mounted on the basis of Articles 4 and 8 of the European Convention on Human Rights ("ECHR") are no longer pursued.

90. The grounds of challenge in each claim are:

    i) the Secretary of State had failed to apply the Policy in relation to each claimant in that she had failed to make a decision in relation to ECAT leave for each claimant;

    ii) the scheduling rule and, as a consequence, the JP Decision and the BS Decision, are incompatible with the obligations of the UK under ECAT; and

    iii) the scheduling rule is incompatible with Article 14 of the ECHR.

Ground 1 - No decision on ECAT Leave

91. The first ground of challenge in each claim is that the Secretary of State had failed to make a decision in accordance with her own policy in relation to ECAT leave for each of JP and BS.

92. As I have noted above, the Secretary of State had originally taken the view, in her Summary Grounds of Defence in relation to JP's claim and her Amended Summary Grounds of Defence in relation to BS's claim, that her decision on ECAT leave was made at the same time as her decision in relation to asylum. Andrew Baker J indicated in the Permission Order that it was arguable that the Secretary of State had not yet made a decision on ECAT leave.

93. In her Detailed Grounds of Defence in relation to each claim, the Secretary of State stated that she had not yet decided the applications for ECAT leave in relation to the claimants but would do so by 15 April 2019. In the event, she issued her decision on ECAT leave in relation to each of JP and BS on 23 April 2019, refusing it in each case.

94. The claimants characterise the foregoing as the Secretary of State having conceded this ground of challenge.

95. The Secretary of State notes that this ground of challenge was introduced by amendment to each claimant's grounds for judicial review. She characterises her position as her having simply acted in accordance with the scheduling rule, and that the claimants no longer pursue this ground. She also notes that the decision on ECAT leave in relation to each claimant has now been made.

96. This ground is no longer extant as far as each substantive claim is concerned. Mr Buttler submitted that it may be relevant to costs in due course.

Ground 2 – The scheduling rule is inconsistent with ECAT

97. The second ground of challenge is that the scheduling rule and, as a consequence, the JP Decision and the BS Decision, are incompatible with the obligations of the UK under ECAT.

98. In his skeleton argument, Mr Buttler sets out the issue under this ground as follows:

    i) Is it consistent with Article 14(1) of ECAT never to grant ECAT leave to those with a well-founded claim for asylum?

    ii) Put another way, on its proper construction, is Article 14(1) of ECAT a residual (or fall-back) provision, applicable only if no asylum claim is made or an asylum claim is rejected?

99. Ms Williams objected to this formulation of the issues on the ground that the claims were not pleaded in this way. I accept that this is not, in terms, how this ground was pleaded in the JP Grounds and in the BS Grounds, but in my view the difference in approach is, essentially, semantic. The same arguments underlie this ground. I do not think that the way Mr Buttler has formulated the issues in his skeleton argument is particularly helpful, and I therefore consider whether the arguments now made by the claimants support their case as pleaded, rather than by reference to this formulation of the issues in Mr Buttler's skeleton.

100. Mr Buttler made a number of submissions in relation to this ground. First, he noted the claimants' evidence as to the substantial delays in making decisions on asylum

applications, citing the Secretary of State's asylum statistics for 2018, which showed that in almost half the cases it took longer than six months to reach an initial decision on an asylum application.

101. Mr Buttler noted that in JP's case, there was a delay of almost five months between the date of her conclusive grounds decision (28 June 2018) and the decision on her asylum application (23 November 2018), with a further delay of five months before the decision on ECAT leave was made (23 April 2019). In BS's case, there was a delay of over eight months between the date of her conclusive grounds decision (15 May 2018) and the decision on her asylum application (22 January 2019), with a further delay of three months before the decision on ECAT leave was made (23 April 2019).

102. I have already summarised at [38] above the claimants' general submissions on the impact of delay in determining ECAT leave on victims of trafficking and at [79] to [81] I have summarised the evidence of Professor Katona in that regard.

103. Mr Buttler submitted that the specific impact on JP of the delay in determining ECAT leave was and is that:

i) she lost her basic trafficking support following the application of the 14-day rule, which applied in her case, with the effect that she was reduced to NASS support and lost her support worker;

ii) she is prohibited from working or studying;

iii) she is prohibited from claiming mainstream benefits, whereas with ECAT leave, if she were not working, she would be entitled to £189.01 per week in Jobseeker's Allowance, Child Tax Credits and Child Benefit, plus Housing Benefit; and

iv) her recovery from the traumatic abuse she suffered as a result of having been trafficked has been impeded due to the uncertainty of her immigration status, and she feels unable to begin counselling until her immigration status is settled, which is consistent with the evidence of Professor Katona that trafficking victims, until granted leave to remain, are "often unable to undertake trauma-focussed work".

104. Mr Buttler submitted that the specific impact on BS of the delay in determining her ECAT leave was and is that:

i) she lost her basic trafficking support following the application of the 14-day rule, which applied in her case, with the effect that on 30 May 2018 she was required to move into shared NASS accommodation, which she found to be cramped, dirty and unsafe and to live on the NASS financial support rate of £37.75 per week;

ii) she is prohibited from working or studying, despite having had a University education in Albania;

iii) she is prohibited from claiming mainstream benefits, whereas with ECAT leave she would be entitled to £73.10 per week in Jobseeker's Allowance, plus Housing Benefit and possibly disability-related benefits; and

iv) her recovery from the traumatic abuse she suffered as a result of having been trafficked has been impeded due to the uncertainty of her immigration status and her consequent inability to work or study, which, as Professor Katona noted in his evidence, has the effect of prolonging her mental ill health and worsening her long-term prognosis.

105. Mr Buttler submitted that the scheduling rule prevents the Secretary of State, on a blanket basis, from considering ECAT leave until a decision is made on the related asylum application. This blanket limitation is not authorised by ECAT. ECAT requires that a residence permit must be granted if the relevant competent authority considers that the victim's stay in that member state is necessary owing to the victim's personal situation or for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings. Given that the purpose of the Policy, of which the scheduling rule forms part, is to give effect to ECAT, the scheduling rule is irrational. In other words, a blanket rule deferring a decision on ECAT leave until an asylum application from the same person is decided bears no rational relationship to the purpose of the Policy.

106. Mr Buttler submitted that in deciding when to make a determination on ECAT leave, the Secretary of State must have regard to the victim's vulnerability and safety and protection needs. This view, he said, is supported by the decision of UTJ Kebede in *VHH* at [42] where she found that the impact of the delay in making a decision on ECAT leave in relation to VHH:

> "flies in the face of the requirements in Article 12 of the Convention for account to be taken of the special needs of vulnerable people and the victim's safety and protection needs."

While Mr Buttler supported this conclusion, he did not seek to support UTJ Kebede's reasoning in that case, noting that it appeared that she did not have the benefit of the same submissions as those advanced on behalf of JP and BS in this case.

107. Mr Buttler submitted that ECAT leave and refugee leave perform very different functions. ECAT leave is a temporary form of leave, lasting up to 30 months, intended to facilitate a victim's recovery or the victim's cooperation with a criminal investigation. Refugee leave is longer term and is granted with a view to settlement. Given the length of time it often takes to determine asylum claims, the grant of ECAT leave pending determination of the asylum claim will, in many cases, have real utility, as in the cases of JP and BS.

108. Mr Buttler submitted that Article 14(5) of ECAT expressly contemplates that a victim of trafficking may be granted ECAT leave before his or her asylum claim is determined.

109. Andrew Baker J commented on this point in the Permission Order as follows:

> "On the face of things …, a 'blanket deferral', so that leave to remain pursuant to Article 14(1) of ECAT is not considered unless and until an asylum/protection claim (if made) has been rejected, seems inconsistent with Article 14(5) of ECAT."

110. Mr Buttler submitted that ECAT does not permit victims to be left without adequate support. They must be afforded either subsistence support under Articles 12(1) and 12(2) of ECAT or the support under Articles 12(3) and 12(4) of ECAT available to those with a residence permit granted under Article 14(1) of ECAT. In the UK that means basic trafficking support or, where ECAT leave has been granted, enhanced trafficking support. The scheduling rule taken with the 45-day rule creates a lacuna where recognised victims of trafficking who are awaiting an asylum decision will receive neither form of support. As held by Mostyn J in the case of *K*, NASS support is not sufficient to meet the requirements of Articles 12(1) and 12(2) of ECAT.

111. Finally, Mr Buttler accepted that it may sometimes be appropriate to decide an asylum claim before deciding entitlement to ECAT leave. It is, he submitted, the blanket nature of the scheduling rule that is unlawful.

112. For the Secretary of State, Ms Williams submitted that the Secretary of State's published policies are consistent with the UK's obligations under ECAT and give proper effect to those obligations. The relevant policy considerations are those set out in the Policy and in the Trafficking Guidance, which I have set out at [83] to [85] above.

113. Ms Williams noted that the legality of the scheduling rule was considered by the Upper Tribunal in the case of *VHH*. She submitted that UTJ Kebede's reasoning in that case at [34] to [38] was compelling and correct and she invited this court to take the same view.

114. Ms Williams noted that the claimants pose a false dichotomy between ECAT leave and refugee leave in that, in either case, there is a grant of the same "permission" to "live, work and settle" in the United Kingdom pursuant to the [1971 Act]. To the extent that the claimants are suggesting that the effect of the scheduling rule is that a person with a well-founded asylum claim will never have their claim for ECAT leave considered and that that is incompatible with the obligations of the UK under ECAT, that argument is rejected by the Secretary of State. As has already been noted, refugee leave is more advantageous than ECAT leave, as it is generally for a longer period and with more generous conditions. Accordingly, if refugee leave is granted, it would be otiose for the Secretary of State also to consider the application for ECAT leave. It is simply not necessary. There is no incompatibility with the UK's obligations under Article 14(1) of ECAT. If asylum is granted, then any obligation under Article 14(1) of ECAT is discharged without the need for any separate consideration of ECAT leave.

115. Ms Williams submitted that the rationale for the scheduling rule is as follows:

    i) it is in the best interests of an applicant for the more advantageous form of leave, refugee leave, to be determined first; and

ii) there are good administrative reasons for considering the asylum claim first, and therefore refugee leave, namely that the decision-maker will only need to consider one claim against one set of criteria.

116. Ms Williams also noted that this order of consideration was consistent with the decision-making process followed by the Secretary of State in relation to cases not involving trafficking, where an individual claims, but does not qualify for, asylum and has to be considered for the grant of leave on some other basis. This includes, she submitted, situations in which the UK has obligations under an international instrument to protect the individual. She gave as an example a case where an individual claims to fear persecution in their country of origin. The person's asylum claim is required to be determined before it is determined whether the person is entitled to humanitarian protection under Article 3 of the ECHR, since such protection is only available under para 339C(ii) of the Immigration Rules to a person who is not a refugee.

117. Ms Williams further noted that discretionary leave outside the trafficking context is not available to a person who qualifies for asylum, humanitarian protection, any other form of leave under the Immigration Rules or Leave Outside the Rules for Article 8 ECHR reasons, as set out in the paras 1.1, 2.1 and 3.1 of the Secretary of State's Asylum Policy Instruction "Discretionary Leave". Thus, she submits, asylum and humanitarian protection claims must logically be determined before any question of discretionary leave can be determined.

118. Ms Williams submitted that Article 14(1) does not require that a decision to grant a residence permit must be made at the same time as, or even within a particular period of time after, a positive conclusive grounds decision. She referred to paras 180 and 181 of the Explanatory Report to ECAT, which discusses the objects of Article 14, and she notes that it is made clear there that the provision of the residence permit contemplated by Article 14 is "meets both the victims' needs and the requirements of combating" trafficking in human beings, it being the case that:

> "… immediate return of the victims to their countries is unsatisfactory both for the victims and for the law-enforcement authorities endeavouring to combat the traffic."

119. Having the foregoing in mind, Ms Williams submitted, it cannot be said that the mere fact that a residence permit is not granted prior to a decision on asylum being made does not result in a failure to meet the individual's needs, nor does it result in the individual's being immediately returned to her or his country of residence.

120. In relation to the argument that Article 14(5) of ECAT contemplates that a victim of trafficking may be granted ECAT leave before his or her asylum claim is determined, Ms Williams first noted that this argument was not raised in the JP Grounds or the BS Grounds. She accepted that it was, however, mentioned by Andrew Baker J in the Permission Order and therefore addressed it by submitting that Article 14(5) seeks only to ensure that a victim of trafficking is not prejudiced in any way by the grant of a residence permit with respect to any right that she or he may have to claim and enjoy asylum. It says nothing about the relative timing of the determination of a person's asylum claim and her or his application for ECAT leave.

121. Ms Williams noted that the JP Grounds and the BS Grounds alleged that the scheduling rule violated Articles 12(3) and 12(4) of ECAT, under which enhanced trafficking support is provided in the UK but did not set out reasons for that allegation. She also noted that this argument was not raised in the claimants' skeleton argument, but, in the event that the claimants were to raise this argument again during the hearing, she submitted in her skeleton argument that para 165 of the Explanatory Report to ECAT makes it clear that "lawfully resident" victims are those who have been issued with a residence permit under Article 14, in other words, ECAT leave in relation to the UK. Accordingly, she submitted, it cannot be argued that there is any inconsistency between the scheduling rule and Articles 12(3) and 12(4).

122. Finally, Ms Williams submitted that ECAT leave was determined in relation to each of the claimants prior to the hearing by the decisions of the Secretary of State made on 23 April 2019. The present issue was, at the date of the hearing, now academic as far as the claimants were concerned. She noted that if the ECAT leave decision had been made at or about the time of the positive conclusive grounds decision, as the claimants contend it should have been, the practical outcome for each of the claimants would have been no more favourable than the actual outcome. From the date of the refusal of ECAT leave, they each would have been treated as asylum seekers entitled (after application of the 14-day rule in their cases) only to NASS support until the decisions were made on their asylum claims on 23 November 2018 in respect of JP and 22 January 2019 in respect of BS. This is, in fact, what happened. After determination of their asylum claims, neither JP nor BS would have had a basis for staying in the UK, and that again, as at the date of the hearing, was the position. Accordingly, section 31(2A) of the Senior Courts Act 1981 applied, under which the High Court must decline to grant relief on the claimants' application for judicial review on the basis of its appearing to the court:

> "… to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

123. In reply to this point, Mr Buttler for the claimants said that it cannot be assumed that the decision on ECAT leave in respect of JP and BS would have been the same had it been made at or about the time of the conclusive grounds decisions in relation to each of them. He submitted that the burden was on the Secretary of State to show that it is "highly likely" the decision would have been the same, and that this was not a burden that she has discharged in this case.

124. Dealing first with Ms Williams's invitation to the court to adopt the reasoning of UTJ Kebede in the case of *VHH* as to the enforceability of the scheduling rule, I note that UTJ Kebede's analysis appears to be based, at least in part, on a mistaken assumption that basic trafficking support for a victim continues until a decision is made on the victim's asylum claim and, where that decision is negative, until the victim is returned to his or her country of residence. UTJ Kebede in *VHH* relies at [37] of her judgment on a mistaken concession to that effect made by agreement between counsel in the case of *PK (Ghana)*, which was set out at [46] of Hickinbottom LJ's judgment in that case. UTJ Kebede does not consider or take into account the effect of the 45-day rule.

125. Ms Williams accepted that the judge's reliance on the mistaken concession made in *PK (Ghana)* was not correct, but she submitted that, nonetheless, overall the judge's

reasoning in *VHH* held good. I note that UTJ Kebede does not appear to have been asked to consider the arguments that have been raised by the claimants in this case. Accordingly, it is of limited assistance to me in relation to the resolution of this claim.

126. I agree with Ms Williams that, to the extent that the JP Grounds and the BS Grounds alleged that the scheduling rule violated Articles 12(3) and 12(4) of the ECAT, that argument is unsustainable. I note that Mr Buttler did not pursue that at the hearing, and nothing more needs to be said about it.

127. I also agree with Ms Williams that Article 14(5) does not provide particular assistance to the claimants' case. I agree with Mr Buttler that the wording of Article 14(5) contemplates the possibility of a permit being granted to a person under Article 14 before an asylum claim by the same person is determined, but if it is otherwise justifiable to have a rule deferring consideration of ECAT leave until after a related asylum claim is determined, then Article 14(5) does not conflict with such a rule.

128. I accept Ms Williams's submission that if refugee leave is granted to a victim of trafficking, it is not necessary for the Secretary of State to make a further determination in relation to ECAT leave in order to satisfy the requirements of Article 14(1) of ECAT.

129. It is common ground that refugee leave is more advantageous than ECAT leave. There would be no basis for these claims if there were not, in practice, a material delay between the making of a conclusive grounds decision and the making of a decision on an asylum claim in relation to the same person. It is that material delay, coupled with the effect of the 45-day rule, which lies at the heart of this case. Ms Williams did not seek to deny the assertion made by the claimants that it is common for the Secretary of State to take several months before making a decision on an asylum claim, as happened in the claimants' own cases. The claimants referred to the Secretary of State's asylum statistics for 2018, which recorded that in 60,214 out of 127,302 cases, representing 47 per cent of the total number of cases, the Secretary of State took longer than six months to reach an initial decision on asylum.

130. As I have already noted, in relation to JP there was a gap of almost five months between her conclusive grounds decision and the decision on her asylum application. In the case of BS, there was a gap of over eight months. As a result of the application of the 14-day rule in their cases, they each lost basic trafficking support for a period of months and were reduced to NASS support until their asylum applications were determined.

131. Ms Williams submitted that it was in the best interests of an applicant for the more advantageous form of leave to remain, namely, refugee leave, to be determined first. She did not, however, articulate why that is in the best interests of an applicant. A better outcome for the applicant would clearly be to have a decision on ECAT leave made as soon as possible after a positive conclusive grounds decision was made so that, either way, the applicant would know where she or he stands in relation to that issue. If ECAT leave were to be granted, it would be for the reasons that apply to the grant of ECAT leave. It would have no effect on the application for asylum, as stipulated by Article 14(5) of ECAT. If the asylum claim were subsequently rejected, that would not affect the justification for ECAT leave having been granted, the criteria for the grant of each form of leave being different. If ECAT leave were granted and

the asylum claim subsequently rejected, that would not put the relevant victim or the Secretary of State in an anomalous position. If the asylum claim were granted, there would be no conceptual difficulty with the terms applicable to the person's leave to remain in the form of ECAT leave being amended to conform with the more favourable terms applicable to refugee leave.

132. Accordingly, the Secretary of State's justification for the scheduling rule amounts, in substance, only to "good administrative reasons … namely that the decision-maker will only need to consider one claim against one set of criteria", as I have summarised that submission by Ms Williams at [115] above. This is a rational justification for the policy, so I reject the submission of Mr Buttler that the scheduling rule is irrational. As Ms Williams noted, and as I summarised at [116] above, the scheduling rule sets out an order of consideration of decisions that is consistent with the Secretary of State's approach to other cases where more than one form of leave to remain is potentially available to be considered in relation to an applicant for leave to remain.

133. The question remains, however, whether the scheduling rule, as currently formulated, is consistent with the obligations of the UK under Articles 12(1), 12(2) and 14(1) of ECAT.

134. I note that in dealing with the point regarding Articles 12(3) and 12(4) of ECAT that had been raised in the JP Grounds and the BS Grounds (but not in the claimants' skeleton argument), Ms Williams said the following at para 5.39 of her skeleton argument:

> "… in considering asylum before DLR [ECAT leave] and thereby deferring the possible grant of a 'residence permit' until such time as asylum has been considered, the Secretary of State takes due account of a victim's safety and protection needs in accordance with Article 12(2) ECAT. Victims of trafficking remain entitled in the interim to support by way of asylum support [NASS support]. The package of support provided includes free accommodation and a weekly cash allowance to cover their other essential living needs, and they also have access to free NHS medical treatment. They may also continue to receive support within the NRM, if an application is made for an extension of NRM support beyond the time at which it would normally terminate (currently 45 day after a positive conclusive grounds decision)."

135. In my view, the foregoing encapsulates the Secretary of State's position in defence of this claim more generally and highlights a key difference between the position of the Secretary of State and the position of the claimants. The Secretary of State says that providing NASS support to an actual victim of trafficking, during the period between the expiration of the 45-day period following the conclusive grounds decision and the determination of the victim's asylum claim, is compatible with the obligations of the UK under Articles 12(1), 12(2) and 14(1) of ECAT. The claimants say that providing only NASS support during that period, which can last several months, is clearly not sufficient and is therefore incompatible with the UK's obligations under those provisions of ECAT.

136. In my view, the scheduling rule, as currently formulated, is not consistent with the obligations of the UK under Articles 12(1), 12(2) and 14(1) of ECAT.

137. Although it may be administratively efficient always to consider an asylum claim before determining ECAT leave, where there is, in practice, likely to be a significant delay after a positive conclusive grounds decision has been made before an asylum decision is made, then there is a material risk that, in a significant number of cases, victims will be reduced to NASS support for a considerable period of time. Mostyn J in *K* held that NASS support is not sufficient to meet the requirements of Articles 12(1) and 12(2) of ECAT. Ms Williams did not argue that his decision in that case was wrong.

138. The evidence of Professor Katona and the evidence provided by JP and BS in relation to their own cases amply demonstrate the special safety and protection needs of victims, which the Secretary of State is required by ECAT to bear in mind in determining whether it is appropriate to defer making a decision on ECAT leave for a victim before making a decision on the victim's asylum claim. The combined effect of (i) the foregoing, (ii) the long delay that may occur (and did in this case for both JP and BS) between a positive conclusive grounds decision in respect of a victim and the determination of the victim's asylum claim and (iii) the effect of the 45-day rule mean that the victim may receive an inadequate level of support for an extended period of time in circumstances where it is necessary for their personal situation that they have access to, at least, basic trafficking support if not the enhanced trafficking support that would be available to them if ECAT leave were granted.

139. Accordingly, the scheduling rule in its current form, where it applies regardless of the personal position of a victim who has also made an asylum claim, is, in my judgment, not compatible with the obligations of the UK under Article 14(1) of ECAT and is therefore unlawful.

140. As for the argument raised by Ms Williams on behalf of the Secretary of State that the court should decline to grant relief, applying section 31(2A) of the Senior Courts Act 1981, on the basis that the outcome for the claimants in this case would not have been substantially different if the scheduling rule had not been applied, I agree with the submission made by Mr Buttler for the claimants that it cannot be assumed that the decision on ECAT leave in respect of JP and BS would have been the same had it been made at or about the time of the conclusive grounds decision in relation to each of them.

141. In making a decision about whether it is necessary for a victim to stay owing to their personal situation or for the purpose of the victim's co-operation with the competent authorities in the investigation or criminal proceedings, the Secretary of State needs to consider the position of the relevant victim at the time the decision is made. Personal situations evolve and change, as do investigations and criminal proceedings.

142. I note that, in relation to JP, there was a gap of almost 10 months between the conclusive grounds decision and the decision on ECAT leave. In relation to BS, there was a gap of over 11 months. The significant passage of time in each case makes it very difficult, if not impossible, in my view, to conclude that it is "highly likely" the decision on ECAT leave would have been the same in relation to either, even if it is possible or even probable that it would have been.

143. Accordingly, the claim succeeds on Ground 2.

Ground 3 – The scheduling rule is incompatible with Article 14 of the ECHR

144. The claimants also pursue a claim under Article 14 of the ECHR, which provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

145. In *Re McLaughlin* [2018] UKSC 48, 1 WLR 4250 (SC), Baroness Hale said at [15] that this raises four questions, although these are not "rigidly compartmentalised", namely:

> "(1) Do the circumstances 'fall within the ambit' of one or more of the Convention rights?
>
> (2) Has there been a difference of treatment between two persons who are in an analogous situation?
>
> (3) Is that difference of treatment on the ground of one of the characteristics listed or 'other status'?
>
> (4) Is there an objective justification for the difference in treatment?"

146. It appears to be common ground that:

i) the circumstances fall within the ambit of one or more Convention rights (although, of course, the Secretary of State denies that there has been a breach of any of those rights);

ii) due to the scheduling rule, there is a difference of treatment between two persons who are in an analogous situation (namely, a victim with an asylum claim seeking ECAT leave and a victim without an asylum claim seeking ECAT leave); and

iii) being a victim of trafficking who claims asylum falls within "other status" for purposes of Article 14.

147. In relation to circumstances falling within the ambit of one or more Convention rights, the Secretary of State, of course, denies that there has been a breach of any of those rights, but appears to concede that the circumstances fall within the ambit of one or more rights. The claimants argue that the provision of ECAT leave falls within the ambit of Article 4 (Prohibition of slavery and forced labour) of the ECHR because it forms part of a package of measures by which the state protects victims of trafficking. Article 8 (Right to respect for private and family life) of the ECHR is also engaged, according to the claimants, since ECAT leave is a means by which a victim's right to live, work and study is promoted by the state. Article 1 of Protocol 1 (Protection of property) ("A1P1") to the ECHR is also engaged according to the claimants because

ECAT leave confers access to state benefits, so a blanket refusal to consider an application for ECAT leave pending determination of a related asylum claim blocks access to those benefits, and therefore falls within the scope of A1P1 to the ECHR. In the case of *K*, Mostyn J found that Article 4 of the ECHR and A1P1 to the ECHR were potentially engaged by the facts of that case in relation to potential victims of trafficking. I am satisfied that Articles 4 and 8 of the ECHR are potentially engaged by the facts of this case in relation to victims of trafficking, as well as A1P1 to the ECHR.

148. I also accept that an asylum-seeking victim, that is, a victim seeking ECAT leave who also makes an asylum claim, is in an analogous position to a non-asylum-seeking victim, that is, a victim seeking ECAT leave who does not make an asylum claim.

149. Ms Williams submitted that the appropriate comparators against whom the claimants' treatment is to be compared are victims who were not entitled to and did not seek asylum, but who sought and were not entitled to ECAT leave. This is because, given the decisions that were made by the Secretary of State in relation to asylum and in relation to ECAT leave in respect of JP and BS, each was a victim who was not entitled to, but did seek asylum, and who sought and was not entitled to ECAT leave. With respect, that unnecessarily and, in my view, unfairly complicates the analysis, applying the benefit of hindsight. The proper comparators for asylum-seeking victims for the purposes of this exercise are, quite simply, non-asylum-seeking victims. The positions are clearly analogous, and it is important to determine whether the treatment of the former group differently from the latter group in relation to the timing of a decision under Article 14(1) of ECAT is justified, without the benefit of hindsight.

150. Finally, I accept that the status of being an asylum seeker falls within "other status" for purposes of Article 14 of the ECHR. I note that Mostyn J in the case of *K* at [38] held that being a potential victim of trafficking is a qualifying status under Article 14 of the ECHR. I see no reason to take a different view in this case in relation to actual victims of trafficking.

151. Accordingly, the question to resolve is whether there is an objective justification for the Secretary of State's treating asylum-seeking victims differently from non-asylum-seeking victims by deferring consideration of ECAT leave until after the asylum decision rather than making that decision at the time of or shortly after the positive conclusive grounds decision.

152. The burden of proving justification rests on the Secretary of State. In *R (Quila) v SSHD* [2011] UKSC 45, [2012] 1 AC 621 (SC) at [44] Lord Wilson held that the burden of establishing justification of interference with the rights under Article 8 of the ECHR of the claimants in that case fell on the Secretary of State. There is no reason why the position would be different in relation to justifying the difference in treatment of asylum-seeking victims and non-asylum-seeking victims at issue in this case.

153. For purposes of this analysis under Article 14 of the ECHR, what must be justified is not the scheduling rule, *per se*, but the difference in treatment between one group and another: *A v SSHD* [2004] UKHL 56, [2005] 2 AC 68 (HL) at [68] (Lord Bingham).

154. The test for assessing a purported justification by the Secretary of State for a difference in treatment between one group and another is well-settled according to Lord Kerr in *Re Brewster* [2017] UKSC 8, [2017] 1 WLR 519 (SC) at [66], where Lord Kerr refers to the judgment of Lord Wilson in *Quila* at [45], and the judgment of the Supreme Court in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 70 at [20] (Lord Sumption) and [74] (Lord Reed). Although Lords Sumption and Reed disagreed on the application of the test in the *Bank Mellat* case, they agreed on the formulation of the test. Lord Reed's formulation at [74] of *Bank Mellat* was as follows:

> "… it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."

155. Mr Buttler noted in his submissions that the Secretary of State had not filed any evidence to support its defence against this claim. There is therefore no evidence that the Secretary of State considered the possible impact of the scheduling rule on victims with asylum claims and took that into account when making his decision to implement it. While the Secretary of State is not precluded from attempting to justify the differential treatment of asylum-seeking and non-asylum-seeking victims *post hoc*, the level of deference that might otherwise have been afforded his decision by the court is necessarily less. Mr Buttler justified these propositions by reference to the following passage from the judgment of Lord Mance in *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420 at [46]-[47]:

> "46. … [W]hat is the position if a decision maker is not conscious of or does not address his or its mind at all to the existence of values or interests what are relevant under the Convention?
>
> 47. The court is then deprived of the assistance and reassurance provided by the primary decision-maker's 'considered opinion' on Convention issues. The court's scrutiny is bound to be closer, and the court may … have not alternative but to strike the balance for itself, giving due weight to such judgments as were made by the primary decision-maker on matters he or it did consider."

156. Mr Buttler also referred to a similar observation made by Lord Kerr in *Re Brewster* at [52]:

> "Obviously, if reasons are proffered in defence of a decision which were not present to the mind of the decision-maker at the

> time that it was made, this will call for greater scrutiny than would be appropriate if it could be shown to have influenced the decision-maker when the particular scheme was devised."

157. I note, however, that the next sentence in the same passage reads as follows:

> "Even retrospective judgments, however, if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made bona fide."

158. I note that in *Re Brewster* at [64] Lord Kerr expands on these points as follows:

> "64. Where a conscious, deliberate decision by a government department is taken on the distribution of finite resources, the need for restraint on the part of a reviewing court is both obvious and principled. Decisions on social and economic policy are par excellence the stuff of government. But where the question of the impact of a particular measure on social and economic matters has not been addressed by the government department responsible for a particular policy choice, the imperative for reticence on the part of a court tasked with the duty of reviewing the decision is diminished. … [T]he level of scrutiny of the validity of the claims [by the government department as to the advantages of the policy choice] must intensify to take account of the fact that the claims are made ex post facto and the claimed immunity from review on account of the decision falling within the socio-economic sphere must be more critically examined."

159. Finally, in relation to the lack of evidence provided by the Secretary of State, Mr Buttler also referred to the following statement of Lord Kerr in *Re Brewster* at [65], where His Lordship commented as follows on a similar lack of evidence by the relevant government decision-maker in relation to the government decision at issue in that case:

> "… the attempt to justify [the relevant decision] was characterised by general claims, unsupported by concrete evidence and disassociated from the particular circumstances of the claimant's case."

160. In her Defence to each of JP's claim and BS's claim, in relation to Ground 3, the Secretary of State gave the following justification of the scheduling rule at paras 33 and 34:

> "33. In considering the balancing exercise and whether the severity of the measure's effects upon the rights of the persons to whom it applies outweighs the importance of the objective, it is respectfully submitted that it does

> not. It is important for an effectively functioning system of immigration control that fully reasoned and rational decisions can be made by the relevant decision makers. If a decision upon DLR is always to be made prior to a decision upon asylum there will inevitably be a need for two decisions to be made on separate occasions thereby risking the prospect of inconsistency of decision making with the consequent further risk of adverse outcomes for victims of trafficking. Some weight, too, should be given to the added burden on the system as a whole if successive decisions are to become the norm as, in effect, the Claimants suggests is necessary to comply with ECAT.
>
> 34. Contrary to the claims in this ground, it is submitted that the nature of the 'administrative convenience' of deciding trafficking related DLR after asylum claims (or sometimes at the same time when there is an obvious overlap between such claims) is not at all modest in nature as alleged. Moreover, victims of trafficking are provided with the necessary support and benefits in accordance with Article 12(1) of ECAT while they await such decisions which, save for having access to the labour market and social security benefits for a relatively short period of time if the system is operating as envisaged under the policy[,] is reasonably sufficient to protect their rights under the ECHR and ECAT. "

161. My preliminary comments on this justification, before turning to the four-stage proportionality test, are as follows:

i) In relation to para 33 of the Defence, I note that the claimants are not seeking a declaration that ECAT leave should always be determined before an asylum decision is made, but merely that there be no requirement, on a blanket basis, that ECAT leave not be determined until the asylum decision is made.

ii) As to the risk of inconsistent decisions, I note that the purpose of and criteria applicable to a decision on ECAT leave and a decision on asylum claim are different, so while there may be some overlap between the applicable criteria in specific cases, the risk of inconsistency in decision-making appears to be a very weak justification, not capable of justifying the impact on an asylum-seeking victim of the scheduling rule.

iii) It is difficult, in the absence of evidence, to assess the Secretary of State's submission that some weight should be given to the added burden on the system of immigration control of requiring that there be, in most if not in all cases, successive decisions on ECAT leave and asylum. I note, in particular, that there was no evidence provided by the Secretary of State of any particular difficulties or problems arising before the scheduling rule was introduced, which the scheduling rule was intended to address.

iv) In relation to para 34 of the Defence, it is difficult, in the absence of evidence, to assess the Secretary of State's submission that the "administrative convenience" of avoiding two decisions in relation to an asylum-seeking victim by deferring the decision on ECAT leave until after an asylum decision has been made is "not at all modest in nature". Once again, no evidence (or even explanation) of administrative difficulties arising prior to the scheduling rule having been introduced was advanced by the Secretary of State.

v) Finally, the Secretary of State does not deal in her Defence in relation to Ground 3 with the impact of the 45-day rule (or 14-day rule, which applied to JP and BS). The second sentence of para 34 of the Defence appears, therefore, not to be accurate for those asylum-seeking victims who must wait significantly more than 45 days after the positive conclusive grounds decision before an asylum decision is made.

162. Turning, then, to the first limb of the proportionality test, in the absence of evidence from the Secretary of State, it is difficult to assess whether the aim of the scheduling rule, namely, "administrative convenience", is sufficiently important to justify the limitation of a protected right, namely, the right to a decision on ECAT leave arising under Article 14(1) of ECAT. As I have already noted, the risk of inconsistency in decision-making seems to be a very weak factor, in the absence of evidence to the contrary.

163. Turning to the second limb of the proportionality test, the scheduling rule is, in my view, rationally connected to the objective of administrative convenience. Mr Buttler rightly conceded this point on behalf of the claimants.

164. Turning to the third limb of the proportionality test, the Secretary of State has not provided any evidence, or even submissions, to suggest that she considered a "less intrusive" rule than the scheduling rule to achieve the goal of administrative convenience in relation to decisions on ECAT leave and asylum in relation to asylum-seeking victims. In particular, she has not shown that the blanket nature of the scheduling rule is justified. It may be the case that for certain asylum-seeking victims it is appropriate to defer the decision on ECAT leave until after a decision is made on asylum, but it is not clear why a blanket rule to that effect is necessary or desirable. A less intrusive rule would be one that allowed for the decision on the relative timing of the decision on ECAT leave and on asylum to be made on a case by case basis by reference to the position of the relevant asylum-seeking victim.

165. Turning to the fourth limb of the proportionality test, I am satisfied that the claimants have shown, by reference to the evidence of Professor Katona as well as the evidence of the impact of the scheduling rule on the claimants themselves, that the effect of the scheduling rule is relatively severe in relation to asylum-seeking victims in a case where there is a significant gap between the end of the 45-day period after which basic trafficking support ceases and the date an asylum decision is made. That impact includes the psychological impact of the prolonged uncertainty suffered by victims as to their immigration status, which, as the evidence of Professor Katona shows, inhibits the ability of many victims to begin proper trauma recovery work. Indeed, that is the evidence of BS in relation to her own case, as I have noted at [104] above. I conclude that the severity of the effects of the scheduling rule on the rights of asylum-

seeking victims outweighs the importance of the objective of administrative convenience to which the scheduling rule is intended to contribute.

166. The Secretary of State has provided no evidence to suggest that a more flexible approach to the timing of such decisions would not strike a better balance of achieving administrative convenience while having regard to the individual circumstances of particular asylum-seeking victims and bearing in mind the obligations of the UK towards such victims under Articles 12(1), 12(2) and 14(1) of ECAT.

167. The clear conclusion that I draw from this application of the four-stage proportionality test is that there is no sufficient objective justification for the discriminatory impact of the scheduling rule in its current formulation on asylum-seeking victims relative to non-asylum seeking victims.

168. Accordingly, the claims succeed on Ground 3.

Conclusion

169. Each of JP's claim and BS's claim succeeds on Grounds 2 and 3. I have already noted, however, at [42] to [44] above in connection with the NN-LP Consent Order, that the Secretary of State is reviewing the current NRM system and has, among other things, moved away from a relatively rigid application of the 45-day rule. That post-dates the hearing of this matter but is clearly relevant to the formulation of any order consequential to this judgment.

170. I will invite the parties to agree a draft form of order or, failing agreement, to provide written submissions as to the appropriate order, including any necessary consequential directions.