THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or any member of his family in connection with these proceedings.

Hilary Term
[2020] UKSC 9
On appeal from: [2018] EWCA Civ 594

JUDGMENT

MS (Pakistan) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lady Hale
Lord Kerr
Lady Black
Lord Lloyd-Jones
Lord Briggs

JUDGMENT GIVEN ON

18 March 2020

Heard on 21 November 2019

Appellant
[MS (Pakistan)]

(Instructed by Anti Trafficking and Labour Exploitation Unit)

Respondent
Sir James Eadie QC
Julia Smyth
(Instructed by The Government Legal Department)

Intervener (1)
Jason Coppel QC
Chris Buttler
(Instructed by Equality & Human Rights Commission)

Intervener (2)
Ben Jaffey QC
Shu Shin Luh
Jason Pobjoy
(Instructed by Freshfields Bruckhaus Deringer LLP)

Intervener (3)
Raza Husain QC
Shane Sibbel
Eleanor Mitchell
(Instructed by Deighton Pierce Glynn (Central London))

Interveners:-

(1) Equality and Human Rights Commission
(2) The AIRE Centre
(3) ECPAT UK

LADY HALE: (with whom Lord Kerr, Lady Black, Lord Lloyd-Jones and Lord Briggs agree)

1. The world community recognises human trafficking and modern slavery as twin evils requiring a world-wide response. The United Kingdom is party to both the 2000 Palermo Protocol (the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime) and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings ("ECAT"). The purposes of ECAT are to prevent and combat trafficking, to protect the human rights of victims, as well as to ensure effective investigation and prosecution, and to promote international co-operation on action against trafficking (article 1).

2. An essential part of that is the effective identification of victims (article 10). Accordingly, the United Kingdom has established the National Referral Mechanism ("NRM"). First responders, such as police officers or social workers, who suspect that a person may be a victim of trafficking refer the case to the Home Office, as the competent authority under the Convention, for investigation. Officials first decide whether there are reasonable grounds to believe that the person may be a victim. If there are, he or she is usually given a period of "recovery and reflection" during which money, practical assistance and if necessary accommodation are provided. Not less than 45 days later (and nowadays usually much longer) the Home Office will make a "conclusive grounds" decision as to whether the person is, on the balance of probabilities, a victim of trafficking.

3. Trafficking may, of course, take place internally. But very often it involves moving people across international borders, in which case victims are likely to face immigration issues. This case is principally about the relationship between the decision-making processes of the NRM and the decision-making processes of the immigration appeals tribunals: in essence, to what extent are the immigration appeals tribunals bound to accept the decisions of the NRM as to whether a person is, or is not, a victim of trafficking? However, it also raises questions about the relevance of a finding that a person has been trafficked to the immigration decisions which come before the tribunals. Specifically, when will a decision to remove a person from the UK be contrary to section 6 of the Human Rights Act 1998 because it is incompatible with that person's rights under article 4 of the European Convention on Human Rights ("ECHR")? Article 4.1 provides that "No-one shall be held in slavery or servitude" and article 4.2 that "No-one shall be required to perform forced or compulsory labour". This raises the broader question of the relationship between the individual's rights under article 4 and the UK's obligations under ECAT.

The history

4. MS is a national of Pakistan. He entered the UK on a visitor's visa on 22 July 2011 when he was just 16. For the four years before that he had been subject to forced labour and physical abuse by his step-grandmother and her nephews in Pakistan. He was brought to the United Kingdom by his step-grandmother, who deceived him into thinking that he was coming here for his education. He was not. When he got here, he was initially made to perform labour for which he received no pay; this was arranged by his step-grandmother, who profited financially. For the next 15 months, he moved from job to job. The First-tier Tribunal ("FTT") found that "he was under the control of adults", "exploited as cheap and illegal labour" and "felt that he had no choice but to work in these establishments in order to survive". The Upper Tribunal ("UT") held that he was acting under compulsion and manipulation throughout those 15 months. He was "a commodity who had been bought and sold and put to forced labour for little payment" (para 52).

5. MS came to the attention of the police in September 2012. They referred him to the local authority social services department. In November, the social services department referred him to the NRM because he appeared to be "a vulnerable young person and potentially a victim of trafficking for exploitation purposes". In February 2013, the NRM decided that there was no reasonable ground to believe that he was a victim of trafficking. The official concerned did not meet or interview MS. On a review of the documents, the official concluded that MS was "never under the control or influence of your alleged traffickers to the UK" because "you were able freely to quit each job you undertook and that you were able to move and work on [sic] your own accord in the UK". This decision was later maintained on review. In April 2013, MS had issued judicial review proceedings challenging the decision.

6. In the meantime, in September 2012, MS had claimed asylum but this claim was rejected on 1 August 2013 and on 2 August the Secretary of State decided to remove him from the UK. MS appealed against this decision to the FTT, which dismissed his appeal on 3 December 2013. Nevertheless, the FTT made various findings of fact which were favourable to MS (see above). Permission to appeal was initially refused by both the FTT and the UT, but the refusal was successfully challenged by judicial review and the UT granted permission to appeal.

7. The UT heard the appeal in December 2015 and January 2016 and promulgated its judgment in March 2016: [2016] UKUT 226 (IAC). It set aside the FTT's decision but preserved some of its positive credibility findings which related to MS' time in the UK. Instead of remitting the case, the UT decided it for itself. The removal decision was challenged on two grounds: first, that it was "not in accordance with the law" because it had been based upon an unlawful NRM decision; and second, that it would be incompatible with MS' human rights under

article 4 of the ECHR: Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), section 84(1)(e) and (c) respectively. The UT decided in the appellant's favour on both grounds. It acknowledged that the NRM decision was not an "immigration decision" which could be appealed under section 82 of the 2002 Act; it could only be directly challenged in judicial review proceedings. Nevertheless, if satisfied that the NRM decision was perverse, the tribunal could make its own decision as to whether the appellant was a victim of trafficking; it could also do so if the decision was in breach of the Secretary of State's guidance or on some other public law ground. If the appellant was the victim of trafficking, he was entitled to the protection of ECAT, and the decision to remove him was not in accordance with the law. It was also a breach of his rights under article 4 of the European Convention.

8. The Secretary of State appealed to the Court of Appeal, which allowed the appeal: [2018] EWCA Civ 594; [2018] 4 WLR 63. The court held that, in accordance with *AS (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 1469; [2014] Imm AR 513, the tribunal could only go behind the trafficking decision and re-determine the factual issues if the decision was perverse or irrational or one which was not open to it (para 70). It was difficult to identify precisely what it was in the NRM decisions which was susceptible to such a challenge (para 75). The UT had in effect treated the NRM decision as an immigration decision, which it was not (para 77). The UT had also been wrongly influenced by a submission that the obligations under ECAT were positive obligations under article 4, contrary to *Secretary of State for the Home Department v Hoang Anh Minh* [2016] EWCA Civ 565; [2016] Imm AR 1272. Hence it had been wrong to conclude that there had been a breach of the procedural obligations under article 4.

A preliminary issue

9. This Court gave the appellant permission to appeal in February 2019. He was later able to resolve his immigration status by other means and applied to withdraw his appeal. However, the Equality and Human Rights Commission had applied to intervene in the case and wished to take over the appeal. This was resisted by the Secretary of State on the grounds that the Commission had no power to take over a case and that the Court had no power to allow it. Accordingly, a preliminary hearing was held on 2 October 2019.

10. The Commission applied to intervene in the appeal under its power to "institute or to intervene" in legal proceedings, whether for judicial review or otherwise, if it appears that the proceedings are relevant to a matter in connection with which the Commission has a function (Equality Act 2006, section 30(1)). Among the Commission's functions is the protection of human rights and encouraging public authorities to act compatibly with them (section 9(1)(c) and (d)).

Thus the only question was what the Court might permit the Commission, as an intervener, to do. An intervener is a party to an appeal (Rules of the Supreme Court 2009 (SI 2009/1603 (L 17)), rule 3(2)). An appeal can only be withdrawn with the written consent of all parties or the permission of the Court (rule 34(1)). The appeal was therefore extant unless and until the Court gave permission to withdraw it. The Rules do not expressly state that the Court may permit an intervener in effect to stand in the shoes of an appellant. However, they do provide that if any procedural question arises which is not dealt with in the Rules, the Court may adopt any procedure that is consistent with the overriding objective, the Constitutional Reform Act 2005 and the Rules (rule 9(7)). The overriding objective is to secure that the Court is accessible, fair and efficient (rule 2(2)). Where an important question of law, which may well have been wrongly decided by the Court of Appeal, is raised in an appeal, it is clearly open to the Court to consider that the question should be fairly decided even though one of the parties no longer wishes to pursue it. Accordingly, we allowed the Commission to intervene and to take over the main conduct of the appeal.

The principal issue

11. The Secretary of State now concedes that "when determining an appeal that removal would breach rights protected by the ECHR, the tribunal is required to determine the relevant factual issues for itself on the basis of the evidence before it, albeit giving proper consideration and weight to any previous decision of the defendant authority" (para 65 of the printed case). Hence it is now common ground that the tribunal is in no way bound by the decision reached under the NRM, nor does it have to look for public law reasons why that decision was flawed. This is an important matter. As the AIRE Centre and ECPAT UK point out, had the tribunal been bound by such decisions, it could have had a profoundly chilling effect upon the willingness of victims to engage with the NRM mechanism for fear that it would prejudice their prospects of a successful immigration appeal.

12. There are several reasons why the tribunal cannot be bound by the NRM decision. First, its jurisdiction is to hear appeals against the immigration decisions of officials: 2002 Act, section 82(1). It does not have jurisdiction judicially to review the decisions of the competent authority under the NRM. An appeal is intrinsically different from a judicial review.

13. Second, those appeals are clearly intended to involve the hearing of evidence and the making of factual findings on relevant matters in dispute. This is made clear both by the 2002 Act and the Rules. Section 85(4) provided:

> "On an appeal under section 82(1) … against a decision the tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision."

The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, (SI 2014/2604 (L 31)) in rules 14 and 15, and the Tribunal Procedure (Upper Tribunal) Rules 2008, (SI 2008/2698 (L 15)) in rules 15 and 16, make detailed provision for the calling of witnesses and the production of documents.

14. Third, that this was the role of the tribunal was made crystal clear by the House of Lords in the well-known case of *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167. That case concerned individuals who did not qualify for leave to enter or remain under the Immigration Rules but claimed that to deny them leave would be incompatible with their rights under article 8 of the ECHR. Discussing the predecessor to the 2002 Act, in section 65 of the Immigration and Asylum Act 1999, Lord Bingham of Cornhill said this:

> "These provisions, read purposively and in context, make it plain that the task of the appellate immigration authority, on an appeal on a Convention ground against a decision of the primary official decision-maker refusing leave to enter or remain in this country, is to decide whether the challenged decision is unlawful as incompatible with a Convention right or compatible and so lawful. It is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety. The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it." (para 11)

The earlier decisions, of *Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716; [2003] 1 WLR 2979 and *M (Croatia) v Secretary of State for the Home Department* [2004] UKIAT 24; [2004] INLR 327,

> "were right to recognise … that the judgment of the primary decision-maker, on the same or substantially the same factual basis, is always relevant and may be decisive. But they do not describe the correct approach of the immigration appellate authority to its role." (para 12)

In contrast to cases such as *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 and *R v Ministry of Defence, Ex p Smith* [1996] QB 517, which were judicial reviews of departmental policy,

> "the appellate immigration authority, deciding an appeal under section 65, is not reviewing the decision of another decision-maker. It is deciding whether or not it is unlawful to refuse leave to enter or remain, and it is doing so on the basis of up-to-date facts." (para 13)

In an article 8 case, the authority had a two-part role:

> "The first task of the appellate immigration authority is to establish the relevant facts. These may well have changed since the original decision was made. In any event, particularly where the applicant has not been interviewed, the authority will be much better placed to investigate the facts, test the evidence, assess the sincerity of the applicant's evidence …" (para 15)

The Upper Tribunal, in the case before us, made the same point:

> "… this Tribunal is better equipped than the Authority to make pertinent findings. The decisions of the Authority were the product of a paper exercise, entailing no live evidence. In contrast, we have the distinct advantage of having heard the appellant's *viva voce* evidence and, further, we have received evidence not available to the Authority. Linked to this is the Secretary of State's submission, with which we concur, that the appellant's credibility is central to the disposal of this appeal." (para 46)

The second task was to weigh up the competing considerations for and against granting leave, in other words, the proportionality exercise required by article 8(2) of the ECHR. After listing the public interest factors against granting leave, Lord Bingham in *Huang* said this:

> "The giving of weight to factors such as these is not, in our opinion, aptly described as deference; it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given

> subject matter and access to special sources of knowledge and advice." (para 16)

15. It is thus apparent that "the proper consideration and weight", which the Secretary of State says should be given to any previous decision of the authority, will depend upon the nature of the previous decision in question and its relevance to the issue before the tribunal. The decision of the competent authority under the NRM process was an essentially factual decision and, for the reasons given, both the FTT and the UT were better placed to decide whether the appellant was the victim of trafficking than was the authority. The more difficult question is the precise relevance of that factual determination to the appeal before the tribunals.

The second issue: trafficking and the ECHR

16. The Secretary of State argues that the Court of Appeal was correct to dismiss the appellant's appeal because the decision to remove him from the UK entailed no possible breach of article 4 of the ECHR. The Upper Tribunal found that he would not be at risk of being re-trafficked back to the UK (or elsewhere) if he returned to Pakistan. He was now older and more mature and would be able to re-locate and establish himself in a manner which would distance him sufficiently from his step-grandmother and her nephews (para 66). The positive obligations in article 4, it is argued, follow the same pattern as the positive obligations in articles 2 and 3. It is wrong to enlarge them by reference to the obligations in ECAT, as the appellant and the interveners seek to do.

17. It is therefore necessary to examine the relevant obligations contained in ECAT and the Strasbourg jurisprudence relating to article 4 of the ECHR. However, it may not be necessary to import all of the obligations in ECAT into article 4 in order to find a violation of the obligations in article 4.

ECAT

18. Article 4 of ECAT defines "trafficking" as follows:

> "a. 'Trafficking in human beings' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of

> exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
>
> b. The consent of a victim of 'trafficking in human beings' to the intended exploitation set forth in sub-paragraph (a) of this article shall be irrelevant where any of the means set forth in sub-paragraph (a) have been used;
>
> c. The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in human beings' even if this does not involve any of the means set forth in sub-paragraph (a) of this article;
>
> d. 'Child' shall mean any person under 18 years of age;
>
> e. 'Victim' shall mean any natural person who is subject to trafficking in human beings as defined in this article."

Thus, it was sufficient for the appellant, as a child, to be identified as a victim of trafficking if he was recruited and transported for the purpose of exploitation in the form of forced labour or services. There was no need to show that this had been achieved by any of the means set out in article 4.a.

19. ECAT imposes a large number of obligations upon state parties. The following are the most relevant to this case. Article 5 requires parties to establish or strengthen effective policies for preventing trafficking and to use a child-sensitive approach to their development and implementation. Article 10 requires parties to identify victims by a procedure which takes account of the special situation of child victims and to have people trained and qualified in preventing and combating human trafficking to do this. Where there are reasonable grounds to believe that a person is the victim of trafficking, that person should not be removed from the country until the identification process is completed. Article 12 requires parties to provide necessary assistance to victims in their physical, psychological and social recovery, including subsistence, accommodation, counselling and information. Article 14 requires those found to be victims to be issued with a residence permit if this is necessary owing to their personal situation or for the purpose of co-operation with the authorities in an investigation or criminal proceedings. Articles 18 to 22 require the creation of various criminal offences and article 23.1 requires that they be

punishable by "effective, proportionate and dissuasive sanctions". Article 40 provides that the Convention does not affect the other international instruments to which the parties are party. Nor does it affect the rights, obligations and responsibilities of states and individuals under international law, including international humanitarian law and international human rights law. This is the usual saving for the other rights and obligations arising under international law: it does not mean that those rights and obligations are to be interpreted without reference to ECAT.

20. ECAT as such has not been incorporated into UK law. Its obligations have been implemented by a variety of measures. The NRM is designed to fulfil the obligations in articles 10, 12 and 13; immigration rules have been modified in the light of article 14; and various criminal offences are created by the Modern Slavery Act 2015. The NRM does not, however, give private law rights to individuals. There is no right of appeal against an adverse decision or against a failure to provide the expected assistance. The only remedy lies in judicial review. However, the Secretary of State has consistently accepted that the NRM should comply with ECAT. In *R (Atamewan) v Secretary of State for the Home Department* [2013] EWHC 2727; [2014] 1 WLR 1959, para 55, it was accepted that it would be a justiciable error of law if the NRM Guidance did not accurately reflect the requirements of ECAT and a decision based on that error would accordingly be unlawful. The same was common ground in *R (PK (Ghana)) v Secretary of State for the Home Department* [2018] EWCA Civ 98; [2018] 1 WLR 3955.

21. But this is of limited help to a victim who is subject to an adverse immigration decision. It would be of much greater help if a failure to observe the requirements of ECAT were also a violation of article 4 of the ECHR.

Article 4 ECHR

22. The first case in which the European Court of Human Rights examined article 4 in this context was *Siliadin v France* (2006) 43 EHRR 16. A 15-year old girl from Togo was brought to France by a relative and then "lent" to a couple who obliged her to work for them unpaid "for years … without respite and against her will" (para 114). The Court held that limiting article 4 to direct state action would be contrary to international instruments and render it ineffective. Accordingly, governments had positive obligations "in the same way as under article 3 for example, to adopt criminal law provisions" penalising slavery, servitude and forced labour "and to apply them in practice" (para 89). The court went on to hold that, while the applicant had not been held in slavery, she had been held in servitude and she had been required to perform forced or compulsory labour. The French criminal law at the time was defective and the perpetrators had not been convicted. Hence there was a violation of article 4. To like effect was *CN v United Kingdom* (2013) 56 EHRR 24

holding that the lack of any legislation in the UK penalising forced labour and servitude violated article 4 (the Modern Slavery Act 2015 followed).

23. The breakthrough in *Siliadin* was recognising that article 4 imposed, not only negative, but positive obligations upon the state. The court relied principally on instruments relating to forced labour and discussion of modern slavery and made only passing reference to ECAT in its discussion. The leading case on the relationship between ECAT and article 4 is *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1. A young Russian woman, Ms Rantseva, had been working as an artiste in a cabaret in Cyprus. She left the apartment she was sharing with other women working there, leaving a note that she wanted to go back to Russia. The manager of the cabaret informed the authorities and, when she was seen in a discotheque, he went and apprehended her and took her to a police station. The police consigned her to the manager, who collected her and took her to the apartment of a male employee. The next morning, she was found dead on the street outside the building. An inquest concluded that in an attempt to escape "and in strange circumstances" she had jumped into the void and was fatally injured. Her father made complaints against both Cyprus and Russia under articles 2 and 4 (and against Cyprus under other articles) complaining of the lack of sufficient investigation and protection.

24. The court had thus to consider whether trafficking, within the meaning of the Palermo Protocol (in force at the time of these events) and ECAT (in force later), fell within the scope of article 4, despite the fact that it referred only to slavery, forced labour and servitude. The court observed:

> "The court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions. It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade." (para 281)

25. Hence the court concluded that trafficking within the meaning of article 4(a) of ECAT fell within the scope of article 4 of the ECHR (para 282). It was not necessary to decide whether it was slavery, servitude or forced labour. The court then went on to discuss what this entailed. It repeated, as had been said in *Siliadin v France*, that, together with articles 2 and 3, article 4 enshrined one of the basic values

of the democratic societies of the Council of Europe (para 283). The spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims and potential victims. This required, not only the criminal law, but also the regulation of businesses used as a cover for trafficking, and immigration rules (para 284). The extent of the positive obligations arising under article 4 had to take account of the broader context of the Palermo Protocol and ECAT, which required not only punishment but prevention and protection (para 285). As with articles 2 and 3, a positive obligation to take operational measures to protect an individual would arise where the authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that the individual had been or was at real and immediate risk of being trafficked or exploited within the meaning of the Palermo Protocol and article 4(a) of ECAT (para 285). Like articles 2 and 3, article 4 also entailed a procedural obligation to investigate situations of potential trafficking. This did not depend upon a complaint. The authorities must act of their own motion once the matter had come to their attention. The investigation must be independent and capable of leading to the identification and punishment of the individuals responsible (para 288).

26. In relation to Cyprus, violations were found in the regulatory regime for artistes' visas which did not afford practical and effective protection against trafficking and exploitation (para 293); in the multiple failures of the police to investigate whether Ms Rantseva had been trafficked and to protect her (para 298); and under article 2 in the failure to conduct an effective investigation into her death (para 300). In relation to Russia, there was no evidence that the Russian authorities were aware of a real and immediate risk to Ms Rantseva before she left and thus no breach of an operational duty towards her (paras 305, 306), but there was a breach of the procedural obligation to investigate alleged trafficking (para 309).

27. Thus, the appellant is right to point to the numerous references to the Palermo Protocol and ECAT in informing the content of the state's obligations under article 4. On the other hand, the Secretary of State is also right to point out that the general structure of those obligations was modelled on the general structure of the state's obligations under articles 2 and 3. However, as will become apparent, it is not necessary for us to decide whether all the obligations in ECAT are incorporated into the state's positive obligations under article 4 in order to decide this appeal.

28. The next case is *Chowdury v Greece* (Application No 2184/15) Judgment of 30 March 2017. A large group of Bangladeshi strawberry pickers protested that their promised wages had not been paid. They worked very long hours and their living and working conditions were "particularly harsh" (para 94). They were overseen by armed guards, who opened fire on the protesters and injured some of them. The Greek public prosecutor accepted that the injured workers were victims of trafficking but not that the other workers were. The Assize Court acquitted the

employers of trafficking. The workers complained of forced and compulsory labour contrary to article 4.2.

29. The court held that member states are required to adopt a comprehensive approach and put in place measures, not only to punish the traffickers, but also to prevent trafficking and protect the victims (para 86). This required the trilogy of measures set out in *Rantsev*: a legislative and administrative framework to do this effectively (para 87); an obligation to take operational measures to protect individual victims in certain circumstances (para 88); and a procedural obligation to investigate potential trafficking situations (para 89).

30. The facts of the case clearly demonstrated the existence of forced labour and human trafficking, consistent with the definitions in the Palermo Protocol and ECAT (para 100). Greece had complied with the obligation to put in place a legislative framework to combat trafficking (para 109). The situation in the strawberry fields had been well-known to the authorities, the Ombudsman had alerted them to the situation, but there had only been a sporadic reaction; hence there was a breach of the obligation to take operational measures to prevent trafficking and protect the applicant victims (para 115). Further, there was a breach of the obligation to investigate, not only in relation to the injured workers whose treatment had resulted in the failed prosecution (para 127), but also in relation to the other workers, because the public prosecutor had failed to investigate and had disregarded the obligation in article 13 of ECAT to provide a "recovery and reflection period" (paras 120-122). In short, there had been a breach of the obligations to prevent, to protect, to investigate and to punish (para 128).

31. Thus the judgment does follow the same analytical framework as the judgment in *Rantsev*, but it more noticeably relies upon specific provisions in ECAT to flesh out the content of those positive obligations.

32. The last case cited to us was *J v Austria* (Application No 58216/12) Judgment of 17 January 2017. The applicants were Filipina women who had been recruited for domestic work in Dubai where they had been badly treated. They were brought by their employers on a holiday to Vienna but escaped after three days and were supported by the Filipino community there. Some months later, after their employers had returned to Dubai, they went to the police. The Austrian authorities decided not to prosecute because the trafficking had taken place abroad and the traffickers were foreigners. The women complained that the Austrian authorities had failed in their protective and investigative obligations under article 4.

33. The Court repeated the positive obligations to protect victims, to conduct a comprehensive investigation and to "put in place a legislative and administrative

framework to prohibit and punish trafficking, as well as to take measures to protect victims, in order to ensure a comprehensive approach to the issue, as required by the Palermo Protocol and the Anti-Trafficking Convention" (para 106). However, it decided that the authorities had done all that could reasonably be expected to protect the women: the police had treated them as potential victims; they had been interviewed by specially trained police officers; a personal data disclosure ban was imposed so that their whereabouts were untraceable; they were supported by an NGO which was publicly funded to provide assistance to victims of human trafficking; and they were given legal representation, procedural guidance and assistance to facilitate their integration in Austria (including special residence permits) (paras 110, 111). There was no obligation on Austria to investigate their recruitment in the Philippines and alleged exploitation in the United Arab Emirates (para 114). The authorities did investigate their treatment in Austria and their conclusion that no offences had been committed there "does not appear unreasonable" (para 116). Nor could they be expected to try and pursue their investigations with the authorities in the United Arab Emirates (para 117).

Application to this case

34. The UT having decided that the appellant was indeed a victim of trafficking, it is necessary to decide whether his removal from the UK would amount to a breach of any of the positive obligations in article 4 of the ECHR. It could well be said that, because of the defective NRM decision, the appellant was denied the protective measures required by ECAT, including the immigration status necessary for him to co-operate in the investigation and prosecution of the perpetrators. As is clear from the above cases, article 4 does require operational measures of protection where the authorities "were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been or was at real and immediate risk of being trafficked or exploited" (*Rantsev*, para 286). However, it does appear that, once he had come to the attention of the police, he was effectively removed from the risk of further exploitation. Further, the UT decided that he would not be at further risk if returned to Pakistan.

35. However, it is clear that there has not yet been an effective investigation of the breach of article 4. The police took no further action after passing him on to the social services department. It is not the task of the NRM to investigate possible criminal offences, although the competent authority may notify the police if it considers that offences have been committed: *Secretary of State for the Home Department v Hoang Anh Minh* [2016] EWCA Civ 565; [2016] Imm AR 1272. The authorities are under a positive obligation to rectify that failure. And it is clear that an effective investigation cannot take place if the appellant is removed to Pakistan: the UT rightly held that "it is inconceivable that an effective police investigation and any ensuing prosecution could be conducted without the full assistance and co-

operation of the appellant. Realistically this will not be feasible if he is removed to Pakistan" (para 64).

36. Accordingly, the appeal should be allowed and the decision of the UT restored on this ground.

"In accordance with the law"

37. In the light of that decision, it is unnecessary for us to consider whether the UT was also correct to hold that, because it followed on from a flawed NRM decision, the removal decision was "not in accordance with the law". As from 20 October 2014, that ground of appeal is no longer contained in section 84 of the 2002 Act, following amendments made by the Immigration Act 2014, section 15. It will therefore be of limited relevance in future. It remains a ground of appeal that the removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998. As the Upper Tribunal pointed out, appellants will still be able to appeal on this ground if the decision breaches the requirements of article 4.