UTIJR 6

JR/4527/2019

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of
AO (Anonymity decision made)

Applicant

v

Secretary of State for the Home Department

Respondent

Before the Honourable Mr Justice Johnson

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Shu Shin Luh, of Counsel, instructed by Deighton Pierce Glynn Solicitors, on behalf of the Applicant and Julie Anderson, of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 12 March 2020.

Decision: the application for judicial review is granted

Judgment:

1. The Applicant is a victim of trafficking. The Secretary of State decided not to grant her "Discretionary Leave" ("DL") to remain in the UK under the Home Office's policy "Discretionary leave considerations for victims of modern slavery." The Applicant argues that the approach to the decision was legally flawed. She seeks an order quashing the decision and requiring the Secretary of State to re-take the decision.

2. The Applicant was represented by Ms Luh, the Secretary of State by Ms Anderson. I am grateful to both of them for their clear, focussed and helpful submissions.

The facts

3. The Applicant is a citizen of Nigeria, aged 37. From a young age she was required to work as a child domestic servant in order to support her family. She was sexually exploited and raped by the man for whom she worked. She was forced by her family to undergo Female Genital Mutilation at the age of 15.

4. The Applicant's family arranged for her to be married to a man in return for financial support. He brought her to the UK in 2010 but abandoned her at the airport, A woman offered her help but instead subjected her to domestic servitude without pay, and controlled her by beating and threatening her and locking her in the house. She was subjected to sexual advances by the woman's husband. She escaped and slept rough. She was raped and had her belongings stolen. Whilst street homeless she met a man who is now her husband. The couple have three children.

5. The Applicant claimed asylum. She gave the account that I have briefly summarised above. The asylum claim was refused because it did not raise a ground for asylum under the Refugee Convention. The Applicant was not, at that stage, referred to the National Referral Mechanism ("NRM") in order for an assessment to be made as to whether she was a victim of trafficking. It was the Salvation Army, rather than those responsible for considering the Applicant's asylum claim, that realised that consideration should be given to this issue. It referred the Applicant to the NRM in July 2015. The Home Office made a decision on the referral three years later, in June 2018. It decided that the Applicant was not a victim of trafficking. The Applicant challenged that decision by way of judicial review. The proceedings were compromised by a consent order dated 30 April 2019. Under the terms of that order, the Secretary of State agreed to withdraw the decision of June 2018, the Applicant agreed to submit and further representations and evidence, and the Secretary of State agreed to issue a new decision.

6. Following that consent order the Applicant's solicitors wrote to the Home Office and said that because there was no available public funding to meet the costs of preparing further representations, no further representations would be submitted.

7. On 5 June 2019 (so 4 years after the referral) the Secretary of State accepted that there “are conclusive grounds to accept [the Applicant] is a victim of modern slavery”. No reasons were given in the decision letter for that finding, but there was nothing to indicate that the Applicant's account of her background was disputed in any way. The

Secretary of State has disclosed in these proceedings the minute which clearly explains the decision making. That minute shows that it was accepted that the Applicant has “been subjected to domestic and sexual exploitation and that [she was] subjected to these circumstances by virtue of human trafficking.”.

Medical treatment in UK

8. The Applicant has received treatment in the UK for symptoms of anxiety and post-traumatic stress disorder. In a letter in October 2015 a counsellor wrote that the Applicant had "overwhelming memories which in my professional opinion, show all the signs of post-traumatic stress." In October 2017 a senior practitioner in specialist community perinatal mental health services referred to the Applicant's “disclosure of suicidal thoughts, flashbacks and anxiety … the symptoms she was experiencing were longstanding and consistent with her history of significant trauma.”. In November 2017 a Consultant in Fetal Medicine & Obstetrics referred to “a background of known post-traumatic stress disorder and anxiety.”. In a letter sent to the Applicant a few months after she had given birth a senior practitioner wrote “psychological therapy to address your trauma history and the distressing flashbacks and anxiety your experience in relation to this is likely to be the most appropriate form of treatment for you. Unfortunately this type of therapy is not recommended in the early months after having a baby as it can destabilise mental health in the early days.” In July 2018 the Applicant's GP wrote that she suffered:

> "from symptoms of post-traumatic stress disorder since being sexually abused in Nigeria, plus being a victim of genital mutilation, plus she was sexually assaulted in 2010. She also suffers severe depression and is currently suicidal since being threatened with deportation to Nigeria and flashbacks and nightmares have increased, I am writing in support of the decision on her case being challenged as I believe her life will be in danger if she is. She takes medication and has engaged with therapy but PTSD is extremely difficult to treat and cure and triggers need to be avoided, one of which is deportation to Nigeria."

9. In October 2018 the Applicant's GP wrote that she “suffers with long-term anxiety and depression and has symptoms of Post-Traumatic Stress Disorder. She suffers with low mood, poor functioning at times, nightmares and flashbacks.”

The decision to refuse DL

10. On the same day that the Secretary of State found that the Applicant was a victim of trafficking, a decision was made (by the same decision maker) to refuse to grant the Applicant DL. Leaving aside

the question of assisting police with their enquiries, or seeking compensation in the courts (potential grounds for granting DL that are not applicable here), the decision addressed three broad issues: the Applicant's medical needs, the risk of re-trafficking, and the needs of the Applicant's children. Broadly, the Applicant advances three grounds of challenge to the Secretary of State's decision. The three grounds of challenge focus on the Secretary of State's response to each of these three issues respectively.

11. As to the Applicant's medical needs the decision maker noted evidence that indicated that the Applicant had suffered from symptoms of anxiety and post-traumatic stress disorder and that she had received counselling. The letter continued:

> “however there is no available evidence to suggest that your client has been diagnosed with PTSD.
>
> There is no supporting information to indicate that your client is continuing to receive the above listed treatment Furthermore, such treatment is available in your client's home country.
>
> It is noted that medical treatment is available in Nigeria (http://apps.who.int/medicinedocs/documents/s16549e/sl6549e.pdf...) and that Nigeria is a country in which psychiatric care is available, there are “8 psychiatric hospitals and about 24 hospitals with a psychiatric unit” it is also noted that there are numerous private clinics which offer access to psychiatric health (https://www.mentallyaware.org/cost-of-psychiatric-care-in-nigeria/...).”

12. On the question of the risk of re-trafficking the letter stated:

> "It has been concluded that there is no realistic risk of your client being re-trafficked or becoming a victim of modern slavery again if she were to return to Nigeria. The objective evidence is that Nigeria is one where authorities are willing and able to provide assistance to your client as a citizen should you need their support and protection-

13. The letter then set out a long unattributed quote (albeit without quotation marks and without identifying the source) from a document dealing with the protection of trafficking victims in Nigeria.

14. In relation to the Applicant's children the letter stated:

> "While it is considered that your children have been fiving in the UK for 1 year 8 months, 5 years 11 months and 3 years 9 months, it is not considered that these lengths of time are substantial. This means that your children have not had sufficient time to establish any significant ties within the UK It is

further noted that there is access to education and medical treatment in Nigeria.

15. Since the decision a formal diagnosis has been made that the Applicant is suffering from PTSD.

Legal and policy framework

16. The Council of Europe Convention on Action against Trafficking in Human Beings ("the Convention") has, as its paramount objectives, “respect for victims’ rights; protection of victims and action to combat trafficking in human beings" (see the preamble to the Convention). Its purposes include (see article 1(1)(b)):

> “to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims …”

17. Article 12 requires state parties to adopt measures to assist victims in their physical, psychological and social recovery. Article 13 requires the adoption of a "reflection period" of at least 30 days in cases where there are reasonable grounds to believe that the person is a victim of trafficking. This period is to enable the person concerned "to recover and escape the influences of the traffickers and/or to take an informed decision on cooperating with the competent authorities". During this period the person may not be forcibly removed from the country,

18. Article 14 states:

> “**Article 14 - Residence permit**
>
> 1. Each Party shall issue a renewable residence permit to victims [if]:
>
> a. The competent authority considers that their stay is necessary owing to their personal situation;
>
> …”

19. An Explanatory Report to the Convention explains:

> “The personal situation requirement takes in a range of situations, depending on whether it is the victim's safety, state of health, family situation or some other factor which has to be taken into account.”

20. The Secretary of State has a general power to grant leave to remain in the UK to any person in the UK who is not a British citizen (see

section 3(1)(b) of the Immigration Act 1971, read with section 4(1)). In the case of victims of trafficking she seeks to exercise that power (by granting DL) in a way that is consistent with the Convention.

21. In PK (Ghana) v Secretary of State for the Home Department [2018] EWCA Civ 98 the Court of Appeal found that the Secretary of State's policy guidance in relation to victims of trafficking failed properly to reflect the obligation imposed by article 14(1)(a) of the Convention (see *per* Hickinbottom LJ at [61]). This was because the Secretary of State had adopted a test of only granting DL when the personal circumstances were "compelling". Instead, the test to be adopted was whether the personal circumstances were such that a grant of DL was necessary in the light of, and with a view to achieving, the objectives of the Convention (see *per* Hickinbottom LJ at [44]).

22. In the light of the decision in PK (Ghana) the Secretary of State promulgated the policy that regulated the decision in this case. "Discretionary leave considerations for victims of modern slavery". The version of that policy that applied at the date of the decision under challenge was published on 10 September 2018. This states:

> "When deciding whether a grant of leave is necessary under this criterion an individualised human rights and children safeguarding legislation-based approach should be adopted. The aim should be to protect and assist the victim and to safeguard their human rights. In seeking to do so decision makers should primarily:
>
> - assess whether a grant of leave to a recognised victim is necessary for the UK to meet its objective under the Trafficking Convention to provide protection and assistance to that victim, owing to their personal situation
>
> It is not possible to cover all the circumstances in which DL may be appropriate because this depends on the totality of evidence available in individual cases. However, considerations when deciding if DL is appropriate might include (the list is not intended to be exhaustive):
>
> - whether the person may be eligible for a more advantageous form of leave, for instance, asylum or humanitarian protection
>
> - whether leave is necessary because there is a significant and real risk in light of objective evidence that the person may be re-trafficked or become a victim of modern slavery again - in such cases consideration should also be given as to whether the risk is greater in the UK or in the person's home country

- whether, if returned home, the person would face harm or ill-treatment from those who first brought them to the UK, or exploited them in their home country

- whether on the objective information and evidence in a particular case the receiving state have the willingness and ability to provide through its legal system a reasonable level of protection to the person, if returned to their care (it would be rare for an individual to be able to rely on there being an absence of sufficient protection for victims of modern slavery in an EU member state)

...

Additionally, a person may provide evidence from a healthcare professional that they need medical treatment. In these cases, consider whether it is necessary for the treatment to be provided in the UK. In terms of needing to stay in the UK to have such treatment you may wish to consider that the UK's international obligations do not extend to a requirement that treatment must be provided by specialists in trafficking, or that it be targeted towards one aspect of an individual's needs (the consequences of trafficking) as opposed to his or her overall psychological needs as set out in the case of *EM v SSHD*. In brief, the support duty calls for the provision of support, not that the person is supported until they achieve full physical, psychological or social recovery Leave granted to allow for medical treatment should normally be granted for the duration of the course of treatment or up to 30 months, whichever is shorter."

Framework for reviewing the Secretary of State's decision

23. The power to grant DL rests with the Secretary of State alone, and certainly not with the Court. The Applicant seeks judicial review of the Secretary of State's decision. She readily accepts that it is not an appeal on the merits, that it was for the Secretary of State to make the decision, and it is not for the Court to substitute its own view as to whether DL ought to have been granted. The issue is whether the Secretary of State made any public law error. The Applicant does, however, argue that the principles of judicial review are flexible and that the level of rigour that public law requires of decision makers depends on the context (see R v Secretary of State for the Home Department *ex parte* Bugdaycay [1987] AC 514 *per* Lord Bridge at 531, and Kennedy v Information Commissioner [2015] AC 455 *per* Lord Mance JSC at [51]).

24. Here, she relies on two aspects of the context. The first is that the Applicant has been accepted to be a victim of trafficking. The purpose of the Secretary of State's policy is to achieve the aims of the Convention, including protecting her from further trafficking. At

stake are the Applicant's rights not to be held in slavery or servitude, not to be required to perform forced or compulsory labour, and not to be subject to sexual assault. In this type of context decision makers must "show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account" — see R (YH) v Secretary of State for the Home Department [2010] EWCA Civ 116 *per* Carnwath LJ at [24]. This is well-established in the particular case of trafficking and the prohibition of slavery and forced labour under article 4 of the European Convention on Human Rights - see R (SF (Sri Lanka)) v Secretary of State for the Home Department [2015] EWHC 2705:

> "The non-derogable right set out in Article 4 is of such fundamental importance that gateway decisions, such as the June 2014 decision, as to whether a person is a victim of trafficking and so entitled to the protection which the State affords to victims requires particular attention and rigorous scrutiny. In relation to Article 10 of the CAT, as I have explained, the Explanatory Memorandum states (so far as material and with emphasis added) that: 'Failure to identify a trafficking victim correctly will probably mean that victim's continuing to be denied his or her *fundamental* rights..'"

25. That was concerned with the question of identification of whether a person was a victim of trafficking. There is no principled reason for taking a less rigorous approach in cases concerned with the steps to be taken to protect those who have been identified as a victim of trafficking.

26. The second aspect of the context is that the decision was made without any input from the Applicant. She was not explicitly asked to make representations on the specific question of whether DL should be granted under the Secretary of State's policy, and nor did she do so. This meant that the Secretary of State was under a heightened duty to ensure that all relevant matters were taken into account.

27. Ms Anderson correctly points out that there was considerable material before the Secretary of State. Moreover, the Applicant had been legally represented in the antecedent judicial review claim. Those proceedings were compromised by an order that enabled the Applicant to make any further representations within a prescribed period, and for the Secretary of State thereafter to decide whether the Applicant was a victim of trafficking. It will have been known to the Applicant's lawyers that the Secretary of State would likely make a decision on DL at the same time as making a decision on whether she was a victim of trafficking. She therefore had every opportunity to ensure that all matters on which she wished to rely were drawn to the Secretary of State's attention.

28. I accept Ms Anderson's submissions so far as they go. The fact is, however, that the Applicant did not make any representations on the issue and she was not explicitly invited to do so. Her lawyers had made it clear that they were not in a position to assist her. In those circumstances there was a need for some particular care in assessing the material and drawing inferences from evidential gaps, without inviting comment from the Applicant: absence of evidence on a point could not necessarily be taken as reliable positive evidence that the point could not be established.

29. Accordingly, I accept Ms Luh's submissions that both of these aspects of the context should influence the level of rigour that is to be expected of the Secretary of State's decision-making.

Ground 1: Approach to Applicant's mental health

Argument

30. There is a difference between the parties as to the correct construction of that part of the decision letter which addresses the Applicant's mental health. Ms Luh says that the reasons for refusing to recognise that the Applicant's medical condition was such that it was necessary to grant DL were that (1) there was no evidence that she had been diagnosed with PTSD, (2) there was no supporting information to indicate that the Applicant was continuing to receive treatment for anxiety and PTSD, and (3) such treatment was available in Nigeria,

31. As to (1) and (2) she argues that these factors were not pre-requisites for a grant of DL, and that if they had been critical the Secretary of State should have made further enquiries, The Applicant was subsequently diagnosed with PTSD and further enquiries as to whether the Applicant's symptoms amounted to PTSD would therefore have established that. Moreover, there was a particular reason why the Applicant had not received treatment (namely that it was medically contraindicated in the perinatal period). Further enquiries could have established that. As to the question of the availability of treatment in Nigeria she argues that the Secretary of State ignored relevant information and took account of irrelevant material.

32. For her part; Ms Anderson says that the observation that the Applicant had not been diagnosed with PTSD was merely a factually accurate observation as to the state of the evidence, rather than a free-standing reason for refusing DL. The fact that there was no supporting information that the Applicant was continuing to receive treatment was relevant because otherwise there may have been a risk of interrupting a continuing course of treatment and that would have been a reason in favour of DL. This was therefore indicative of the decision maker positively considering different routes by which

DL might be granted. On analysis, there is nothing to indicate that the Applicant's medical needs arise out of the trafficking rather than sexual abuse. The purpose of granting DL is to enable a trafficking victim to achieve a minimum of psychological stability, not to entitle a right to access medical services in the UK for the treatment of symptoms that are not attributable to trafficking.

Discussion

33. Ms Anderson is obviously right that the Secretary of State's policy does not give rise to a general right to access medical services in the UK. The fact that a victim of trafficking happens to have medical needs that can be better treated in the UK than elsewhere does not in and of itself mean that a grant of DL is necessary in order to meet the objectives of the Convention, particularly if those medical needs do not arise out of trafficking. Here, however, there was no evidence to suggest that the Applicant's medical problems were unrelated to the trafficking. On the contrary, there was evidence that they were caused, at least in significant part, by sexual abuse. The sexual abuse could not rationally be regarded as being independent of the trafficking. It was an integral part of the trafficking. When recognising that the Applicant was a victim of trafficking the decision-maker identified the purpose of the trafficking as being sexual exploitation. Moreover, nothing in the Secretary of State's decision suggested that the Secretary of State had concluded that the Applicant's medical problems were unrelated to the trafficking. If that had been the basis for the decision then it would have been necessary to say so.

34. Nor do I accept that the purpose of a grant of DL is simply to enable a victim to "achieve a minimum of psychological stability". That phrase does not appear in the Secretary of State's policy. It is taken from the Explanatory Report in relation to article 13 of the Convention. That provision concerns the "recovery and reflection period" that is needed to enable a suspected victim of trafficking to achieve a minimum of psychological stability so as to enable them to "escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities". It therefore has a narrow focus and purpose. The aim of a grant of DL is broader, and is explicitly stated in the Secretary of State's policy to “protect and assist the victim and to safeguard their human rights”. That said, I entirely accept a broader contextual submission made by Ms Anderson that there is no presumption that victims of trafficking require a residence permit, or that a residence permit is intended as a first step towards migration to the host state.

35. The question of whether the Applicant had PTSD could not, in and of itself, provide a basis for refusing DL. Ms Anderson did not suggest otherwise. She recognised that if the Applicant's medical condition was such that it was necessary to grant DL in order to achieve the purposes of the Convention, then the absence of a formal diagnosis

should not make any difference. I agree. Moreover, there was ample evidence that the Applicant had suffered from symptoms that are associated with post-traumatic stress disorder, and nothing to suggest that her symptoms did not meet the threshold required for a diagnosis. If the Secretary of State had sought to justify the decision to refuse DL on the basis of an absence of a diagnosis of PTSD then it would have been necessary to engage with Ms Luh's argument that the duty to make further enquiries necessitated, in the context of this case, a duty to enquire into whether the Applicant's symptoms did in fact merit such diagnosis. As it is, however, the issue falls away once it is recognised (as is common ground) that the absence of a formal diagnosis could not provide a basis for refusing DL.

36. The Secretary of State's observation that there was "no supporting information to indicate that [the Applicant] is continuing to receive … treatment" was factually accurate. It did not, however, follow that the Applicant was not receiving treatments The Secretary of State did not know what the position was, either way. The most recent evidence cited in the decision letter pre-dated that decision by 19 months. In the context of this case it could not safely be concluded, on the material before the Secretary of State, that the Applicant could be removed from the UK without interrupting treatment. Insofar as the Applicant's treatment had in fact been interrupted that was because of the birth of the child - it did not mean that continuing treatment was unnecessary.

37. The only remaining reason given by the Secretary of State was that treatment was available in Nigeria. In principle, this could have provided a sustainable basis for refusing DL (so far as the Applicant's medical condition is concerned) if the treatment available in Nigeria was sufficient to achieve the aims of the Convention. No doubt there was a wealth of authoritative material available to the Secretary of State as to the quality of medical treatment in Nigeria. She chose to rely on a "blog". I intend no criticism of the blogger (who could have had no inkling that their post would be relied on by the UK's Home Secretary) in observing that the article does not cite any original sources. It has been cited in a highly selective manner. It is relied on for the proposition that there are 8 psychiatric hospitals and 24 hospitals with a psychiatric unit in Nigeria. Yet the very same sentence observes (in a passage that was not quoted) that this is "for a population of almost 200 million" and that there are "very few professionals trained in the field". In other words, the point being made was not that there was sufficient mental health provision in Nigeria. It was the opposite.

38. The Secretary of State also cited a World Health Organisation report for the proposition that medicinal treatment was available in Nigeria. The report does indeed make good that proposition. I do not attach great significance to the fact that it does not explicitly mention the precise medication that the Applicant has found to be the most

effective. As Ms Anderson points out it does not purport to give an exhaustive list of all the medication that is available, and generic equivalents might be used in place of proprietary brands. However, the report does state (again in a passage not referenced by the Secretary of State) that "[m]edicines are unaffordable to the majority of Nigerians".

39. If the Secretary of State rationally concluded that the medical sequalae from the Applicant's trafficking could be sufficiently treated in Nigeria then the Secretary of State would have been entitled to conclude that the Applicant's mental health did not require a grant of DL (subject to the further point raised under ground 3 below). However, the evidence relied on by the Secretary of State did not come close to providing a rational basis for concluding that this was the case. It was necessary to consider the particular circumstances of the Applicant (who came from a rural area, a day's journey from the nearest city). It was necessary to consider her particular medical needs. It was then necessary then to assess whether the Applicant would be able to access treatment that would be sufficient to provide her with the assistance that is required by the Convention and contemplated by the Secretary of State's policy

40. For these reasons I find that the decision was flawed on public law grounds.

Ground 2: Approach to risk of re-trafficking

Argument

41. Ms Luh argues that it is not necessary to show a risk of re-trafficking in order to be granted a residence permit. That is so. However, leaving aside categories of case that do not here apply, DL will only be granted where that is necessary owing to the victim's personal circumstances. A risk of re-trafficking is one factor which might necessitate DL. It was therefore entirely appropriate for the Secretary of State to consider the issue. As Ms Anderson points out, if the Secretary of State had concluded that there was a risk of re-trafficking then that would have been relevant to the decision. Conversely, if the Secretary of State rationally concluded that there was no risk of re-trafficking then (subject to the other factors that were in the mix) DL would not fall to be granted on this basis. So Ms Luh's preliminary point does not go very far.

42. Ms Luh's substantive point was that an assessment of the risk of re-trafficking required the structured analysis identified by the Upper Tribunal in HD (Trafficked women) Nigeria CG [2016] UKUT 00454 (IAC). She contended that here the Secretary of State had simply relied on generic evidence and that the level of analysis fell far short of that required in *HD*. Ms Anderson responded that the Applicant's position (which is what has to be considered under the policy) was

very different from when she was in Nigeria. Then she was a young single woman in the grips of the exploitative, controlling and abusive behaviour of her family. Now she is a married woman with a family of her own and has experience of seeking assistance from NGOs. She was unable to demonstrate that her pervious abusers were still alive or that they would be able to identify her, and anyway she could go to another part of Nigeria.

Discussion

43. The Secretary of State's arguments amount to an invitation to engage in a merits based evaluation that is not appropriate in these proceedings. It is necessary to review the decision taken by the Secretary of State, rather than to undertake my own assessment of the level of risk that the Applicant faces on return to Nigeria. If the Secretary of State had based her decision on the Applicant's different personal circumstances now compared to the time when she left Nigeria then it would be necessary to assess that reasoning. However, that was not the approach that was taken. The decision that there was no risk of re-trafficking was not said to be due to the fact that the Applicant was now a married woman with experience of engaging with NGOs. Rather, it was simply asserted that there was no realistic risk of the Applicant being re-trafficked, and an unattributed generic report was quoted as to the efforts taken by the authorities in Nigeria to protect and assist victims of trafficking.

44. In HD (Trafficked women) Nigeria CG [2016] UKUT 00454 (IAC) the Tribunal found that there is no general risk of a woman trafficking victim being re-trafficked after returning to Nigeria. The word "general" needs to be given some emphasise The Tribunal also emphasised that it will be necessary in any individual case to undertake a detailed assessment of the particular and individual characteristics. It identified some of the factors to be considered - see at paragraphs 190-191:

> "190. Whether a woman returning to Nigeria having previously been trafficked to the United Kingdom faces on return a real risk of being trafficked afresh will require a detailed assessment of her particular and individual characteristics. Factors that will indicate an enhanced risk of being trafficked include; but are not limited to:
>
> a. The absence of a supportive family willing to take her back into the family unit;
>
> b. Visible or discernible characteristics of vulnerability, such as having no social support network to assist her, no or little education or vocational skills, mental health conditions, which may well have been caused by experiences of abuse when originally trafficked, material and financial deprivation

such as to mean that she will be living in poverty or in conditions of destitution;

c. The fact that a woman was previously trafficked is likely to mean that she was then identified by the traffickers as someone disclosing characteristics of vulnerability such as to give rise to a real risk of being trafficked. On returning to Nigeria, it is probable that those characteristics of vulnerability will be enhanced further in the absence of factors that suggest otherwise.

191. Factors that indicate a lower risk of being trafficked include; but are not limited to:

a. The availability of a supportive family willing to take the woman back into the family unit;

b. The fact that the woman has acquired skills and experiences since leaving Nigeria that better equip her to have access to a livelihood on return to Nigeria, thus enabling her to provide for herself."

45. In order to assess whether the Applicant was at risk of being re-trafficked it was necessary to engage with these types of factors. They were relevant considerations that fell to be taken into account. There is a generic assertion in the letter that careful consideration had been given to the Applicant's circumstance, but there is no evidence that these factors were considered.

46. For that reason I agree that the decision was flawed on public law grounds for these further reasons.

Ground 3: Approach to risk of suicide and family

47. Ms Luh further argued that the Secretary of State failed to address the risk of suicide that was raised in some of the letters from clinicians. She also contended that the Secretary of State had failed sufficiently to address the best interests of the Applicant's children. Their interests fell to be considered in the context of a mother whose already impaired mental health was likely to deteriorate further as a result of being removed to Nigeria.

48. Ms Anderson contended that this ground relied on the allegations that were advanced under grounds one and two and that it added nothing material, and that anyway these factors could be advanced in the context of a claim for humanitarian protection.

49. I agree that these factors might be relevant to a claim for humanitarian protection. If the Secretary of State considers that humanitarian protection should be granted then (as the policy implies) it may not then be necessary to consider DL. That is

because humanitarian protection is a “more advantageous form of leave” than DL. In particular, it lasts for longer (5 years rather than 30 months), and it more naturally and speedily leads to a claim for settlement (after 5 years rather than 10 years). But that does not mean that (where humanitarian has not been granted) factors relevant to humanitarian protection may permissibly be left out of account when assessing if DL should be granted. There is the potential for considerable overlap between claims for DL and humanitarian protection, but they each fall to be considered on their own merits according to the differing legal and policy frameworks. Ms Anderson did not suggest otherwise, and accepted that the Applicant's psychiatric health and family position could be relevant to consideration of DL, even though they were also relevant to questions of humanitarian protection.

50. I do, however, agree that ground 3 flows from the underlying complaint that the Secretary of State failed to address the Applicant's individual personal circumstances as required under her own policy. That underlying complaint is well-founded for the reasons I have given in relation to grounds 1 and 2. That being the case it is not necessary to consider ground 3 further.

Section 31(2A)(a) Senior Courts Act 1981

51. The Secretary of State relies on the requirement of section 31(2A)(a) of the Senior Courts Act 1981 that relief be refused if it is highly likely that the outcome would not have been substantially different if a lawful decision had been made. Here; I have found that the Secretary of State failed to address factors about the Applicant's specific circumstances that were relevant to the decision. The impact of those factors was highly fact-sensitive. They do not all go one way: compare, for example; paragraphs 190 and 191 of HD and their application to the Applicant's case. These are matters for the Secretary of State to assess. I do not consider that it is highly likely that the decision would have been the same if these matters had been assessed.

Outcome

52. Accordingly, the Secretary of State's decision not to grant the Applicant DL was flawed on public law grounds. The Applicant's claim for judicial review is allowed.

Order

53. I therefore make an Order quashing the Respondent's decision dated 5 June 2019 to refuse to grant discretionary leave to the Applicant,

and requiring that a new decision be made as to whether to grant discretionary leave to the Applicant.

Permission to appeal to the Court of Appeal

54. I refuse permission to appeal. I do not consider that an appeal would have a real prospect of success of that there is any other compelling reason why an appeal should be heard. Any application for permission to appeal must be made by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal within 28 days of the date that this decision was sent to the parties.

Costs

55. The Respondent shall pay the Applicant's costs of the claim, to be assessed if not agreed.

Signed:

Mr Justice Johnson
13 March 2020

Applicant’s solicitors:
Respondent’s solicitors:
Home Office ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).