Upper Tribunal
(Immigration and Asylum Chamber)

AUJ (Trafficking – no conclusive grounds decision) Bangladesh [2018] UKUT 200 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 5 April 2018	……

Before:

UPPER TRIBUNAL JUDGE GILL

Between

A U J
(ANONYMITY ORDER MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ANONYMITY

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.

The parties at liberty to apply to discharge this order, with reasons.

Representation:

For the Appellant:	Mr G Franco, of Counsel, instructed by Schneider Goldstein Immigration Law.
For the Respondent:	Mr. T Melvin, Senior Home Office Presenting Officer.

In cases in which there is no "Conclusive Grounds" decision:

(i) If a person ("P") claims that the fact of being trafficked in the past or a victim of modern slavery gives rise to a real risk of persecution in the home country and/or being re-trafficked or subjected to modern slavery in the home country and/or that it has had such an impact upon P that removal would be in breach of protected human rights, it will be for P to establish the relevant facts to the appropriate (lower) standard of proof and the judge should made findings of fact on such evidence.

(ii) If P does not advance any such claim in the statutory appeal but adduces evidence of being trafficked or subjected to modern slavery in the past, it will be a question of fact in each case (the burden being on P to the lower standard of proof) whether the Secretary of State's duty to provide reparation, renders P's removal in breach of the protected human rights.

DECISION AND REASONS

Introduction and background facts:

1. There are two issues in this appeal, as follows:

   (i) (the first issue) whether Judge of the First-tier Tribunal Robinson (hereafter the "judge" unless otherwise indicated) materially erred in law in failing to make any findings as to whether the appellant had been trafficked in the United Kingdom;

   (ii) (the second issue) whether Judge Robinson materially erred in law in failing to decide whether the appellant met the requirements of para 276ADE(1)(vi) of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the "Rules").

2. Following a hearing before him on 3 November 2017, the judge dismissed the appellant's appeal in a determination promulgated 21 November 2017 on asylum grounds and on human rights grounds. In relation to the latter, the judge only considered Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

3. The judge did not consider Article 8.

Immigration history

4. The judge referred to the appellant's immigration history as not being in dispute, an observation that Mr Franco relied upon at the hearing before me, as will be seen.

5. At para 3 of his decision, the judge said that the appellant arrived in the United Kingdom on an unknown date in 1998, travelling with a couple his mother used to work for. On 14 August 2011, he was arrested by the police and subsequently granted temporary admission. He submitted two applications for leave to remain in the United Kingdom, dated 12 September 2001 and 13 October 2014. On 8 December 2011 his representatives asked for the first refusal to be reconsidered. He failed to report to

an Immigration Officer as required on 18 April 2013 and 18 October 2013. On 15 January 2015, his representatives lodged a pre-action protocol letter and on 13 March 2015 a response was sent by the Secretary of State stating that the original decision made on 31 December 2014 was maintained. On 7 May 2015 his representatives lodged an application for judicial review challenging the decision of 31 December 2014. The application was refused. Permission to appeal to the Court of Appeal was refused on 12 October 2015.

6. On 7 November 2016, the appellant was arrested when he was encountered driving a rickshaw in London and checks revealed that he was an absconder. He claimed asylum on 29 November 2016. The asylum claim was refused on 30 May 2017. This is the decision that was the subject of the appeal before the judge.

Basis of asylum and human rights claims

7. The appellant's nationality was in dispute before the judge, as was his ethnicity and sexual orientation. The basis of his asylum claim made on 29 November 2016 was that he was a Rohingya Muslim of Burmese nationality, born in Buthidaung, Arakan State, Burma (now Myanmar). He and his parents left Burma in 1990 because they were ill-treated by Buddhists. They went to Bangladesh where they lived on the Kotupalen makeshift refugee camp, before they travelled to Sylhet.

8. The appellant lived in Sylhet until 1998 when he travelled to the United Kingdom with a Bangladeshi couple. He stayed with the couple for 3 to 4 days (para 3(d) of the respondent's decision). They forced him to work for them. He did not receive any wages and was made to sleep on the floor. He left the house after a few days and went to Whitechapel where he was found crying by some Bengalis. They offered him a job in a restaurant where he worked until 2003. He began to realise he was gay in 2004.

9. The appellant had made a previous claim in 2011 when he described himself as a citizen of Bangladesh.

10. The appellant claimed to be at risk on return in Myanmar on account of his ethnicity and in Bangladesh on account of his sexual orientation.

11. It should be noted that he did not at that stage (nor at the hearing before the judge, as Mr Franco confirmed before me) claim to fear persecution in Myanmar or in Bangladesh on account of having been trafficked in the past or that he was at risk of being trafficked in Myanmar or in Bangladesh if returned to either country.

12. Insofar as concerns his Article 8 claim, the appellant said, at paras 49-51 of his witness statement, as follows:

> "49. My only family in this world are my friends in the UK. I depend on them for moral and emotional support. I do not have any contact with my parents in Bangladesh and I do not even know if they are still alive or not. I am originally from Burma but as a Rohingya Muslim I fear going to Burma because Rohingya people are treated very harshly and are persecuted every day in Burma.

50. I cannot imagine my life without my friends in the UK whom I consider as my family and I certainly do not consider it safe for me to return to Burma, a country I left when I was 6 years old, and I do not have any ties with Burma.

51. My friends in the UK are supportive of me. I am living in the UK in peace and without any fear for safety of my life. I feel I have integrated into the British way of life and believe that I will not be able to continue with my life in Burma. I can confirm that I am in good health and in a fit state. I have built a very strong Private life in the UK in the last 19 years."

13. In oral evidence, the only evidence he gave about his private life claim was that he had supported himself in the United Kingdom with the help of friends (para 16 of the judge's decision).

Grounds of appeal to First-tier Tribunal

14. At para 7 of the appellant's grounds of appeal, it was said that the appellant relied upon the following grounds of appeal under s.84 of the Nationality, Immigration and Asylum Act 2002 Act (the "2002 Act"):

    (i) that the decision was not in accordance with the law;

    (ii) that the decision is unlawful because it is incompatible with the appellant's rights under the ECHR; and

    (iii) that the appellant's removal would be in breach of the United Kingdom's obligations under the Refugee Convention or unlawful under s.6 of the Human Rights Act 1998 (the "1998 Act").

15. The grounds of appeal did not mention Article 8 in terms.

16. Since the decision appealed against was dated 30 May 2017, ground (i) was not in fact available because of the amendments to s.84 of the 2002 Act by the Immigration Act 2014 (the "2014 Act") which came into force on 20 October 2014. The grounds have to be read with reference to the 2014 Act as a complaint that the appellant's removal would breach the United Kingdom's obligations under the Refugee Convention (the "new s.84(1)(a)") or that removal would be unlawful under s.6 of the 1998 Act (the "new s.84(1)(c)").

The judge's decision

17. At para 7 of his decision, the judge recorded that the hearing of the appellant's appeal was first listed at Hatton Cross hearing centre on 13 July 2017 when it was adjourned to 3 November 2017 as the respondent had agreed that the appellant be referred to the Competent Authority under the National Referral Mechanism ("NRM") for assessment as to whether he had been the victim of trafficking or modern slavery. The Competent Authority is the authority that, under domestic law, makes decisions on trafficking under the European Convention on Action Against Trafficking in Human Beings ("ECAT"). A decision by the Competent Authority is effectively a decision by the Secretary of State because the NRM operates under the auspices of the Home Office.

18. The appellant's solicitors consented to the adjournment on his behalf. However, no further action was taken by the Home Office to make the necessary arrangements. At the hearing before the judge on 3 November 2017, this was raised again by the respondent's representative who applied for an adjournment so that the necessary referral could be made. He explained that the case worker had been on maternity leave and there had been a lack of action in pursuing the referral.

19. Counsel for the appellant said he withdrew consent to the referral as more than 3 months had passed without progress. However, the appellant wanted his appeal to be heard on the evidence then available. The case therefore proceeded before the judge. The judge said at para 7 that there was no purpose in adjourning for a referral to the NRM if consent was not forthcoming.

20. The judge heard oral evidence from the appellant with the assistance of a Bengali interpreter. He also heard evidence oral evidence from Mr J A, the appellant's friend.

21. The appellant's oral evidence on his claim to have been trafficked was set out by the judge at para 11 of his decision, which reads:

> "11. He gave details of his situation when he arrived in the UK. He stayed with the couple who brought him here. He was told by them that he had to do housework and he cried for a long time. He managed to escape from them after 3 days. They took him out to carry their shopping and he saw many Bangladeshis living in the market. He met asked *[sic]* a young Bangladeshi man to help and he was taken to a restaurant where he was given a job as a kitchen porter."

22. The judge considered the evidence before him in relation to the appellant's claimed nationality, ethnicity and sexual orientation in considerable detail. He did not find the appellant credible. In the course of giving his reasons, he said that he found that the appellant had not given any reasonable explanation why he waited almost 19 years after his arrival in the UK before seeking asylum and why he made no mention of his sexuality in his previous human rights claim when he was also silent about his ethnicity and nationality (para 53).

23. The judge's main findings may be summarised as follows: He did not accept that the appellant was born in Myanmar and went to Bangladesh when he was 7 years old. He found that the appellant is a national of Bangladesh. He did not accept that the appellant is a Rohingya Muslim. He did not accept that the appellant is gay or that he had lived openly in the United Kingdom as a gay man (para 59). He found that the appellant had fabricated an account in order to support a false asylum claim.

24. The judge therefore dismissed the appellant's claim on asylum grounds and on human rights grounds. As stated above, the judge's decision in relation to human rights was limited to Article 3.

25. The skeleton argument relied upon on the appellant's behalf before the judge raised Article 8 briefly. It was submitted that the appellant's appeal "*[fell] to be allowed under Article 8 within the Immigration Rules, specifically para 276ADE(1)(vi) on the basis of the very significant obstacles the appellant would face reintegrating in Bangladesh*".

26. The judge's Record of Proceedings ("RoP") shows that he was addressed briefly on Article 8 by the respondent's representative. The relevant part of the RoP reads:

> "No corroboration of claim to have been here since 1998. Applied twice. Refuse. Speaks little English. Not fin. independent."

27. The judge was also addressed briefly by Mr Franco on Article 8. The relevant part of the RoP reads (the word in brackets is difficult to decipher and appears to be "*asthma*"):

> "His evidence was he was doing some work. Not a burden on the state. Has (asthma?). No medical evidence with him. Goes to Article 8 to some extent."

The grounds of appeal to the Upper Tribunal and the grant of permission

28. Permission was granted by Judge of the First-tier Tribunal Doyle on limited grounds.

29. Judge Doyle refused the appellant permission to argue that, in deciding the issue of whether the appellant was a Rohingya Muslim, the judge had failed to take into account the fact that the appellant had some knowledge of the Rohingya language as (the grounds contend) he had said in evidence that he spoke the "*Rohingya dialect well*".

30. I record that no application was made to the Upper Tribunal to renew the application for permission on the ground upon which permission was refused. In any event, Mr Franco accepted that there was no evidence before the judge that the appellant could speak the Rohingya dialect well, or at all, or any evidence to support Mr Franco's assertion that the appellant had lapsed into speaking the Rohingya dialect at the hearing, an assertion that was based on what the appellant had said at the hearing. The appellant had not chosen to give evidence in the Rohingya language or to submit expert evidence from an independent linguist confirming that he speaks the Rohingya language or dialect.

31. The grant of permission was limited to the two issues described at my para 1 above.

Submissions

The first issue

32. Mr Melvin relied upon the recent judgment of the Court of Appeal in SSHD v MS (Afghanistan) [2018] EWCA Civ 594. In MS (Afghanistan), the Court of Appeal held, inter alia, that, in circumstances where a negative trafficking decision by the Competent Authority had not been challenged by way of judicial review, the First-tier Tribunal may only entertain an indirect challenge to such a decision if the trafficking decision is demonstrated to be perverse or irrational or one which was not open to the Competent Authority.

33. Mr Melvin relied upon paras 69, 77 and 79 of MS (Afghanistan) in support of his submission that it was not necessary for the judge to have decided whether the appellant had been a victim of trafficking. At paras 69, 77 and 79, Flaux LJ said:

> "69. In my judgment, it is absolutely clear that the Court of Appeal in *AS (Afghanistan)* was limiting the circumstances in which, on a statutory appeal against a removal decision, an appellant can mount an indirect challenge to a negative trafficking decision by the authority (in the circumstances where the appellant has not challenged it by way of judicial review), to where the trafficking decision can be demonstrated to be perverse or irrational or one which was not open to the authority, those expressions being effectively synonymous for present purposes. … there is a two stage approach. First, a determination whether the trafficking decision is perverse or irrational or one which was not open to the authority and second, only if it is, can the appellant invite the Tribunal to re-determine the relevant facts and take account of subsequent evidence since the decision of the authority was made.
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> 77. … What the Upper Tribunal did was to treat the trafficking decision as if it were an "immigration decision" under section 82 of the 2002 Act susceptible to the procedure applicable to the determination of statutory appeals under section 84 of the 2002 Act. However, as already noted, trafficking decisions are not in the list of decisions susceptible to appeal, either before or after the changes to sections 82 and 84 effected in 2014. Accordingly, it is clear that the Upper Tribunal exceeded its jurisdiction.
>
> 79. Nothing in those cases bears on the approach which should be adopted to a trafficking decision which is not the decision of the Secretary of State which is being appealed, but which may be relevant to the decision under appeal. As *AA (Iraq)* established, there is no right of appeal against a trafficking decision. The only remedy is by way of judicial review. Where, as in the present case, there has been no judicial review, *AS (Afghanistan)* establishes that the trafficking decision is only susceptible to an indirect challenge on a statutory appeal where it is demonstrated to have been perverse or irrational or one which was not open to the authority…."

34. Mr Melvin submitted that, as the appellant had refused the suggestion by the respondent's representative that the hearing be adjourned so that his case could be referred to the Competent Authority, there was no breach of any policy in relation to the Article 4 of the ECHR and there was no trafficking issue before the judge. Accordingly, the judge did not err in law in failing to make findings of fact on the appellant's claim that he had been trafficked.

35. Mr Melvin said that, if the appellant wishes to have a referral to the NRM, he was sure that any such request would be considered, although it was difficult to see how his claim that he had been trafficked 15 years ago (in fact, on the appellant's evidence, 19 years ago) could have any material impact on his removal.

36. I asked Mr Franco to address me on the question why findings as to the appellant's evidence that he had been trafficked or as to Article 4 of the ECHR were relevant in this particular appeal.

37. Mr Franco accepted that the appellant had not claimed to be at future risk of persecution on account of having been trafficked in the past or that he was at real risk of being trafficked in Myanmar or Bangladesh. However, he submitted that it was still relevant for the judge to make findings on his evidence that he had been trafficked.

38. In Mr Franco's submission, it was necessary or relevant for the judge to make such findings of fact because the Secretary of State had not complied with her policy to refer potential victims of trafficking to the Competent Authority under the NRM. Mr Franco submitted that, as the Secretary of State had not complied with her policy, the appellant was "*entitled*" to look to the First-tier Tribunal to make the findings that the Competent Authority should have made.

39. In this regard, Mr Franco relied upon para 17 of the judgment of Longmore LJ in AS (Afghanistan) v SSHD [2013] EWCA Civ 1469, quoted at para 26 of the judgment of the Court of Appeal in MS (Afghanistan). Para 17 of AS (Afghanistan) reads:

> "17. For the reasons given above, I cannot agree with this paragraph of *SHL*. It seems to me that First Tier Tribunal judges are competent to consider whether the Secretary of State has complied with her policy in relation to trafficking; if asked to consider that question, they should then decide whether she has in fact complied with her policy since that it is (or may be) relevant to her removal decision."

40. On this basis, Mr Franco sought to distinguish MS (Afghanistan).

41. In his reply to Mr Melvin's submissions, Mr Franco relied upon a further distinction, i.e. that there is no trafficking decision in the instant case. Accordingly, he submitted MS (Afghanistan) does not apply. Instead, in his submission, AS (Afghanistan) applied.

42. Furthermore, Mr Franco relied upon the fact that it was not the appellant's fault that the Secretary of State had failed to progress his referral to the Competent Authority. He decided to proceed with his hearing because he was fed up with the delay.

43. Mr Franco relied upon the fact that, in granting permission, Judge Doyle had said that the judge had not considered Article 4 of the ECHR. The judge had merely set out the appellant's evidence on this aspect of his case.

The second Issue

44. Mr Melvin did not accept that the respondent had accepted before the judge that the appellant arrived in the United Kingdom in 1998.

45. Mr Melvin submitted that, even if Article 8 was before the judge, there was very little evidence going to Article 8. The appellant has been living within the Bangladeshi community in the United Kingdom, hiding from the authorities. He speaks little English. There has been very little integration in the United Kingdom.

46. Mr Franco confirmed that there was no application before the judge for permission to amend the grounds to raise Article 8. I asked Mr Franco to address me on the question why para 276ADE(1) of the Rules was relevant before the judge.

47. Mr Franco submitted that, notwithstanding the general terms in which the grounds of appeal raised the ECHR (paras 14(ii) and (iii) above), the grounds did raise human rights. He had made submissions before the judge on Article 8, as did the respondent's representative. The skeleton argument relied upon on the appellant's

behalf raised para 276ADE(1)(vi). The appellant's witness statement raised Article 8. The respondent's decision considered Article 8.

48. In Mr Franco's submission, the fact that the judge had said that the appellant's immigration history was not in dispute and the fact that the judge had considered the delay in claiming asylum on the basis that the appellant had delayed for a period of 19 years, which the respondent had not challenged, meant that the respondent could not now be allowed to dispute that the appellant has been living in the United Kingdom since 1998.

Assessment

The first issue., i.e. whether the judge materially erred in law in failing to make any findings as to whether the appellant had been trafficked in the United Kingdom

49. Mr Franco suggested, in effect, that if MS (Afghanistan) did not apply for one reason or another, then AS (Afghanistan) applies. This submission is misconceived because it is clear that the two judgments are consistent. The Court of Appeal in MS (Afghanistan) was merely clarifying the judgment in AS (Afghanistan).

50. Mr Franco sought to distinguish MS (Afghanistan) on the basis that a trafficking decision had been made in that case by the Competent Authority. On that basis, he submitted that AS (Afghanistan) applies. However, this is a false distinction because there had also been a trafficking decision in AS (Afghanistan) (para 6 of AS (Afghanistan)).

51. In AS (Afghanistan) and in MS (Afghanistan), the decisions that were appealed to the First-tier Tribunal were decisions under s.10 of the Immigration and Asylum Act 1999 (the "1999 Act") and the rights of appeal arose under s.82(2)(g) of the 2002 Act. It is clear from the judgment in AS (Afghanistan) that the claimant's evidence that he had been trafficked was relevant to the decision to remove.

52. In relying upon para 17 of the judgment in AS (Afghanistan), Mr Franco is being selective in what he relies upon and ignores the concluding words of para 17. At paras 17 and 18 of the judgment in AS (Afghanistan), Longmore LJ said that:

> "17.… First Tier Tribunal judges are competent to consider whether the Secretary of State has complied with her policy in relation to trafficking; if asked to consider that question, they should then decide whether she has in fact complied with her policy since that it is (or may be) relevant to her removal decision.
>
> 18. In this context it is important to be aware that a decision to refuse asylum is not itself an immigration decision appealable pursuant to section 82(2) of the 2002 Act (any more than a trafficking decision is such a decision). The relevant immigration decision is the decision to remove the appellant under section 10 of the Immigration and Asylum Act 1999 (see s.82(2)(g) of the 2002 Act). It is in reaching the decision to remove that the Secretary of State must consider relevant matters including (where relevant) whether an applicant for asylum is a victim of trafficking. No doubt, if a conclusive decision has been reached by the Competent Authority, First Tier Tribunals will be astute not (save perhaps in rare circumstances) to allow an appellant to re-run a case already decided against him on the facts. But where, as here, it is arguable that, on the facts found or accepted,

the Competent Authority has reached a decision which was not open to it, that argument should be heard and taken into account."

(my emphasis)

53. Thus, at para 18 of AS (Afghanistan), Longmore LJ drew attention to the importance of the fact that the decision to refuse asylum was not itself an immigration decision appealable pursuant to s.82(2) of the 2002 Act and that the relevant immigration decision was the decision to remove under s.10 of the 1999 Act. It is clear from both AS (Afghanistan) and MS (Afghanistan) that, if (and only if) the Competent Authority has reached a negative "Conclusive Grounds" decision that was irrational or perverse or not open to it and the trafficking or modern slavery claim is relevant to the decision to remove, the First-tier Tribunal must make findings on the trafficking / modern slavery claim to the extent that such findings are relevant on deciding the appeal against the removal decision.

54. With effect from 20 October 2014, ss. 82 *and* 84 of the 2002 Act have been amended. Section 84 sets out the grounds upon which a decision may be applied. The versions of ss.82 and 84 that were in force immediately prior to 20 October 2014 (the "old ss.82 and 84) and the current versions are set out below:

The old ss.82 and 84:

"**82 Right of appeal: general**

(2) In this Part *"immigration decision"* means—

…

(g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (removal of person unlawfully in United Kingdom),

…"

"**84 Grounds of appeal**

(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds—

…

(e) that the decision is otherwise not in accordance with the law;

(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

The new ss.82 and 84:

"82. Right of appeal to the Tribunal

(1) A person "P" may appeal to the Tribunal where –
  (a) the Secretary of State has decided to refuse a protection claim made by P,
  (b) the Secretary of State has decided to refuse the human rights claim made by P, or
  (c) the Secretary of State has decided to revoke P's protection status.

84. Grounds of appeal

(1) An appeal under section 82(1)(a) (refusal of protection claim) must be bought on one or more of the following grounds –
  (a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;
  (b) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
  (c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).
(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be bought on the grounds that the decision is unlawful under section 6 of the Human Rights Act 1998."

55. Accordingly, a decision to refuse asylum can now be appealed under s.82. However, s.84 focuses on removal being in breach of the United Kingdom's obligations under the Refugee Convention and removal being in breach of s.6 of the 1998 Act. As a further point of distinction, it should be noted that the wording of the old s.84 (i.e. the version in force at the time that AS (Afghanistan) and MS (Afghanistan) were decided) meant that the "*not in accordance with the law*" ground of appeal was available so that a decision of the Secretary of State that should have awaited a decision by the Competent Authority but did not, might have been appealable on that ground.

56. Tribunal judges are not obliged to make findings of fact on all aspects of the evidence adduced before them. They are, however, obliged to make adequate findings of fact. The adequacy of a judge's findings will depend on what issues are relevant. These principles are well-understood. Nevertheless, at times, the scope of the findings that need to be made may not be readily apparent. Trafficking and modern slavery claims may fall within this category.

57. Where an appellant relies upon evidence that he was trafficked or was a victim of modern slavery in the past, the question arises as to whether the trafficking or modern slavery claim is relevant to the asylum ground and/or the human rights ground. AS (Afghanistan), MS (Afghanistan) and EK (Ivory Coast) (Article 4 ECHR: Anti-trafficking Convention) Tanzania [2013] UKUT 00313 (IAC) make it clear that it is necessary for the Tribunal to assess evidence that an appellant was trafficked or was a victim of modern slavery in the past if it is relevant in deciding whether his removal would be in breach of the United Kingdom's obligations under the Refugee Convention or in deciding whether his removal would be in breach of his protected rights under the ECHR, whether or not the Competent Authority has made a decision.

58. Accordingly, it is necessary to remember not only that the focus is on removal but also that the focus is only whether removal would be in breach of the United Kingdom's obligations under the Refugee Convention or in breach of an individual's protected rights under the ECHR. This will help to ensure that only relevant issues are dealt with in a statutory appeal and that issues that are properly *only* within the province of the Competent Authority or which should only be the subject of judicial review proceedings are not dealt with in the statutory appeal. It is clear from MS (Afghanistan) that it is important to keep in mind the separate functions of each process.

59. Mr Franco's submission, that as the Secretary of State had not complied with the policy to refer potential victims of trafficking or modern slavery to the Competent Authority the appellant was "*entitled*" to look to the First-tier Tribunal to make the findings that the Competent Authority should have made, is simply misconceived because it ignores the fact that the two bodies have separate functions and jurisdiction, the question before the First-tier Tribunal being confined to deciding whether the appellant's removal would be in breach of the United Kingdom's obligations under the Refugee Convention or whether it would be in breach of his protected rights under the ECHR.

60. An appellant's claim that he was trafficked or was a victim of modern slavery in the past may be relevant in reaching a decision in a statutory appeal as to whether his removal would be in breach of the United Kingdom's obligations under the Refugee Convention or whether his removal would be in breach of his protected rights under the ECHR in the following ways, by way of example:

    (i) if he claims that the fact that he has been trafficked in the past or was a victim of modern slavery exposes him to a real risk of persecution or being trafficked again or subjected to modern slavery on return to his home country;

    (ii) if he claims that the fact that he has been trafficked in the past or was a victim of modern slavery has had such an impact upon him that (irrespective of the Secretary of State's duty to provide reparation) his removal would be in breach of his protected human rights: for example, Article 3 or Article 8 of the ECHR;

    (iii) if the Secretary of State's duty to provide reparation under the ECAT is relevant in deciding whether his removal would be in breach of his protected rights under the ECHR; for example, because interruption of his rehabilitation would be in breach of his rights under the ECHR. The Secretary of State's duties under ECAT include an obligation to adopt such measures as may be necessary to assist victims in their physical, psychological and social recovery (Article 12 paragraph 1) and to issue a renewable residence permit to victims if their stay is necessary owing to their personal situation (Article 14), which must include consideration of his or her medical needs (head-note (4) of EK.

61. The above is not an exhaustive list and it may be that (ii) and (iii) are linked.

62. In my view, applying AS (Afghanistan) and MS (Afghanistan), cases in which the Competent Authority has reached a "*Conclusive Grounds decision*" should be approached as follows:

(i) Where there is a positive "*Conclusive Grounds decision*" and the Secretary of State has complied with her duty to provide reparation are unlikely to come before the Tribunal before such time as the individual concerned is refused a renewal of his residence permit and faces removal. In such cases, the judge should not go behind the decision of the Competent Authority that the appellant was a victim of trafficking or modern slavery. The focus will be on whether removal of the appellant at that stage would be in breach of the United Kingdom's obligations under the Refugee Convention or in breach of his rights under the ECHR.

(ii) In cases in which the Competent Authority has reached a negative "*Conclusive Grounds decision*" but the appellant continues to rely (in his statutory appeal) upon evidence that he has been a victim of trafficking or modern slavery, the judge should decide, at the start of the hearing and before oral evidence is given, whether the decision of the Competent Authority was perverse or irrational or not reasonably open to it. At this stage, evidence subsequent to the decision of the Competent Authority must not be taken into account. If (and only if) the judge concludes that the Competent Authority's decision was perverse or irrational or one that was not reasonably open to it, that the judge can then re-determine the relevant facts and take account of subsequent evidence.

63. In cases in which there is no "Conclusive Grounds" decision:

(i) If the appellant claims that the fact that he has been trafficked in the past or was a victim of modern slavery exposes him to a real risk of persecution in his home or being trafficked again or subjected to modern slavery in his home country or that it has had such an impact upon him that his removal would be in breach of his protected human rights, it will be for him to establish the relevant facts to the appropriate (low) standard of proof and the judge should make findings of fact on such evidence.

(ii) If the appellant does <u>not</u> advance any such claim in the statutory appeal but he adduces evidence that he was trafficked or subjected to modern slavery in the past, it will be a question of fact in each case (the burden being on the appellant to the low standard of proof) whether the Secretary of State's duty to provide reparation makes his removal in breach of his protected rights under the ECHR. If, for example, he claims that interruption of his rehabilitation would be in breach of his rights under Article 8, it will for relevant to consider all the circumstances very carefully, including the length of time that has elapsed since he was trafficked or subjected to modern slavery, whether he has sought medical attention since then, any difficulties he has experienced since being trafficked in terms of his physical and psychological health and his social integration, the evidence as to his medical needs for his physical, psychological and social recovery as well as the situation that he will face on return to his home country. If the evidence does not indicate that the Secretary of State's duty to provide reparation may be relevant in deciding whether removal would be in breach of the appellant's protected rights under the ECHR and no such claim is advanced by the appellant, then it may be unnecessary to make findings of fact on the evidence of past trafficking or modern slavery.

64. In all cases, it is not open to the Tribunal to make findings as to whether the United Kingdom is in breach of its obligations under ECAT or whether there has been a breach of the procedural obligation (including delays in making or failures in making referrals to the NRM) under Article 4 of the ECHR (paras 83-84 of MS (Afghanistan)). Nor can such delays be relied upon as the sole basis for contending that the Tribunal is obliged to make findings of fact on an appellant's trafficking claim or claim to have been a victim of modern slavery. Although Article 8 of the ECHR incorporates a requirement that a decision be in accordance with the law, this phrase in Article 8 has a different meaning from that which applied in relation to old s.84(1)(e) of the 2002 Act. For the purposes of Article 8, the phrase "*in accordance with the law*" refers to the need for there to be in place a legal basis for the decision appealed. In the instant case, the legal basis of the decision to remove is that the appellant is a person who requires leave to enter or remain in the United Kingdom but does not have it (s.10(1) of the 1999 Act). This suffices for the purposes of Article 8.

65. In the instant case, even if it is the case that the Secretary of State was in breach of her policy to refer potential victims of modern slavery to the NRM, it was not explained to the judge, nor to me, how this was relevant in deciding whether the appellant's *removal* would be in breach of the United Kingdom's obligations under the Refugee Convention or in breach of his protected rights under the ECHR.

66. Mr Franco accepted that it was not part of the appellant's case before the judge that he was at real risk of being trafficked or subjected to modern slavery in Myanmar or Bangladesh or that his past experience of having been subjected to modern slavery exposed him to a real risk of being trafficked or subjected to modern slavery in Myanmar or Bangladesh.

67. It was not part of the appellant's case before the judge that the Secretary of State's duty to provide reparation as a victim of modern slavery (if he was a victim of modern slavery) rendered his removal in breach of his protected rights under the ECHR. Furthermore, the evidence before the judge did not disclose that the duty of reparation was relevant in deciding whether his removal would be in breach of his protected rights under the ECHR. His evidence was that, after his arrival in the United Kingdom in 1998, he was forced into servitude by the couple with whom he travelled to the United Kingdom and that he escaped from the couple after 3 to 4 days or "*a few days*". On his evidence, he has been living in the United Kingdom since then, i.e. a period of almost 19 years as at the date of hearing before the judge. There was no medical evidence before the judge. At most, the judge's RoP indicates (para 26 above) that he may have given oral evidence to the effect that he has asthma. There was no evidence before the judge of any difficulties in terms of his physical and psychological health and his social integration experienced by him in the period of almost 19 years since his period of enforced servitude. There was no evidence as to his medical needs for his physical, psychological and social recovery. He did not give evidence that his period of enforced servitude almost 19 years ago would, to the low standard of proof, have an impact on his circumstances on return to Bangladesh such as to render his removal in breach of his protected right under the ECHR.

68. In these circumstances, I have concluded that any duty of the Secretary of State to provide reparation was not relevant to whether the appellant's removal would be in

breach of his protected rights under the ECHR. It was therefore not necessary for the judge to make findings of fact on the appellant's evidence that he was a victim of modern slavery 19 years ago.

69. In any event, on the very limited evidence that was before the judge and even if he had accepted the appellant's evidence that he had been forced into servitude for a few days after his arrival in the United Kingdom in 1998 (which is by no means clear, given the wholesale adverse credibility assessment in relation to the remainder of the appellant's evidence), it is impossible to see how the Secretary of State's duty of reparation could make any material difference to the outcome of the appellant's appeal and therefore impossible to see how the judge's decision could have been any different, given the lack of evidence as explained at para 67 above. Accordingly, even if the judge did err in law in failing to make findings of fact on the appellant's evidence that he was a victim of modern slavery, I have decided that his decision should not be set aside.

The second issue, i.e. whether the judge materially erred in law in failing to decide whether the appellant met the requirements of para 276ADE(1)(vi) of the Rules

70. Mr Melvin (correctly) did not suggest before me that reliance upon para 276ADE(1)(vi) of the Rules was a "*new matter*" within the meaning of s.85(5) and (6) of the 2002 Act, as explained in Mahmud (S.85 NIAA 2002 – 'new matters') [2017] UKUT 00488 (IAC), given that the respondent had considered para 276ADE(1)(vi) in the decision letter.

71. As is clear from para 14 above, the grounds of appeal before the judge raised human rights in general terms only. There was no specific mention of Article 8 and it is clear that the evidence going to the appellant's Article 8 private life claim was very limited.

72. However, even if the judge erred in law in failing to decide para 276ADE(1)(vi), it is impossible to see how his decision on the appeal could have been any different, for the following reasons:

73. I do not accept Mr Franco's submission that, given the absence of any challenge, the respondent was precluded from going behind the judge's finding that the appellant had lived in the United Kingdom for 19 years. The fact is that the judge plainly misapprehended the position when he said at para 3 of his decision that the appellant's immigration history was not in dispute because the respondent's representative had submitted that there was no corroboration of the appellant's claim to have been here since 1998 (para 26 above).

74. However, even if the judge had decided the para 276ADE(vi) issue and even if he had decided it on the basis that the appellant had lived in the United Kingdom for 19 years, this would have meant that the appellant arrived in the United Kingdom at the age of 14 years. Given that his account that he was a national of Myanmar had been rejected by the judge, it follows that, if the judge had considered the matter, he would have been bound to decide para 276ADE(1)(vi) on the basis that the appellant had lived in Bangladesh from birth until he was 14 years old when he left Bangladesh. In other words, he was a minor when he left Bangladesh. However, he was not a minor of tender years.

75. The appellant did not explain in terms, in his witness statement or in oral evidence, what obstacles he would experience on reintegration in Bangladesh. If the judge had considered the matter, he would have been left to draw inferences from the length of his residence and his evidence that he does not have contact with his parents in Bangladesh.

76. The appellant's screening interview and asylum interview were conducted with the assistance of Bengali language interpreters. He gave evidence at the hearing before the judge through an interpreter in the Bengali language. It is clear from the judge's summary of his oral evidence, at paras 11 and 14 of the judge's decision in particular, that he lived among members of the Bangladeshi community.

77. In all of these circumstances, given the very limited evidence that was before the judge, it is inevitable, on any reasonable view, that, if the judge had considered para 276ADE(1)(vi), he would have been bound to conclude, on any legitimate view, there was only one answer to the appellant's claim under para 276ADE(1)(vi), i.e. that he had not established that there would be very significant obstacles to his reintegration in Bangladesh.

78. For all of the reasons given above, I have concluded that, even if the judge erred in law in not deciding whether the appellant met the requirements of para 276ADE(1)(vi) of the Rules, his decision should not be set aside.

79. The appeal is therefore dismissed.

Decision

The decision of Judge of the First-tier Tribunal Robinson did not involve the making of any error on a point of law such that it falls to be set aside.

Signed Date: 17 May 2018
Upper Tribunal Judge Gill