JR/882/2021

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

BEFORE

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

BETWEEN

THE QUEEN on the application of
LT
(ANONYMITY DIRECTION MADE)

Applicant

-and-

FIRST-TIER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Respondent

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Interested party

ORDER

UPON HEARING Ms G Ward, Counsel for the Applicant and Mr N Chapman, Counsel for the Interested Party, at a hearing on 16 November 2021

AND UPON the Respondent taking no active part in the proceedings

IT IS ORDERED THAT:-

1. The application for judicial review is granted on ground 4 and refused on grounds 1-3.

2. For reasons set out below, permission to appeal to the Court of Appeal is refused.

3. The parties have permission to make written submissions on the costs remaining to be determined in the asylum appeal, any such submissions to be filed in the First-tier Tribunal (marked for the urgent attention of Upper Tribunal Judge Norton-Taylor) and served on the Interested Party within 21 days of the date of this order.

4. Upper Tribunal Judge Norton-Taylor is to reconstitute himself as a First-tier Tribunal Judge and determine the outstanding costs in the asylum appeal.

5. Liability for costs in this application for judicial review is to be determined on written submissions limited to 3 sides of A4, 12pt, 1½ spacing, to be filed in the Upper Tribunal and served on the Interested Party within 21 days of notification of the costs order in the asylum appeal.

6. The amount of costs to be paid in this application for judicial review shall be subject to detailed assessment if not agreed.

7. An anonymity direction is made in the following terms:

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Applicant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Permission to appeal: reasons

8. Having considered the grounds of appeal filed by the Applicant and dated 11 February 2022, there are no arguable errors in the Upper Tribunal's judgment and no other reasons why permission should be granted.

9. The Upper Tribunal addressed the findings of the First-tier Tribunal and, for reasons set out at paragraphs 36-48 of judgment, concluded that the judge below had been entitled to find that the asylum support proceedings have not had a material bearing on the appeal in the First-tier Tribunal. Those reasons are unarguably adequate.

10. The Awuah issue was dealt with by the Upper Tribunal at length. Whilst it was apparent that the SSHD might have provided greater assistance to the Applicant and the First-tier Tribunal during the course of the appeal proceedings, the Upper Tribunal set out reasons why it was unarguably the case that the judge had been entitled to find that there had not been unreasonable conduct such that costs should be awarded. He had directed himself to Awuah and the Upper Tribunal was correct to conclude the applicable principles had been properly applied.

11. In respect of the rationality challenge, the Upper Tribunal was unarguably correct to conclude that the judge below had not erred in law. This case, as in all, was highly fact-sensitive.

Signed: H Norton-Taylor
Upper Tribunal Judge Norton-Taylor

Dated: 14 February 2022

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): *29 March 2022*

Solicitors:
Ref No.
Home Office Ref:

In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR/882/2021

In the matter of an application for Judicial Review

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

The Queen on the application of

LT

Applicant

and

FIRST-TIER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

Respondent

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Interested Party

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the applicant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

JUDGMENT

Introduction

1. This application for judicial review concerns the decision of First-tier Tribunal Judge Froom (hereafter "the judge"), issued on 16 March 2021, by which he made a limited order for costs against the

Secretary of State ("SSHD") for what was alleged by the applicant to have been unreasonable conduct during the course of proceedings before the First-tier Tribunal in relation to the applicant's protection and human rights claims.

2. The applicant had sought an order for costs in respect of a number of aspects of the SSHD's conduct relating to: (a) the scope of the appeal before the First-tier Tribunal; (b) the failure to clarify the basis of the case against the applicant following the recognition that he was a victim of trafficking; (c) the failure to comply with directions issued by the First-tier Tribunal; and (d) requiring an unnecessary case management hearing.

3. In the event, the judge declined to make an order for costs in respect of all the conduct complained of, save for the last. An order in the sum of £1000 was made, which included an unspecified amount for the making of the costs application itself.

4. The applicant asserts that the judge's approach and conclusions are flawed. The SSHD submits that there is nothing wrong with the judge's decision.

5. The Respondent has elected not to participate in these proceedings.

Background

6. The applicant is a Vietnamese national. He arrived in United Kingdom clandestinely in 2012 and claimed asylum very shortly thereafter. During the processing of his asylum claim the applicant was convicted of production of cannabis and was sentenced to 20 months' imprisonment. In November 2014 the asylum claim was refused and a year later his appeal was dismissed. Following the exhaustion of appeal rights, in April 2016 he was referred to the National Referral Mechanism ("NRM"). A positive Reasonable Grounds decision followed shortly thereafter. In July 2016, a

negative Conclusive Grounds decision was issued. This decision was maintained on reconsideration.

7. In 2017 and 2018 a series of further representations were provided to the SSHD, asserting that there was sufficient material on which to base a fresh claim under paragraph 353 of the Immigration Rules. By a decision dated 6 December 2018, the SSHD refused to grant the applicant leave to remain, but accepted that his representations constituted a fresh claim. Therefore, the decision had the effect of a refusal of a claim and attracted an in-country right of appeal (I note here that the decision letter contained the heading “Refusal of a human rights claim…”: There is no mention of a protection claim. I will return to this point later in the judgment). The decision also refused to reconsider the previous negative Conclusive Grounds decision.

8. The applicant duly exercised his right of appeal and proceedings in the First-tier Tribunal began.

9. Meanwhile, the SSHD had refused to grant asylum support to the applicant on the basis that he was not an “asylum seeker” and was therefore ineligible for support under section 95 of the Immigration and Asylum Act 1999. The applicant’s challenge to this was rejected by the Social Entitlement Chamber of the First-tier Tribunal. In turn, that decision was challenged by way of judicial review. The judicial review proceedings were then stayed pending the outcome of the protection/human rights appeal before the First-tier Tribunal.

10. Separate judicial review proceedings had also been initiated in the Administrative Court against the SSHD’s refusal to reconsider the previous Conclusive Grounds decision. This claim culminated in settlement by consent, with the SSHD agreeing to reconsider the decision.

11. On 17 May 2019, a case management hearing was held in the First-tier Tribunal. This was done in part to establish the scope of the

applicant's appeal; was it limited to Article 8 ECHR, as asserted by the SSHD in the parallel asylum support proceedings, or did it also encompass protection issues under the Refugee Convention and Article 3 ECHR? Having referred to the decision letter of 6 December 2018, the First-tier Tribunal (Judge Kimnell) took the view that the appeal "clearly" included protection grounds and that the appeal was to proceed on that basis.

12. The applicant's appeal was then listed for hearing on 4 March 2020 (it appears as though this date was later changed to 19 March and then again to 4 June). On 6 February 2020, a positive Conclusive Grounds decision was issued, confirming that the applicant was a victim of modern slavery. The applicant's solicitors wrote to the SSHD on 10 February 2020 urging her to reconsider her position in the appeal and that there should be a grant of leave in light of the Conclusive Grounds decision and further evidence. A response from the SSHD was received on 24 February 2020, confirming that a review had been undertaken, but that the appeal should proceed to hearing. A day later the SSHD confirmed that she would not be providing any reasons for the previous day's review decision. The applicant's solicitors contacted the SSHD again, setting out detailed representations as to why the applicant's case should be reconsidered in light of developments. Paragraph 28 of those representations read as follows:

> "**We put the [SSHD] notice that since we do not consider that the decision under appeal is realistically defendable by the [SSHD] in its current form, that we will seek wasted costs in respect of any action emanating from this decision that causes disruption to the process of this appeal or impedes upon the Appellant's ability to prepare or present his case adequately before the [First-tier Tribunal].** These actions include, but are not limited to the following actions:

i. our preparation for and attendance at a hearing where new and unseen arguments raised by the Respondent without reasonable notice to the Appellant;

ii. any adjournment which should follow from this (the Appellant will point to this correspondence as a basis for requesting such an adjournment and to the appeals reconsideration process in which the Respondent was given ample time to deliver a satisfactory response);

iii. the full cost of preparing for any further hearing based on the above;

iv. any other associated actions as a result of the above issues."

(Emphasis in the original)

13. On 17 March 2020, the SSHD responded by confirming that a further review had been conducted and that the case should proceed to hearing.

14. On 9 March 2020 the SSHD granted the applicant discretionary leave to remain in the United Kingdom on the basis that he was a victim of modern slavery. It appears as though notice was then given under section 104(4B) of the Nationality, Immigration and Asylum Act 2002, such that the applicant's appeal continued notwithstanding the grant of leave.

15. The First-tier Tribunal issued further case management directions on 20 July 2020, requiring, amongst other matters, that the SSHD confirm the grant of leave and whether the decision under appeal was to be maintained. The SSHD did not comply with these directions. A further case management hearing was listed for 12 October 2020. At that hearing, the First-tier Tribunal (Judge Grey) noted the SSHD's failure to comply with directions over time and stated that:

> "Consequently the Appellant is unable to know the case he has to meet in order to prepare a consolidated bundle and ASA, and this matter has suffered further delay, without any adequate reason having been provided by the Respondent for the lack of compliance."

16. A further case management review hearing and "wasted costs" hearing was listed for 10 February 2021.

17. On 27 October 2020, the applicant was granted asylum. This ended the appeal.

18. The hearing on costs took place on 10 February 2021, following the provision of written submissions from the applicant and SSHD. The applicant asserted that the SSHD had behaved unreasonably in respect of three aspects of the proceedings (as summarised by the judge): first, the initial stance that the appeal did not cover protection issues, a position subsequently reversed; second, the SSHD's failure to withdraw the decision under appeal following the positive Conclusive Grounds decision; and third, the SSHD's failure to provide reasons for continuing to defend the decision having reviewed the applicant's case.

19. The judge rejected all but one specific aspect of the applicant's case. He agreed that the case management hearing on 12 October 2020 could have been avoided had the SSHD communicated her position that the applicant's case was to be reconsidered (presumably with a view to granting asylum). The judge went on to make a summary assessment of costs in relation to that limited aspect of proceedings, rejected the contention that costs should be awarded on an indemnity basis, and arrived at the sum of £1000. This incorporated reasonable costs in respect of the 12 October 2020 case management hearing and the costs of making the costs application itself.

20. Following the issuance of the judge's decision, this judicial review claim was filed on 16 June 2021. An acknowledgement of

service was provided by the Respondent, confirming its neutral stance and non-participation in these proceedings. At the pre-permission stage, the SSHD also stated that she was adopting a neutral position, but, following the grant of permission by Upper Tribunal Judge Lane on 22 July 2021, she provided detailed grounds of defence.

The legal framework

21. The relevant provisions of section 9 of the Tribunals, Courts and Enforcement Act 2007 read as follows:

> **29. Costs or expenses**
>
> (1) The costs of and incidental to—
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

22. The relevant provisions of rule 9 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the 2014 rules") provide as follows:

> **Orders for payment of costs and interest on costs (or, in Scotland, expenses)**
>
> 9.—(1) If the Tribunal allows an appeal, it may order a respondent to pay by way of costs to the appellant an amount no greater than—
>
> (a) any fee paid under the Fees Order that has not been refunded; and

(b) any fee which the appellant is or may be liable to pay under that Order.

(2) The Tribunal may otherwise make an order in respect of costs only—

(a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs; or

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—

(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and

(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

23. It is rule 9(2)(b) of the 2014 rules which is relevant to these proceedings.

24. The First-tier Tribunal's costs jurisdiction under rule 9 has been considered in two cases which have been the subject of submissions by the parties before me: Cancino (Costs - First-tier Tribunal - New Powers) [2015] UKFTT 00059 (IAC) ("Cancino") and the unreported decision in Awuah and Others (No.2) [2017] UKFTT (IAC) ("Awuah").

25. Combining the relevant guidance set out in these two cases (including references to other authorities considered therein), the following synthesis of principles relevant to the case before me may be offered:

(a) Cases being considered under rule 9 of the 2014 rules are highly fact-sensitive;

(b) The acid test for whether there has been unreasonable conduct is whether there is “a reasonable explanation for the conduct under scrutiny”;

(c) The conduct in question is to be assessed objectively and the tribunal is the arbiter of unreasonableness;

(d) Unreasonable does not simply mean “wrong”;

(e) The objective standard to be applied to the SSHD is that of a hypothetical reasonably competent civil servant;

(f) There is a “strong general rule” that it will be unreasonable to defend, or continue to defend an appeal which is, “objectively assessed, irresistible or obviously meritorious.”;

(g) If conduct is judged to be unreasonable, the decision whether to make a costs order is discretionary;

(h) There is a high threshold for awarding costs and such an award should be reserved only for the clearest cases;

(i) The costs jurisdiction covers all aspects of proceedings, including case management hearings.

26. There are two relevant Presidential Guidance Notes on costs: No 1 of 2015 “Wasted Costs and Unreasonable Costs” and No2 of 2018 “Costs”.

The parties’ respective cases

27. Rather than setting out the parties’ arguments in detail here, and without intending any disrespect to Counsel, I will address the salient aspects of their detailed submissions when setting out my analysis and conclusions later in the judgment.

28. The following summary is taken from paragraph 2 of the applicant's statement of facts and grounds:

    (a) The judge wrongly characterised the SSHD's conduct that led to the case management review hearing on 17 May 2019 as not being related to the applicant's appeal ("**the asylum support issue**");

    (b) The judge failed to have regard and/or misdirected himself to the guidance given in Awuah ("**the Awuah issue**");

    (c) The judge applied a "wholly unrealistic and irrational" approach to what was expected of the applicant's representatives in light of the SSHD's failure to clarify her case ("**the irrationality issue**"); and

    (d) The judge failed to give reasons for the assessment of the quantum of costs at £1000 ("**the reasons issue**").

29. In defending the judge's decision, the SSHD contends that he directed himself to all relevant legal principles, and produced a determination described as "impressively careful, thorough and well-structured." It is said that there are no errors in the decision.

Analysis and conclusions

30. I propose to address the applicant's grounds of challenge in the order in which I have placed them in paragraph 28, above, and using the accompanying descriptions.

31. I remind myself that I am reviewing the judge's decision: this is not a merits appeal and I am not concerned with whether I would have made the same decision.

32. Before turning to the issues in dispute, I observe that the judge made a number of self-directions at paragraph 17-24, which, in my judgment, were all correct. It does not of course necessarily

follow that the relevant legal principles were then applied, but nor can it properly be said that this simply counts for nothing. In the absence of sufficiently cogent contraindications, it might reasonably be assumed that a judge who has correctly directed himself to the applicable law will have gone on to conduct their assessment of the evidence in that context. Ultimately, however, it is the substance of the judge's analysis and conclusions which is all-important.

The asylum support issue

33. In the parallel proceedings before the Social Entitlement Chamber of the First-tier Tribunal, the SSHD had argued that the applicant was not an "asylum seeker" because his appeal in the Immigration and Asylum Chamber was not an asylum appeal, but rather a human rights appeal only. It may be that an official in the asylum support unit simply read the heading of the decision letter of 6 December 2018 (which read "Refusal of a human rights claim - in country right of appeal") and took the view that it was indeed only a human rights case. It is common ground that the position taken in the asylum support proceedings was erroneous. That this erroneous view found its way into an attempted defence of the SSHD's position when judicial review proceedings were lodged in the Administrative Court was, to say the least, unfortunate.

34. In addressing this aspect of the applicant's case, the judge said the following at paragraphs 36 and 37 of his decision:

> "36. The decision letter of 6 December 2018 set out the following. Firstly, it acknowledged that Duncan Lewis had made a case that the Appellant was at risk of being re-trafficked. Consideration of the protection claim begins at paragraph 3 and covers sufficiency of protection, referring to Nguyen (Anti-Trafficking Convention: respondent's duties) [2015] UKUT 170 (IAC) and the US State Department report. The letter concluded the Appellant would receive a sufficiency of protection and also have the option to relocate to avoid the people he claim to fear. The letter gave

reasons for rejecting the reconsideration of the trafficking claim and stated that the new evidence did not require the protection claim to be revisited. The Appellant had not given a consistent account. A relatively short section of the letter considered human rights. It is easy to see why Judge Kimnell appears to have found it a straightforward matter to decide that the ambit of the appeal took in both protection and human rights grounds. The letter is explicit about that at paragraph 157 onwards. I do not accept Mr Packer's contention that the Appellant was unable to prepare his case until the Respondent's position was clarified.

37. I accept that the stance of the Secretary of State in both the judicial review and the tribunal proceedings relating to asylum support appears contradictory to a stance in relation to protection. However, her position in relation to the immigration appeal did not require clarification and it was - or should have been - perfectly clear to the Appellant's experienced solicitors following the revised trafficking decision that they had to prepare the appeal on the basis that, even though it could no longer be argued that the Appellant had given an incredible account, he was still required to satisfy the Tribunal as to the risk on return, protection and internal flight. If the Respondent did behave unreasonably in defending the other proceedings on an inconsistent basis, that was not conduct in these proceedings and is therefore outside the scope of this tribunal's costs jurisdiction."

35. The applicant argues that the judge's conclusion that the SSHD's position did not require clarification is unsustainable. It failed to have regard to the observations of the Deputy High Court Judge in the judicial review proceedings relating to the asylum support matter and the fact that the First-tier Tribunal listed a case management review hearing for 17 May 2019 in order that clarification could take place.

36. In my judgment, the judge was entitled to reach the conclusions reached in paragraphs 36 and 37 of his decision. I say this for the following reasons.

37. First, I consider the decision letter of 6 December 2018. As mentioned earlier, this was headed “Refusal of a human rights claim - in country right of appeal”. Taken in complete isolation, that would indicate the absence of a refusal of a protection claim, notwithstanding the fact that the applicant’s further submissions had always relied on Refugee Convention grounds and Article 3 ECHR.

38. However, it is readily apparent from a sensible and holistic reading of the letter that the SSHD was fully aware of the nature of the representations and, with reference to paragraphs 3-25, 156 and 157, that the clear intention was to refuse both a protection and human rights claim. This is further supported by paragraph 158, which confirms that the applicant’s in-country right of appeal had to be made on grounds including the assertion that a removal from United Kingdom would breach this country’s obligations under the Refugee Convention. The imprecision of the terminology used at the outset of the decision letter was rendered immaterial by the substance of that document.

39. The judge was plainly entitled to take account of what the body of the decision letter actually said.

40. Second, the judge was also entitled to take account of what Judge Kimnell had said at the case management hearing on 17 May 2019. He had concluded that the appeal “clearly” included protection grounds. In light of what was said in the decision letter, it was manifestly open to Judge Kimnell to reach that view and, in turn, the judge was himself entitled to take this view into account as support for the conclusion that the ambit of the appeal had been clear all along.

41. Third, this aspect of the applicant’s challenge does not rest comfortably with his acceptance - indeed, his assertion - that Judge Kimnell’s conclusion on the scope of the appeal was “inevitable” (as stated at paragraph 32 of the costs submissions dated 15 January

2021) and that the inclusion of protection issues in the appeal was "obviously the case" (paragraph 20 of the applicant's skeleton argument). In fact, the inevitable and obvious scope of the appeal from its inception is entirely consistent with the judge's view. This goes to support the lawfulness of his conclusion and undermines the applicant's case.

42. Fourth, it was the First-tier Tribunal which listed the case management hearing on 17 May 2019. It appeared to do so on the basis that the SSHD's position required clarification. For the reasons set out above, the judge was entitled to conclude that this premise was misplaced and that the scope of the appeal had always been clear. There is perhaps an implicit criticism of the First-tier Tribunal made by the judge in respect of the need for an oral case management hearing as well as requiring written submissions from the applicant seemingly because of the erroneous stance taken in the asylum support proceedings. Those proceedings were clearly separate and, as a matter of fact and law, had no bearing on the scope of the appeal. There was no question of the SSHD having to provide a reasonable explanation in the appeal proceedings for the erroneous position adopted in the asylum support proceedings and in my judgment the judge did not err in concluding that the latter proceedings had no bearing on the former.

43. That the First-tier Tribunal appeared to believe that they did (that being a reason for listing the hearing on 17 May 2019 in the first place) could not, of itself, have fixed the SSHD with unreasonable conduct. Although the applicant argues that the erroneous position taken in the asylum support proceedings caused the case management hearing to occur, thereby creating the nexus between those proceedings and unreasonable conduct in the appeal, I disagree. Rather, the SSHD's submissions accurately state the reality of the situation: the applicant went to the case management hearing with the unarguably correct view that the

appeal covered both protection and Article 8 ECHR issues; Judge Kimnell appreciated this from the outset; it was, to say the least, questionable whether an oral case management hearing was required.

44. For the sake of completeness, the fact that the Presenting Officer at the hearing on 17 May 2019 sought an adjournment to take further instructions adds nothing to the applicant's case before me. The application was (rightly) refused by Judge Kimnell, thus avoiding any further expense to the applicant, and the scope of the appeal was stated clearly in his decision.

45. In passing, I deem it appropriate to state an observation on the issue of the costs sought by the applicant in respect of the case management hearing on 17 May 2019, those being just over £3000 for 15 hours preparatory work. Mr Chapman described this as "extraordinary". I entirely agree.

46. Fifth, the observations of Mr Kovats, QC, were made in the context of a judicial review claim relating to separate proceedings, namely a challenge to decision of the Social Entitlement Chamber. With the greatest of respect, his view in those proceedings, not having considered any relevant issues at a substantive hearing, did not provide the platform (taken in isolation or cumulatively) for demonstrating that the judge erred in his approach.

47. Sixth, the judge was entitled to take account of the indisputable fact that the applicant's solicitors were "experienced" in immigration-related matters. That would follow from the principle that cases are highly fact-specific and the particular circumstances of an individual (and presumably by extension their legal representatives) may be relevant.

48. In summary, there are no errors in respect of the first issue.

The Awuah issue

49. The second basis of challenge involves two interrelated issues: (a) the nature of the applicant's appeal; and (b) the SSHD's position in respect of the appeal following the positive Conclusive Grounds decision issued on 6 February 2020.

50. It is important to step back and bear in mind the context in which the applicant's appeal was being prosecuted. It was his case that he was a refugee (in addition to being entitled to protection by virtue of Article 3 ECHR). A person is a refugee if they are outside their country of nationality and have a well-founded fear of persecution for specified reasons against which the authorities of the country in question are unwilling and/or unable to provide sufficient protection and there is no viable internal relocation option.

51. It is the case that the decision letter of 6 December 2018 was written at a time prior to the applicant being recognised as a victim of trafficking and therefore a vulnerable individual. Having said that, it is also clearly the case that state protection and internal relocation are dealt with in some detail and the country information and case-law cited in the letter (Nguyen, *supra*) was not confined to individuals who were *not* victims of trafficking, but had a general application. Indeed, Nguyen dealt with the position of an individual who *was* such a victim. The argument put to the judge (and recorded at paragraph of 27 of his decision) that the decision letter was predicated exclusively on reasons for disbelieving the applicant's account of being trafficked was misplaced. It cannot be said that the judge erred in concluding that there were "obvious issues" which remained for determination at the final hearing of the appeal.

52. It is clear from the case-law that a positive Conclusive Grounds decision is not determinative of whether a victim of trafficking is a refugee or otherwise in need of international protection: see, for example, DC (trafficking: protection/human

rights appeals) Albania [2019] UKUT 351 (IAC). Whilst the judge did not expressly refer to any case-law on trafficking, the underlying point is implicit in what he said at paragraphs 36-38 of his decision.

53. The evidence relating to the applicant's vulnerability (provided to the SSHD over the course of time, with much of it having been relied on in respect of the NRM process) was of course evidence in the appeal and would, in conjunction with the positive Conclusive Grounds decision, have been relied on at a final hearing. In my judgment, neither the SSHD's position in the asylum support proceedings, nor the positive Conclusive Grounds decision, left the applicant in the position of being so unclear as to what he needed to demonstrate in order to succeed in his appeal and the nature of the evidence which was best suited to secure that outcome. Indeed, the positive Conclusive Grounds decision provided good ammunition, as it were, to assert the applicant's credibility.

54. I acknowledge what Judge Grey said in her decision following the case management hearing on 12 October 2020, namely that the SSHD's failure to have complied with directions led to the applicant being "unable to know the case he has to meet in order to prepare a consolidated bundle and ASA [Appellant's Skeleton Argument]…". With respect, and with reference back to what I have said about the case management hearing on 17 May 2019, the view of the First-tier Tribunal was not in some way dispositive of the existence of unreasonable conduct by the SSHD. The judge rejected the existence of such a lack of clarity as to prevent the applicant from preparing his case. Thus, what Judge Grey said does not materially add to the applicant's attack on the judge's decision.

55. Having regard to all the considerations discussed thus far (including those set out under the asylum support issue), it was, in my judgment, open to the judge to find in paragraph 37 that, notwithstanding the Conclusive Grounds decision, the SSHD's position did not require clarification. This arguably has the effect of

rendering the remaining part of the Awuah issue otiose, as asserted in the SSHD's skeleton argument.

56. However, the judge did in fact deal with the SSHD's conduct following the positive Conclusive Grounds decision. Paragraph 38 of the judge's decision reads as follows:

> "38. Was the Respondent's defence of the decision following the revised trafficking decision conduct which did not permit of a reasonable explanation? I acknowledge the energy with which Duncan Lewis have conducted the Appellant's appeal and the strength of the representations they made to persuade the Respondent to alter her decision on the protection claim. However, the decision of the senior presenting Officer's to maintain the decision was not outside the range of reasonable responses. Nor is a failure to provide reasons for maintaining the decision unreasonable conduct given what I have said about the obvious issues which remained for the Tribunal to resolve."

57. First and foremost, I am satisfied that (to the extent that it is implicit in paragraph 38) the judge was entitled to conclude that a failure by the SSHD to have simply conceded the appeal immediately following the positive Conclusive Grounds decision (or shortly thereafter) did not constitute unreasonable conduct. As discussed earlier, it was not inevitable or a foregone conclusion that the Conclusive Grounds decision led to refugee status or an alternative basis for international protection. This is because of the differing legal framework applicable to the NRM process and the protection appeal and the issues raised in the decision letter of 6 December 2018.

58. Even putting that to one side, the judge was clearly cognisant of the two reviews undertaken by Senior Presenting Officers. The fact that these took place is common ground (if there had been any dispute, there was documentary evidence as to the fact of the two reviews).

59. The applicant complains that, notwithstanding the fact of the reviews, no reasons were provided by the SSHD for maintaining the decision under appeal and not conceding the appeal prior to the applicant being granted refugee status in late October 2020. Thus, the reviews were not "proper". Reliance has been placed on paragraphs 24 and 30 of Awuah, which read as follows:

> "24. Following an initial assessment of the viability of defending an appeal, subsequent reassessment on the part of the Secretary of State will normally be expected. While issuing any attempt to formulate prescriptive guidance, we would observe that the Secretary of State's duty of reassessment will arise when any material development occurs. Material developments include (in exhaustively) the completion of the Appellant's evidence (by whatever means), the outcome and out workings of judicial case management directions, the impact of any further decisions of the Secretary of State (for example affecting a family member), any relevant changes in or development of the law and any relevant changes in or development of the Secretary of State policy, whether expressed in the Immigration Rules or otherwise. While the above list ought to encompass most eventualities in the real world of Tribunal litigation, we make clear that it is not designed to be exhaustive in nature.
>
> …
>
> 30. We would add that it may be appropriate for tribunal is in certain cases to require evidence of review/reconsideration of an appeal on behalf of the Secretary of State. This exercise is, presumably, documented and is therefore susceptible to production via documentary evidence. The bare assertion of the fact of a review or reconsideration or the content or outcome thereof may not, without supporting documentary evidence, be considered acceptable or sufficient by the Tribunal in certain cases. Furthermore, review by an official of a rank higher than that of the decision maker is, in principle, likely to carry greater weight than review by one of equivalent rank."

60. The SSHD counters this by asserting that, at least in the circumstances of this case, no reasons were required as a matter of law, the judge's finding of fact that reviews had taken place was sufficient, and the passages in Awuah cited above do not disclose any error of approach by the judge.

61. For the following reasons, I conclude that there has been no error in approach by the judge on the question of the reviews.

62. First, it must be borne in mind that cases such as this are highly fact-specific. That is a cardinal principle set out in the relevant case-law.

63. Second, the judge had correctly directed himself to the relevant principles of approach and I am appropriately cautious before concluding that, notwithstanding this, he then went on to misapply, or simply overlook, those principles.

64. Third, paragraph 30 of Awuah uses terms such as "may", "certain cases", and "may not" when addressing the issue of reviews/reconsiderations. When this is combined with the highly fact-specific nature of cases such as the present, I am satisfied that the judge was entitled to apply what may be described as a degree of latitude or a discretionary element to the reviews undertaken by the SSHD. He was undoubtedly aware of the lack of reasons provided by the Senior Presenting Officers. However, in paragraph 38 he applied his assessment of this omission in the context of what he had said about the "obvious issues" set out in paragraphs 36 and 37. I have already concluded that it was open to the judge to find that the issues were clear, notwithstanding the positive Conclusive Grounds decision. It follows that the judge was entitled to take that into account when evaluating whether, on the facts of this particular case, more was required of the SSHD than a confirmation that reviews had occurred. In my judgment, the judge was entitled to conclude that the Senior Presenting Officer's reviews were rational. Further, I do not read the guidance in Awuah as imposing an

obligation on the SSHD to provide reasons in all cases, nor did it impose an obligation on the judge to require reasons, or, in their absence, to deem the SSHD's conduct unreasonable.

65. I note that in an email dated 25 August 2020, a member of the SSHD's Appeals Costs team, Mr Addy, provided some detail as to why the reviews had not resulted in a concession of the appeal. Reference is made to "objective evidence concerning risk of re-trafficking" and "the alternative consideration in the event the Appellant had been trafficked." It is right that the decision letter of 6 December 2018 did not expressly refer to an "alternative" scenario, but country information related to state protection and internal relocation was set out and was relevant to the position of an individual who was in fact a victim of trafficking. The judge was aware of this email. It post-dated the reviews and it was unnecessary for the judge to take it into account, but it does reinforce my assessment of the lawfulness of the judge's conclusions on the scope of the appeal and the SSHD's conduct following the positive Conclusive Grounds decision.

66. Fourth, there is nothing of real substance in the points taken by the applicant at paragraph 53(iv) and (v) of his skeleton argument. The grant of discretionary leave followed from the positive Conclusive Grounds decision. The letter granting leave referred to "Personal Circumstances" and the fact that the applicant was under the care of the Helen Bamber Foundation, but no details were provided. The applicant's solicitors were undoubtedly aware of his personal circumstances, as they had provided evidence of these to the SSHD.

67. In terms of the change of position resulting in the grant of asylum in October 2020, I cannot see how the two reviews undertaken in February and March 2020 could have given reasons at that point for a change which took place many months later. The fact that there was a change leading to the grant of asylum was

relevant to the judge's assessment of conduct relating to the October 2020 case management review hearing, to which I will return, below.

68. In summary, there are no errors in the judge's decision as regards the Awuah issue.

The irrationality issue

69. In light of everything I have said previously, I can deal with this aspect of the applicant's challenge relatively briefly.

70. The judge's conclusion that the applicant's solicitors knew, or should have known, what the live issues in the appeal were following the positive Conclusive Grounds decision, cannot properly be described as "irrational and wholly unrealistic." On the contrary, adopting as he did a fact-sensitive approach and in light of the guidance set out in the case-law, the judge's conclusion was well within the parameters of rational responses.

71. I do not accept that it would have been "extremely high risk, and probably negligent" for the applicant's solicitors to have continued to prepare for final hearing of the appeal on the basis of what they had before them, namely the original decision letter, the voluminous evidence provided to the SSHD (including expert reports), and the positive Conclusive Grounds decision. What would potentially have been risky was a failure to have addressed all relevant aspects of the protection claim. However, it is abundantly clear that the solicitors had no intention of doing that: indeed, as acknowledged by the judge, they had set about their task with "energy".

72. This ground of challenge fails.

The reasons issue

73. The judge concluded that there was no reasonable explanation for the SSHD's failure to have expeditiously communicated her position and that the case management review hearing on 12 October 2020 could have been avoided.

74. The judge conducted a summary assessment under rule 9(7)(a) of the 2014 Rules, as he was entitled to do. He disagreed with the applicant's assertion that costs should be awarded on the indemnity basis and there has been no challenge to this conclusion.

75. The judge concluded that the applicant was entitled to costs in respect of the case management review hearing and the making of the costs application itself.

76. The total cost claimed by the applicant was £2529.90 for the case management hearing and £5263.00 for the costs application.

77. Paragraphs 52 and 53 of the judge's decision read as follows:

> "52. That said, the amount of costs claimed under this head is grossly disproportionate and, more generally, the effort expended on this costs application as a whole is excessive bearing in mind the guidance referred to above that there is a danger that more time, effort and cost goes into making in challenging the order done was alleged to have been wasted in the first place. My award includes an amount for the time reasonably incurred in making the costs application.
>
> 53. The Appellant is awarded costs of £1000."

78. The applicant's challenge specifically relates to the award of costs for the case management review hearing on 12 October 2020, not the costs incurred by the making of the costs application (although it was a composite award). For my part, I agree with the judge's description of the costs claimed for the making of the application as being "grossly disproportionate".

79. It follows from the above that the point in issue is narrow. Yet it involved a degree of debate at the hearing as to the meaning of paragraph 52 of the judge's decision.

80. On the applicant's side, it was argued that the judge explained why he was unimpressed with the cost of making the costs application, but had provided no reasons for why the cost of preparing for and attending the case management review hearing had been reduced from the claimed £2529.90 to some unspecified proportion of the £1000 awarded.

81. The SSHD's response was that much of the preparation for the case management review hearing, and indeed much of its very purpose, was taken up by the issue of costs. Given that the judge was entirely unimpressed by the time and expense given over to the application for costs as a whole, it can properly be seen that the award of £1000 was a rational exercise of discretion.

82. Having reflected on this issue for some time, I am satisfied that the judge's conclusion on the amount of the award of costs made is unclear by virtue of a lack of reasons. This is based on the following considerations.

83. First, the starting point is that the case management hearing was found to have been unnecessary and that formed the basis for an award of costs.

84. Second, whilst the issue of costs did play a part in the preparation for that hearing, the extent of this was limited. In respect of the written submissions prepared for the hearing, dated 9 October 2020, only three paragraphs were given over to the issue of costs. It was these written submissions which comprise the largest single cost item of the total claimed for preparation for the hearing, as set out in the cost schedule (4.5 hours with a total of £1201.50). The lengthy written submissions prepared prior to this and, in particular, subsequently, were not part of the costs claimed.

85. Third, I do not accept that the hearing on 12 October 2020 was only concerned with the issue of costs. The appeal was ongoing and the hearing was also addressing matters of case management.

86. Fourth, I am satisfied that the phrase “this head” in paragraph 52 of the judge’s decision related solely to the costs of making the costs application. It was this to which the judge directed his obvious concern. This concern properly explained the very significant taxation of the costs of making the costs application. What it did not do was to explain why the costs of the hearing had been reduced from those claimed to an unidentified proportion of the £1000 awarded.

87. Further, I am satisfied that the final sentence of paragraph 52 confirms that the other unidentified portion of the £1000 awarded related to the costs of making the costs application.

88. Fifth, in all the circumstances, I am satisfied that the judge should have explained, albeit briefly, why the claimed costs of £2529.90 was being reduced by what was a significant amount.

89. To this very limited extent, I conclude that the judge erred.

Relief

90. I have considered whether it is appropriate to grant any relief, given the limited nature of my conclusions set out in the preceding paragraph. Ultimately, I have decided that I should.

91. I therefore make a declaration that the judge’s decision is unlawful to the extent set out in this judgment and I quash that part of the decision which is unlawful.

92. The parties will be invited to draw up an order to reflect my conclusions and the limited nature of the relief granted.

Next steps

93. The applicant has confirmed that if a new decision on costs is to be made, he would have no objection to me reconstituting myself as a Judge of the First-tier Tribunal and determining what remains of the costs application myself in order to avoid further cost. I regard that as a sensible course of action.

94. Any new costs award cannot form part of these judicial review proceedings because it would fall under the jurisdiction of the First-tier Tribunal. Therefore, I will in due course issue a separate decision on costs, having reconstituted myself as a Judge of the First-tier Tribunal and in light of any further written submissions received by the parties.

95. In advance of any such submissions, I emphasise the extremely limited basis of my decision to quash the judge's decision and the specific aspects which now require a new decision on costs. The reasons challenge was premised solely on the costs incurred in respect of the case management review hearing on 12 October 2020. I reiterate my agreement with the judge in his description of the costs claimed for the making of the costs application as being "grossly disproportionate" and that the effort expended on that application had been "excessive". It is right that the judge included "an amount" for the time reasonably incurred in making the costs application in the composite sum of £1000. In re-examining the award, I will have regard to both the costs incurred for the case management hearing and for the making of costs application itself.

Anonymity

96. It is appropriate to make an anonymity direction in this case. The applicant is a victim of modern slavery and is a refugee. In all the circumstances, these considerations outweigh the very important public interest in open justice.

Signed: H Norton-Taylor

Upper Tribunal Judge Norton-Taylor

Dated: 14 February 2022

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): *29 March 2022*

Solicitors:
Ref No.
Home Office Ref: