Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/01391/2015**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision and Reasons Promulgated**
On 15th June 2017 and	**On 01st October 2018**
14th August 2018	

Before

UPPER TRIBUNAL JUDGE COKER

Between

JM
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Kirk, instructed by Elder Rahimi solicitors on 15th June 2018 and Mr A W Khan, Fountain solicitors on 14th August 2018

For the Respondent: Mr P Singh on 15th June 2017 and Ms H Aboni on 14th August 2018, Senior Home Office Presenting Officers

DETERMINATION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) 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 appellant in this determination identified as JM. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. Following a hearing on 15th June 2017 I found an error of law in the decision of the First-tier Tribunal decision dismissing the appellant's international protection claim. My decision was promulgated on 26th July 2018 as follows:

> 1. First-tier Tribunal Judge Miles dismissed JM's protection claim appeal on asylum and human rights grounds in a decision promulgated on 9 November 2016. The First-tier Tribunal Judge found JM credible and, in paragraphs 10.14 – 10.17 of his decision sets out in summary his findings on the factual elements of her claim relied upon, namely:
> - Her parents were killed in November 2008 by people who wanted to take their land for the exploitation of oil;
> - She was lured into working for T who raped her and forced her into prostitution in Nigeria before trafficking her to the UK for the same purpose;
> - Although she had stopped working as a prostitute in the UK when arrested she was a person trafficked to the UK from Nigeria for sexual purposes;
> - She is a single woman without children
> - She has been diagnosed with HIV but there is no challenge to the respondent's evidence that relevant treatment for her is available in Nigeria;
> - She was working illegally in the UK at the time of her arrest;
> - She would not have a supportive family on her return to Nigeria;
> - She has little educational or vocational skills;
> - There was no evidence or mention made of any mental health difficulties;
> - Her conduct in using false documents demonstrates an acquisition of skill and experiences which make her better equipped to have access to a livelihood on return to Nigeria.
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> 2. The First-tier Tribunal Judge assessed the risk to JM if returned to Nigeria. He set out the headnote of *HD (Trafficked women) Nigeria CG* [2016] UKUT 00454 (IAC). The judge concluded that she would not be at risk of being persecuted if removed to Nigeria or that there would be a risk of a breach of Articles 2, 3 or 8 of the ECHR.
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> 3. The applicant sought permission to appeal, permission being granted by the Upper Tribunal, on the grounds that it was arguable the First-tier Tribunal judge failed to take into account all material matters when assessing risk on return.
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> 4. The grounds relied upon are:
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> (i) Having accepted the appellant was a lone female who has previously been raped and trafficked and would be returning to Nigeria without a supportive family, the judge has erred in his assessment of her vulnerability and risk of re-trafficking.
> (ii) The judge failed to make findings required under paragraph 276ADE whether there would or would not be very significant obstacles to her return to her home country in the light of having been previously trafficked to the UK for the purposes of sexual exploitation; the judge failed to consider whether there were exceptional and compelling circumstances.
> (iii) The judge failed to give adequate reasons why the appellant does not satisfy the Refugee Convention; the judge made contradictory findings having held she had little educational or vocational skills but then stating that she had acquired skills and experiences that made her better equipped to access a livelihood.
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> 5. In his judgment, the First-tier Tribunal judge states that in his view there are an

"endless number of potential victims of trafficking and traffickers will have an easier task in targeting a woman with no knowledge of trafficking or its consequences rather than the person who has suffered as a result and is therefore well aware of the tactics used to entice individuals into this situation".

In reaching this conclusion the judge has failed to consider the appellant's individual claim and appears to have ignored the country guidance. If what he says is correct (and there is no evidence to suggest that what he says is as a general rule true), it would result in any woman who has been trafficked being able to return in safety to Nigeria. He refers to it being speculative that the original traffickers would locate a returned victim. Yet the country guidance makes clear that such a scenario is indeed unlikely; it is not clear why he makes this finding. The issue is whether an individual is at risk because of the matters set out in the head note and amplified in the judgment of *HD*.

6. The judge acknowledges the appellant has no or little educational or vocational skills yet also finds that she has acquired skills and experiences. He relies upon her ability to access the NHS in a false name to make a finding that she has acquired resourcefulness and determination and in control of her own life. He refers to her ability to work "despite her HIV status". It is unclear on what basis he considers her HIV status to be relevant to her ability to work. He fails to take account of the limitations of what is offered by NAPTIP and the relevance of that for this appellant as a victim of trafficking.

7. The judge has failed to engage with the Country Guidance other than to set it out in the decision. The starting point is that she is a victim of trafficking. The analysis of whether she is at risk should flow from that taking account of all factors including the extent to which she has been able to access the NHS, was able to leave the person who was holding her in the UK and is able to work in the UK but in the context of what her situation will likely be in Nigeria.

8. The judge failed to engage with paragraph 276ADE Immigration Rules and failed to make any adequately reasoned findings.

9. Accordingly the First-tier Tribunal judge erred in law in reaching his decision and I set aside the decision to be remade. The findings of fact, as set out above, are retained.

Conclusion

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision, the findings of fact set out in paragraph 1 are retained.

Directions

1. The resumed hearing of this appeal will be listed on the first available date after 21days.

2. Both parties have leave to file such background evidence as they intend to rely upon, such evidence to be filed no later than 7 days prior to the resumed hearing.

3. If the appellant intends to rely upon paragraph 276ADE and, in particular, that there would be very significant obstacles to her reintegration in Nigeria

> and/or that there are exceptional or compelling circumstance which prevent her return there, she is to file and serve a skeleton argument on that point no later than 7 days prior to the hearing; such skeleton to deal with the issue of why such matters are not covered in her protection claim appeal.

2. For some reason the resumed hearing was not listed as I had directed. It came before UTJ Bruce, following the making of a transfer order, on 13th July 2018. She adjourned the hearing because of a new point made on behalf of the respondent namely that the handing down of the Court of Appeal judgment in *MS (Pakistan)* [2018] EWCA Civ 594 raised issues as to the weight to be given to and the relevance of the Competent Authority ("CA") decision that the appellant was NOT a victim of trafficking. The respondent submitted that he should not be constrained from raising this as a new point given the clarification in the law and invited the Upper Tribunal to re-visit the error of law decision and thereafter remit the appeal to the First-tier Tribunal for re-hearing in accordance with *MS (Pakistan).* UTJ Bruce gave oral directions that the parties file and serve skeleton arguments and for the appeal to be relisted before me.

3. On 3rd August 2018, I made the following directions:

> On 13thJuly 2018 Upper Tribunal Judge Bruce directed both parties to file and serve skeleton arguments dealing with procedural issues arising from the late submission of a new point of argument relating to MS (Pakistan) [2018] EWCA Civ 594.
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> The respondent has filed and served, in the form of a letter dated 26th July 2018, submissions for the Error of law decision to be re-opened. This will be considered at the hearing on 14th August 2018.
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> I have considered that letter and the matter generally. I note Article 14.5 of the Council of Europe Convention against Trafficking in Human Beings states that:
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> > "Having regard to the obligations of Parties to which Article 40 of the Convention refers, each Party shall ensure that granting of a permit according to this provision shall be without prejudice to the right to seek and enjoy asylum".
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> Article 40 states that:
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> > "…
> > (4) Nothing in this Convention shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulment* as contained therein".
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> Paragraph (10) of the preamble to Directive 2011/36/EU *on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA* states that:
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> > "This Directive is without prejudice to the principle of non-refoulement in accordance with the 1951 Convention relating to the Status of Refugees (Geneva Convention), and is in accordance with Article 4 and Article 19(2) of the Charter of Fundamental Rights of the European Union".

I direct

1. The parties do provide the Upper Tribunal with further written submissions in relation to the extracts from the Council of Europe Convention against Trafficking in Human Beings and the EU Anti-trafficking Directive referred to above and its potential impact on the decision in *MS (Pakistan).*

2. The parties do also provide further written submissions on the manner in which the Upper Tribunal is bound by *MS (Pakistan).*

3. These written submissions are to be filed and served no later than 4pm on 10th August 2018 and marked for the attention of Upper Tribunal Judge Coker.

4. The parties are granted permission to up-date the Upper Tribunal in relation to any relevant factual developments up until the date of their written submissions.

4. Both parties complied with both sets of directions.

Appeal rights

5. An issue that arose at the hearing before me on 14th August 2018 concerned the transitional provisions relating to the implementation of the new appeal procedures in the Immigration Act 2014. On 22nd January 2014, the appellant had been served with form IS151A informing her that she was an illegal entrant and liable to detention. On 10th July 2014, the respondent took a decision to remove the appellant, stating in the notice of decision that she had refused the appellant's asylum and human rights claim for the reasons in the attached letter. That Notice of Decision also notified the appellant of her appeal rights under s82(1) Nationality, Immigration and Asylum Act 2002 and the grounds upon which she could appeal. That decision was not served until 17th January 2015. The letter referred to in the Notice of Decision is dated 15th January 2015. That letter states that she must appeal by the date on the enclosed Notice (29th January 2015). It also states that if she wished to appeal she should do so within 28 days of her departure from the UK. Plainly, both those statements cannot be correct; the latter statement seems to refer to the rights of appeal that apply where a protection claim has been certified under s94(1) Nationality, Immigration and Asylum Act 2002 – which this has not.

6. The Immigration Act 2014 significantly amended appeal rights – in particular an appeal does not lie against a removal decision but against a refusal of a claim for international protection. The decision which has been treated throughout these proceedings as the appealable decision is the Notice of Decision to remove. Since October 2014, removal decisions are not appealable decisions. The combination of the reasons for refusal of the claim for international protection and the decision to remove do not comply with the Notices Regulations. Neither party at any stage has raised a jurisdictional query. I am satisfied that although no specific waiver of the failure to serve a valid Notice of decision has been given, the appellant has

in fact waived that requirement by her pursuit of the appeal; her appeal is an appeal against the refusal of her international protection claim and human rights claim.

Re-opening of the Error of Law decision.

7. The submission that the Error of Law decision should be re-opened is predicated upon the findings by the judge that the appellant had been trafficked to the UK, such a finding being erroneous given the dicta in *MS (Pakistan)* that the finding of the CA can only be dislodged if it is perverse or irrational (See [69] *MS (Pakistan)).*

8. The First-tier Tribunal judge found that the appellant had been trafficked, reaching his decision upon consideration of the evidence before him. He did not conclude that because there had been a negative trafficking decision by the CA that she had not been trafficked; he considered the evidence that was before him and reached his findings on the evidence before him, applying the lower standard of proof. The First-tier Tribunal judge's finding that the appellant had been trafficked does not subvert the CA finding. It is a finding reached in the context of different proceedings for a different purpose – the purpose of establishing whether the appellant is or is not entitled to international protection – as can be seen from the other findings, or lack of findings, made by him and set out in [1] above. In terms of the error of law, the error is to fail to analyse whether her vulnerability would render her at risk of being trafficked irrespective, (given *MS (Pakistan))* of whether she had been previously trafficked or whether, given her particular vulnerability, she is at risk of Article 3 harm together with the contradictory findings made by him in terms of return to Nigeria. I do not re-open the Error of Law decision save to conclude that the starting point of consideration of her claim is not that she is a victim of trafficking but that she is an individual with the characteristics that have been identified by the First-tier Tribunal judge and that these must be considered, taking into account the finding of the CA that she was not a victim of trafficking.

Trafficking

9. The essence of the respondent's submissions is that the Tribunal is bound by *MS (Pakistan)* which he submits means that Tribunal judges are only entitled to reach a different view to that of the Competent Authority ("CA") where the trafficking decision can be demonstrated to be perverse or irrational or one which was not open to the authority. This, it is submitted by the respondent, involves a two-stage approach: first a decision that the decision taken by the CA was perverse or irrational or one which was not open to the CA – and only if it is, can the appellant invite the Tribunal to re-determine relevant facts and take account of subsequent evidence.

10. The appellant submits[1] that the decision of the CA is simply a factor that is taken into account in the overall assessment of the appellant's claim for international protection; the decision taken by the CA is taken on the basis of written evidence without the benefit of hearing from the appellant and her

[1] She also submits that in this case the decision of the CA is perverse – as to which see later in my decision.

oral evidence; that the decision is taken on the balance of probabilities and not on the lower standard as in a protection claim.

11. *MS (Pakistan)* is an appeal against a UT decision *MS (Trafficking – Tribunal's Powers – Art. 4 ECHR) Pakistan* [2016] UKUT 226 (IAC). As stated by Flaux LJ in [2]

> The appeal raises an issue of principle as to the jurisdiction of the First-tier Tribunal and the Upper Tribunal on a statutory appeal…to undertake an indirect judicial review of a negative trafficking decision made by the Secretary of State in that individual's case. In that context, the appeal concerns the scope and effect of the previous decision of this Court in *AS (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 1469.

12. A trafficking decision is not an immigration decision. There is no statutory appeal against a decision of the CA that a person has or has not been trafficked – the only remedy for a party who disputes the decision is by way of judicial review. It is not open to the Tribunal, in a statutory appeal, to in effect conduct an appeal of the CA decision. It is also clear that merely because a person is a victim of trafficking, that does not enable them to remain in the UK on any long-term basis; the provisions for periods of residence to be granted for certain periods and for certain reasons are not immigration decisions subject to a statutory appeal if an individual does not agree with the period of leave s/he has been granted on not granted. Recognition as a victim of trafficking does not result in a finding, without more, that an individual is to be recognised as a refugee.

13. Flaux LJ states

> Analysis and conclusions
>
> 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. Mr Lewis is correct that 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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> 70. Of course, a trafficking decision, whether positive or negative, may well be relevant to the issue before the Tribunal as to the lawfulness of the removal decision. However, an appellant can only invite the tribunal to go behind the trafficking decision and re-determine the factual issues as to whether trafficking has in fact occurred if the decision of the authority is shown to be

perverse or irrational or one which was not open to it. This is clearly what Longmore LJ was saying in the last two sentences of [18] of his judgment[2].

71. The Upper Tribunal was thus wrong and misinterpreted the decision of the Court of Appeal in *AS (Afghanistan)* when it said at [39] of its Decision that, in effect, the Court of Appeal was contemplating that the Tribunal could go behind the negative trafficking decision and re-make the decision as to whether there had been trafficking, whenever that trafficking decision could be challenged on any judicial review ground as opposed to the narrow ground of perversity. Contrary to the view of the Upper Tribunal, there is nothing in [12] to [18] of Longmore LJ's judgment which justifies that conclusion. Certainly it is not justified by his reference to *Abdi*.

72. To begin with *Abdi* was decided at a time when the appellate process under section 19 of the Immigration Act 1971 involved a review by the adjudicator or tribunal of any determination of fact, not a complete re-determination of issues of fact. It is equally clear that, contrary to Mr Toal's submission, the adjudicator was not engaged in a process of making his own findings of fact. As Peter Gibson LJ noted at 154:

"He [the adjudicator] decided that there existed 'a certain circumscribed jurisdiction in the adjudicator to examine the facts upon which the decision had been based and to consider whether the decision is in accordance with the law or is the result of an excess or misuse of the Secretary of State's powers.'"

73. Furthermore and in any event, that was a case of a statutory appeal against the particular decision made in disregard of the policy, not an indirect challenge to a decision not subject to a right of appeal, as in this case. It seems to me that Longmore LJ recognised that distinction when, in [11] of his judgment, he rejected the argument of the respondent based on *Abdi* that a failure to follow the policy, here the competent authority guidance, gave rise to a right of appeal, on the basis that the argument is contrary to the decision of this Court in *AA (Iraq)* that there is no right of appeal against a negative trafficking decision, the only remedy being to apply for permission for judicial review.

74. Accordingly, Longmore LJ was indeed careful to limit the instances where there can be an indirect challenge to a negative trafficking decision to those where the decision is shown to be perverse or irrational or one which was not open to the authority. The analysis of *AS (Afghanistan)* by Collins J in *XB* that the circumstances in which there can be an indirect challenge are much wider is simply wrong.

…..

79. *Huang*, *Hesham Ali* and *J1* are all concerned with what the approach of a Tribunal should be to a decision which is being appealed, namely that the Tribunal should determine for itself by reference to all the relevant facts whether the decision was lawful, not simply review the decision in a species of judicial review. 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. Contrary to Mr Toal's submissions,

[2] *AS (Afghanistan)* [2013] EWCA Civ 1469 "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"

nothing in the narrowness of the circumstances in which such an indirect challenge is permissible in any sense subverts the appeal process or the function of the Tribunal in respect of the decision which is the subject of the statutory appeal, here the decision of the Secretary of State to remove the respondent.

80. I was not impressed by the suggestion that this narrow approach which I consider is appropriate would be more circumscribed than the approach of the criminal courts to the question of trafficking. The criminal courts are concerned with wider issues, as the passages cited from Lord Judge CJ's judgment make clear. The judgment in that case was handed down some months before *AS (Afghanistan)* and whilst it is clear from the last sentence of [28] that the Court of Appeal Criminal Division did consider that the circumstances in which a trafficking decision could be challenged were circumscribed, it did not have the benefit of the subsequent analysis in *AS (Afghanistan)*.

81. The short answer to the parallel which Mr Toal sought to draw between trafficking decisions and asylum decisions is, as Mr Lewis pointed out, that the latter are susceptible to appeal under sections 82(1)(a) and 84(1)(a) of the 2002 Act as amended in 2014 so that the parallel is a false one. Trafficking decisions simply do not have the same status as adverse asylum decisions.

82. As for the reliance on *Hounga v Allen* I agree with Mr Lewis that this was misconceived, since in that case neither the authority nor the tribunal had made a trafficking decision, so that was not a case concerning a previous negative trafficking decision or its status.

83. The error which the Upper Tribunal made in assuming that it had jurisdiction to remake the decision of the authority and determine, as it did, that the respondent was trafficked was compounded by a further error as to the relevance of that conclusion. I agree with Mr Lewis that a decision that someone has been trafficked can be relevant to the question whether he is at risk of being re-trafficked on return. That was an issue which the Upper Tribunal determined against the respondent on the facts.

84. However, the Upper Tribunal erroneously assumed that its conclusion that the respondent had been trafficked and the failures of the authority which it identified had particular relevance in that there were breaches of the obligations of the United Kingdom under ECAT which the Upper Tribunal considered also amounted to a breach of the procedural obligation under Article 4 of the ECHR, which the Upper Tribunal at [45] regarded as the "crucial question" on the appeal.

85. Mr Toal sought to suggest that this was not really the basis of the Upper Tribunal's Decision and it had limited itself to concluding at [64] that it would be a breach of Article 4 to remove the respondent on the basis that it would not be feasible for him to cooperate with any criminal investigation from outside the jurisdiction. I agree with Mr Lewis that the analysis of the Upper Tribunal was not at clear cut as that. At [41] the Upper Tribunal described as "able" the specific submission by counsel for the respondent that the positive duties under Articles 12 to 15 of ECAT have the status of positive obligations under Article 4 of the ECHR, a submission which cannot stand in the light of the decision of this Court in *H*.

86. The Upper Tribunal does not expressly or implicitly reject the submission, but I agree with Mr Lewis that it clearly influenced what the Tribunal decided at [59] to [64] about the obligations under ECAT and the procedural obligation under Article 4 of the ECHR. In my judgment, that analysis is wrong and contrary to the decision of the Court of Appeal in *H.* Thus, even if the Upper Tribunal had been entitled to conclude that the authority was wrong in making a negative trafficking decision, it should not have concluded that this amounted to a breach of the procedural obligation of the United Kingdom under Article 4.

87. An indication of the extent to which the Upper Tribunal overreached itself is the finding at [63] that, by virtue of Article 10(2) of ECAT there was a prohibition on removal of the respondent from the jurisdiction, so that the removal decision was unlawful. As Mr

Lewis pointed out, the prohibition in Article 10(2) follows a "reasonable grounds" decision by the authority in favour of someone who alleges he or she has been a victim of trafficking. The Upper Tribunal has effectively substituted itself for the authority under the Article, for which it does not have jurisdiction.

88. I also agree with Mr Lewis that the Upper Tribunal also overreached itself in purporting to criticise the state agencies involved in compliance with the obligations of the United Kingdom under ECAT, in particular the police. It should have been no part of the functions of the Upper Tribunal to go beyond determining the lawfulness of the decision to remove the respondent. Even if it had had the jurisdiction it assumed it did have to re-determine the trafficking decision, it should not have engaged in such criticism without affording the police an opportunity to provide an explanation for not having pursued enquiries.

89. I was unimpressed by the plea *in terrorem* in Mr Toal's submissions that the narrow approach to indirect challenges to negative trafficking decisions which I consider to be appropriate in line with the previous decision of this Court in *AS (Afghanistan)* would have an extreme impact on trafficking cases. I agree with Mr Lewis that this point was vastly overstated and not substantiated. The only cases where there will be an impact is in cases of negative trafficking decisions in which an individual wishes to mount a challenge on grounds other than perversity. As Mr Lewis says, in such cases, any challenge will have to be made by way of judicial review, which is the normal and proper method of challenge.

14. The decision the subject of *MS (Pakistan)* was a “removal decision” appeal. The amendments to the appeal structure implemented by the Immigration Act 2014 do not include the introduction of a statutory appeal against a decision by the CA. They do however remove a right of appeal against a removal decision. The appeal since October 2014 has, in asylum claims, been against the refusal of the claim, not the removal decision that may follow. The Court of Appeal in *MS (Pakistan)* was alive to this – see [81]. In [83] Flaux LJ agreed that the question of whether a person had been trafficked can be relevant to whether a person is at risk of being re-trafficked “on return”. Flaux LJ also made clear ([79]) that the narrow challenge available within the statutory appeal procedure to the CA decision did not “in any sense” subvert the appeal process or the function of the Tribunal in its statutory appeal function.

15. The Immigration Rules set out the process by which an asylum claim is to be determined:

> 339I. When the Secretary of State considers a person’s asylum claim, eligibility for a grant of humanitarian protection or human rights claim it is the duty of the person to submit to the Secretary of State as soon as possible all material factors needed to substantiate the asylum claim or establish that they are a person eligible for humanitarian protection or substantiate the human rights claim, which the Secretary of State shall assess in cooperation with the person.
>
> The material factors include:
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> (i) the person’s statement on the reasons for making an asylum claim or on eligibility for a grant of humanitarian protection or for making a human rights claim;
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> (ii) all documentation at the person’s disposal regarding the person’s age, background (including background details of relevant relatives), identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes; and

(iii) identity and travel documents.

…

339J. The assessment by the Secretary of State of an asylum claim, eligibility for a grant of humanitarian protection or a human rights claim will be carried out on an individual, objective and impartial basis. This will include taking into account in particular:

(i) all relevant facts as they relate to the country of origin or country of return at the time of taking a decision on the grant; including laws and regulations of the country of origin or country of return and the manner in which they are applied;

(ii) relevant statements and documentation presented by the person including information on whether the person has been or may be subject to persecution or serious harm;

(iii) the individual position and personal circumstances of the person, including factors such as background, gender and age, so as to assess whether, on the basis of the person's personal circumstances, the acts to which the person has been or could be exposed would amount to persecution or serious harm;

(iv) whether the person's activities since leaving the country of origin or country of return were engaged in for the sole or main purpose of creating the necessary conditions for making an asylum claim or establishing that they are a person eligible for humanitarian protection or a human rights claim, so as to assess whether these activities will expose the person to persecution or serious harm if returned to that country; and

(v) whether the person could reasonably be expected to avail themselves of the protection of another country where they could assert citizenship.

339JA. Reliable and up-to-date information shall be obtained from various sources as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited. Such information shall be made available to the personnel responsible for examining applications and taking decisions and may be provided to them in the form of a consolidated country information report.

This paragraph shall also apply where the Secretary of State is considering revoking a person's refugee status in accordance with these Rules.

339K. The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

339L. It is the duty of the person to substantiate the asylum claim or establish that they are a person eligible for humanitarian protection or substantiate their human rights claim. Where aspects of the person's statements are not supported by documentary or other evidence, those aspects will not need confirmation when all of the following conditions are met:

(i) the person has made a genuine effort to substantiate their asylum claim or establish that they are a person eligible for humanitarian protection or substantiate their human rights claim;

(ii) all material factors at the person's disposal have been submitted, and a satisfactory explanation regarding any lack of other relevant material has been given;

(iii) the person's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the person's case;

(iv) the person has made an asylum claim or sought to establish that they are a person eligible for humanitarian protection or made a human rights claim at

the earliest possible time, unless the person can demonstrate good reason for not having done so; and

(v) the general credibility of the person has been established.

339M. The Secretary of State may consider that a person has not substantiated their asylum claim or established that they are a person eligible for humanitarian protection or substantiated their human rights claim, and thereby reject their application for asylum, determine that they are not eligible for humanitarian protection or reject their human rights claim, if they fail, without reasonable explanation, to make a prompt and full disclosure of material facts, either orally or in writing, or otherwise to assist the Secretary of State in establishing the facts of the case; this includes, for example, failure to report to a designated place to be fingerprinted, failure to complete an asylum questionnaire or failure to comply with a requirement to report to an immigration officer for examination.

339NA. Before a decision is taken on the application for asylum, the applicant shall be given the opportunity of a personal interview on their application for asylum with a representative of the Secretary of State who is legally competent to conduct such an interview.

The personal interview may be omitted where:

(i) the Secretary of State is able to take a positive decision on the basis of evidence available;

(ii) the Secretary of State has already had a meeting with the applicant for the purpose of assisting them with completing their application and submitting the essential information regarding the application;

(iii) the applicant, in submitting their application and presenting the facts, has only raised issues that are not relevant or of minimal relevance to the examination of whether they are a refugee, as defined in regulation 2 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006;

(iv) the applicant has made inconsistent, contradictory, improbable or insufficient representations which make their claim clearly unconvincing in relation to having been the object of persecution;

(v) the applicant has submitted a subsequent application which does not raise any relevant new elements with respect to their particular circumstances or to the situation in their country of origin;

(vi) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in their removal;

(vii) it is not reasonably practicable, in particular where the Secretary of State is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond their control; or

(viii) the applicant is an EU national whose claim the Secretary of State has nevertheless decided to consider substantively in accordance with paragraph 326F above.

The omission of a personal interview shall not prevent the Secretary of State from taking a decision on the application.

Where the personal interview is omitted, the applicant and dependants shall be given a reasonable opportunity to submit further information.

Fresh Claims

353. When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly

> different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection. This paragraph does not apply to claims made overseas.
>
> 353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.

16. It is of course possible that a person can be a victim of trafficking but not be entitled to international protection. The considerations when determining whether a person is a refugee may include whether a person is a victim of trafficking but that is not the only consideration. This is implicitly recognised by the respondent in the reasons for refusal of asylum decision letter dated 15th January 2015:

> 8. On 21st February 2014 a referral was made on your behalf to the National Referral Mechanism in order for a Competent Authority to make a decision as to whether you fall within the definition of victim of trafficking, as established by the Council of Europe Convention on Action against Trafficking in Human Beings. As such your status as a victim of trafficking is assessed in a separate decision under the NRM process, where as the consideration below deals with protection issues.

17. The reasons for refusal of asylum letter goes on to accept that as a victim of trafficking an individual can be a member of a Particular Social Group for the purposes of the Refugee Convention but did not accept that this appellant's parents had been killed as she claimed, considered that her account of being raped and forced to have sex with men by T Baba was "both internally and externally consistent to the available country information", that her claim of scarring was plausible and would be considered in line with paragraph 339L of the Immigration Rules, that her account of her exit from Nigeria and use of false documents was rejected, that she had not given a reasonable explanation for the delay in claiming asylum and that overall her claim that her parents had been killed, that she had been forced to work for T in Nigeria and in the UK was rejected. The respondent also, in the reasons for refusal letter, concluded that there was sufficiency of protection and that she could relocate within Nigeria.

18. In paragraph 57 of the reasons for the refusal of asylum, the respondent said

> Further consideration has been given to victims of trafficking and the availability of protection on your return…

and concluded that there was sufficiency of protection and that she could internally relocate within Nigeria.

19. The CA conclusive grounds decision is dated 10th July 2014. Although not relied upon by the respondent in her decision on the appellant's asylum

claim, it was before her when she reached her decision – there is reference to the referral and to the asylum decision being a protection claim decision.

20. The CA decision confirms that the decision whether she is a victim of trafficking is taken on the "balance of probabilities". The decision makes reference to the initial decision that there were "reasonable grounds" for concluding that she was a victim of trafficking (such decision being taken on the lower threshold of "I suspect but cannot prove"). The CA considered evidence that was before it when it made the reasonable grounds decision (this is not specified but presumably includes a copy of her visit visa application, screening interview records and arrest record) together with her Asylum Interview Record (AIR) dated 22nd May 2014, an asylum reasons for refusal letter dated 1st July 2014 (which has not been produced and was not relied upon by the respondent or referred to in the decision the subject of this appeal), her witness statement dated 15th April 2014 and a letter from Sandwell Women's Aid. The appellant, through solicitors, sent a pre-action protocol letter challenging the CA decision but this was not, it seems, pursued to an application for permission to seek judicial review of the CA decision.

21. The CA decision sets out the three criteria that have to be met for a finding to be made that an individual is a victim of trafficking. The decision refers to the inconsistencies in the appellant's visit visa application and her witness statement and AIR and rejects, on that basis, that she was subject to an act of recruitment, that she had been transported etc by means of threats and that there was an exploitative purpose.

22. The First-tier Tribunal judge was aware of and set out, accurately, the basis of the respondent's rejection of her asylum claim. He was aware of and reflected in the decision, the CA decision.

23. Consideration by the First-tier Tribunal judge of evidence that was before him led to his conclusions as set out in [1] above. Those findings do not subvert the CA decision; they reflect the evidence that was before the judge at the date of the hearing before him, applying the lower standard of proof. Nevertheless the judge's decision that she was a victim of trafficking has to be weighed in the overall assessment taking into account the fact that the CA has found that she is not such a victim and that the CA conclusive grounds decision was essentially based on the same evidence but on a different standard of proof. A finding by the CA that a person is a victim of trafficking leads to various protective measures being implemented by the UK Government. In this case, the appellant is not a victim of trafficking as defined by the CA; the various protective measures do not come into play but that does not mean that the appellant cannot have her account factored into the assessment of her refugee claim. Likewise, if an individual were found by the CA to have been trafficked, if the evidence before the Tribunal was such that the Tribunal did not, on the lower standard of proof reach the same conclusion, that would factor into the assessment of the claim for refugee status.

24. The First-tier Tribunal Judge concluded the appellant had been trafficked. I note however that he did not analyse whether she had been trafficked in the terms required by the legislation. In particular he did not consider the three element process which the CA undertook in reaching its conclusion that she had not been trafficked. Nor did the judge consider the victim profiles/indicators of risk referred to in *HD* in reaching his conclusion that the appellant had been trafficked to the UK. Although the First-tier Tribunal Judge has used the term 'trafficked' I am satisfied that the lack of analysis undertaken by him indicates a vernacular approach to the word rather than the correct legal interpretation. That she worked as a prostitute for T is a finding that was made by the First-tier Tribunal judge on the evidence before him and open to him. That she worked as a prostitute in the UK is a finding made by the First-tier Tribunal judge and open to him. That someone else arranged her travel documents was a finding open to him on the evidence before him. The First-tier Tribunal judge accepted that she obtained documents from T to travel to the UK but the judge did not make a finding on the other elements of her claim to have been trafficked such as to amount to a subversion of the CA decision.

Remaking the decision.

25. Mr Khan submitted that the decision of the CA was perverse and that the evidence before the First-tier Tribunal was such as would enable the finding of the First-tier Tribunal that the appellant had been trafficked to be maintained. I do not agree. In terms of the evidence that was before the CA, the decision was a decision that was open to the CA and could not be characterised as perverse or irrational. It may be that there is further evidence available that could be considered by the CA and might result in a different finding. That evidence was not identified before the First-tier Tribunal; the three elements required for a finding of trafficking were not identified as present and even though the standard of proof before the First-tier Tribunal is the lower standard the finding by the First-tier Tribunal that she was trafficked in the correct sense of the word, cannot be sustained on the evidence that was relied upon, given that the CA finding should have been factored in.

26. The decision of the CA is a decision that cannot be challenged in a statutory appeal against a refusal of a protection claim save on grounds of perversity or irrationality. The Tribunal is required to consider evidence before it on the day of the hearing and to apply the correct burden and standard of proof. That evidence will include the CA decision but will also include other evidence that impacts upon the protection claim. The Tribunal in reaching a decision on the protection claim is obliged to place weight upon the CA decision but bearing in mind that it is a non-judicial decision that was reached prior to the hearing before the Tribunal.

27. This appellant will be returning to Nigeria as a single woman with no familial support, little vocational or other skills. She had been raped and forced into prostitution in Nigeria, had travelled to the UK on false documents and worked as a prostitute in the UK. She is HIV+ve but there is adequate treatment available to her in Nigeria and she has no mental health problems

that cannot be adequately catered for in Nigeria, if there are any such problems.

28. *HD* considered the risk to a previously trafficked woman of being re-trafficked. As stated in *HD*, the fact of having been trafficked is **not** generally indicative of a real risk of retribution or being re-trafficked by her original traffickers although it may be an indicator of vulnerability at that time which may impact upon future vulnerability. In this case, the CA found that the appellant had not been trafficked and, although the First-tier Tribunal Judge described her as having been trafficked, that finding did not amount to a legally sustainable finding, rather it was a finding that she had been previously working as a prostitute in Nigeria and had done likewise here in the UK, having arrived in the UK unlawfully, utilising the vernacular of trafficking. She does not fall within a particular social group for the purposes of the Refugee Convention.

29. Even though *HD* considers the risks to a woman who has been trafficked, the consideration to be given to the claim by the appellant that she is in need of international protection should be considered in the context of the identification in *HD* of factors that may place her at real risk, even though she has not been trafficked. There was no evidence before me that the appellant is suffering or has suffered from mental health problems such as would impact upon her ability to reside in Nigeria.

30. Trafficking can of course take place within a person's country of origin; it is not limited to trafficking across borders. It may be that the appellant was a victim of trafficking whilst in Nigeria although the evidence before me could not have led to that conclusion. The finding of the First-tier Tribunal was that she had been forced into prostitution by T; that is not the same as being trafficked within Nigeria. Paragraph 62 of *HD* lists a number of characteristics that could indicate that someone was at risk of being trafficked. As *HD* makes clear, it is not necessary for a potential victim to exhibit all these characteristics, but the existence of a selection of such characteristics should be seen as strong identifiers. This appellant exhibits very few of such characteristics. That the appellant, who was born in either 1978 or 1986, had worked as a prostitute in Nigeria and has few skills or vocational skills is not, absent evidence to show she would be unable to obtain unskilled work or would otherwise be destitute, sufficient to support her claim that she would be at risk of treatment that would breach her Article 3 rights.

31. In so far as paragraph 276ADE is concerned, the appellant has been in the UK unlawfully since 4th March 2011. She claimed asylum in February 2014. Her claim that there are insurmountable obstacles to her returning to Nigeria are predicated upon her claim to have been trafficked to the UK and the findings made by the First-tier Tribunal judge as set out above. The applicant is unskilled with no qualifications. There was a dearth of evidence that absence from Nigeria for some 7 years, working as a prostitute for a period of time in the UK as well as Nigeria and lack of family in Nigeria amounts to insurmountable obstacles to her return to Nigeria. She is either 40 years old (as the Home Office believe) or 32 years old (as she claims).

In either case she lived in Nigeria for her childhood and much of her adult life. She has worked as a cleaner in the UK. There was no medical evidence relied upon that any mental health problems she may or may not have were such as to cause obstacles to her reintegration. She does not meet the criteria in paragraph 276ADE of the Immigration Rules.

32. In so far as Article 8 is concerned, the appellant has been living in the UK for the past 7 years. She entered the UK unlawfully and has been working unlawfully. Although she is likely to have established a private life in the UK that engages Article 8, very little detail of this was evidenced. She does not have a partner or qualifying child; although she speaks English and although, if allowed to work, she may be able to support herself through cleaning jobs, there is nothing in the evidence before me that indicates that her removal would be a disproportionate interference in her private life. Her appeal against the decision to refuse her human rights/Article 8 claim is dismissed.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision

I re-make the decision in the appeal by dismissing it on all grounds.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Date 4th September 2018

Upper Tribunal Judge Coker