IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003438
First-tier Tribunal No: DA/00391/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 20 February 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Secretary of State for the Home Department

Appellant

and

JM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr E. Tufan, Senior Home Office Presenting Officer
For the Respondent: The Respondent did not appear and was not represented

Heard at Field House on 20 December 2022

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Karbani ("the judge") promulgated on 16 March 2022 in which she allowed an appeal brought by a citizen of Portugal, JM, born on 11 January 2001, against a decision of the Secretary of State dated 14 December 2020 deport him to Portugal pursuant to the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The Secretary of State maintained her decision in a supplementary decision dated 13 January 2021.

2. For ease of reference, I will refer to the appellant before the First-tier Tribunal as "the appellant" in this decision.

3. The 2016 Regulations were revoked by paragraph 2(2) of Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 with effect from 31 December 2020, at the conclusion of the "implementation period" for the UK's withdrawal from the EU. The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 ("the 2020 Regulations") make provision for certain provisions of the 2016 Regulations to continue to apply, notwithstanding their revocation, in relation to appeals against EEA decisions that were taken before "commencement day", that is the day upon which the 2016 Regulations were revoked: see Schedule 3, paragraph 5(1)(c). For such appeals, certain provisions of the 2016 Regulations continue to apply, with the specified modifications, in accordance with paragraph 6 of Schedule 3.

Absence of the appellant

4. Neither the appellant nor his legal team attended the hearing on 20 December 2022. There had been no application for an adjournment, still less had a judicial decision been taken granting such an adjournment, or otherwise excusing the appellant's attendance. There had been some contact from the appellant's legal team, but not in relation to an adjournment application. The appellant had provided the tribunal with a notice under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules") dated 24 November 2022, in response to the tribunal's standard directions. On 13 December 2022, in express anticipation of the hearing on 20 December 2022, the appellant's solicitor, Mr Goldberg from Turpin Miller submitted a skeleton argument drafted by counsel (Mr Ronan Toal).

5. Rule 38 of the Rules makes provision for conducting a hearing in a party's absence. There are two criteria. First, that the Upper Tribunal is satisfied that the party has been notified of the hearing. Secondly, that the Upper Tribunal considers that it is in the interests of justice to proceed with the hearing.

6. As to the first criterion, I am satisfied that the appellant's solicitors had received notice of the hearing. Notice was served on 24 November 2022. Mr Goldberg's email to the tribunal of 13 December 2022 enclosing the rule 24 notice acknowledged the same.

7. As to the second criterion, I took the following factors into account:

   a. There had been no application for an adjournment.

   b. The appellant's experienced and well respected legal team would know that, even if an adjournment application had been made ahead of the hearing, in the absence of it being granted on the papers, it would be necessary to attend the tribunal in order to renew the application orally (on

the assumption that the appellant wished or was advised to renew the application).

c. I had the benefit of the appellant's rule 24 notice and Mr Toal's skeleton argument, which I would be able to take into account.

d. There was no apparent basis on the papers before me for the appellant to require an adjournment.

e. Procedural rigour is important in this jurisdiction. There was no basis to conclude that, if I were to adjourn of my own motion, the appellant would engage in the proceedings on a future occasion. Adjourning unnecessarily would waste the tribunal's valuable resources.

8. Mr Tufan informed me that there had been "a development" subsequent to the judge's decision in that, on 7 September 2022 the appellant had been sentenced to 32 weeks' imprisonment for the possession of a bladed article in public. He handed up a copy of the appellant's latest criminal antecedents. Mr Tufan clarified that, insofar as these proceedings were concerned, the Secretary of State did not intend to withdraw the decisions under challenge or withdraw her case before the Upper Tribunal. He suggested that the appellant's latest conviction may well explain the appellant's decision to bring his engagement with the process to an end.

9. Bearing in mind the overriding objective of the rules, namely, to deal with cases fairly and justly, and the need to avoid delay so far as compatible with proper consideration of the issues, I concluded that it was in the interests of justice to proceed in the appellant's absence. There was no reason not to do so, in light of the factors listed at paragraph 7, above. I would be able to consider the written submissions provided by the appellant's legal team as part of my analysis of whether the decision of the judge involve the making of an error of law.

10. The fact that the appellant has received a further conviction subsequent to the judge's decision was not a factor which militated against him as part of the above analysis.

Factual background

11. The judge set out the factual background at some length, so it is not necessary to do so again in detail here. In summary, the appellant arrived in the United Kingdom in 2012 aged 11. He lives with his mother and has little contact with his father. Prior to the commission of the offence for which the Secretary of State pursued his deportation, he had accrued five convictions for drugs, robbery and failing to comply with a community order, for which he received non-custodial sentences.

12. On 20 December 2019, the appellant pleaded guilty to two counts of possessing Class A drugs, namely cocaine and heroin, with intent to supply. He also pleaded guilty to the possession of a bladed article in public. For the drugs offences, the appellant was sentenced to three years' detention in a young offenders' institution. For the bladed article offence, he was sentenced to 3 months' detention on a consecutive basis, giving a total of 3 years and 3 months' detention. Those offences led to the Secretary of State deciding to deport the appellant under the 2016 Regulations by her decision of 14 December 2020,

which was the decision under challenge before the judge. The grounds of appeal were exclusively pleaded by reference to the 2016 Regulations.

The decision of the First-tier Tribunal

13. At the hearing before the judge on 23 February 2022, the appellant was represented by Ms Z. Hasan, Counsel. He was assisted by an intermediary. The judge heard evidence from the appellant, his mother, and the principal and vice-principal of a boxing academy that the appellant had attended following his release from detention.

14. By the date of the hearing below, the appellant had been identified by the Competent Authority as a potential victim of trafficking. He relied on a report from a Dr Lisa Davies, a forensic psychologist, written following a joint consultation with Dr Jack Hollingdale, also a forensic psychologist. That report diagnosed the appellant with autism spectrum disorder (ASD"). There had been no formal prior diagnosis of that condition. The judge treated the appellant as vulnerable.

15. It was conceded by the Secretary of State that the appellant enjoyed the right of permanent residence under the 2016 Regulations, and so could only be deported on serious grounds of public policy, public security, or public health.

16. In the first 60 paragraphs of her decision, the judge set out the issues, the evidence, the law, and the submissions. Her operative reasoning commenced at para. 61; she addressed (and rejected) arguments advanced by the Secretary of State as to why the appellant represented a genuine, present and sufficiently serious threat affecting the fundamental interests of society, and why his deportation would be proportionate.

17. At paragraph 66, the judge rejected the Secretary of State's submission that the appellant's involvement in two incidents of violence involving weapons while in criminal detention meant that he posed a continued risk of reoffending; the appellant's autism manifested itself in frustration, she found, and the pandemic restrictions then in force meant that the appellant was only allowed out of his room for 45 minutes each day (paras 66 – 67). The judge also found that there were two key factors that meant that the risk posed by the appellant was lower than the Secretary of State's assessment, and the risk of reoffending assessed in the OASys report: he had stopped associating with his criminal acquaintances and did not smoke cannabis anymore. He had not reoffended since his release from detention seven months earlier (para. 68). The fact the appellant had not undertaken formal rehabilitation courses attracted little weight, in light of the pandemic restrictions that continued to apply at the time (para. 69).

18. The judge ascribed weight to the appellant's autism diagnosis by Dr Davies and found that the criminal justice process had failed to engage with his mental health conditions (para 72). Dr Davies' report had concluded that the appellant's experiences were consistent with having been a victim of drug trafficking. As such, the judge found that the appellant had not performed a "leading or significant role" in the wider criminal enterprise of which the Secretary of State contended he was a part (para. 74). The appellant's removal to Portugal would be likely to increase the risk factors, as that would separate him from his mother and the sources of stability in his life he currently enjoyed (paras 75).

19. The judge considered the evidence of the staff from the boxing academy attended by the appellant to be significant and described their summary of his participation as being a "glowing report" (para 76).

20. The judge concluded that the respondent's decision to deport the appellant would be disproportionate. While his cultural integration in the UK was limited, the judge found that he assisted his mother at home. The supportive environment the appellant enjoyed at home had, found the judge, developed following his release from detention. In the event of the appellant's deportation, it would be prohibitively expensive for the appellant's mother to spend time visiting him in Portugal on a regular basis, or to provide funds to help him settle there. The appellant had expressed a "convincing desire" to pursue a legitimate income and a career as a personal trainer, and his teachers had presented a positive perspective route for him to continue his rehabilitation.

21. The judge allowed the appeal. She added at para. 84 that, since the appeal had succeeded under the 2016 Regulations, she had not gone on to conduct a separate assessment of the appeal under Article 8 of the European Convention on Human Rights ("the ECHR").

Grounds of appeal

22. The Secretary of State advances a single ground of appeal consisting of a number of criticisms of the judge's decision under the rubric of failing to give adequate reasons, although, properly understood, the individual criticisms do not all appear to be reasoned-based challenges.

23. In summary, the grounds contend that the judge failed to have regard to Schedule 1(7)(a) to (g) of the 2016 Regulations. Seven months was not long enough to conclude that the appellant would not reoffend. His behaviour in the young offenders' institution was "not that of a model prisoner". The appellant sought to blame others for his offending, and the judge failed to have regard to the appellant's choices in choosing who to associate with. The appellant's understanding of his offending conduct was limited to the impact that had been on him and his mother and did not show true remorse. The judge erred by accepting the "bare assertion of a convicted drug supplier that he is a reformed character". The judge failed to give adequate reasons for preferring the report of Dr Davies to the OASys report's assessment of the appellant's propensity to reoffend. The judge failed to consider all relevant factors at regulation 27(6) of the 2016 Regulations and failed to undertake a balanced assessment taking into account the fundamental interests of society. There was "no basis in law" for the judge's finding that the appellant's ASD meant that he represented a lower risk of reoffending.

24. Permission to appeal was granted by Upper Tribunal Judge Gill.

SUBMISSIONS

25. Mr Tufan relied on the grounds of appeal. Mr Tufan also emphasised that the judge had recited paragraphs 3, 4 and 5 of Schedule 1 to the 2016 Regulations in her decision, but, crucially, had omitted to refer to paragraph 7 concerning the fundamental interests of society.

26. The appellant's rule 24 notice contended that the grounds of appeal failed to identify any error of law. The notice also seeks to cross-appeal against the

judge's decision not to address Article 8 ECHR factors at the hearing, and her failure to consider of her own motion (despite not having been invited to do so by Ms Hasan at the time) whether the appeal should have been allowed under Article 4 ECHR (prohibition of slavery and forced labour), in light of the appellant's then status as a potential victim of trafficking. Mr Toal's skeleton argument expands upon those submissions; the judge was obliged to determine any matter raised as a ground of appeal, pursuant to section 86(2)(a) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and erred by declining to do so. The appellant's status as a potential victim of trafficking was implicitly raised as a ground of appeal, and the judge should have addressed Article 4 ECHR and the protective obligations assumed by the United Kingdom pursuant to it.

THE LAW

The 2016 Regulations

27. Central to this appeal is regulation 27 of the 2016 Regulations which provides:

> **"27.- Decisions taken on grounds of public policy, public security and public health**
>
> (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (2) A relevant decision may not be taken to serve economic ends.
>
> (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.
>
> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—
>
> > (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or
> >
> > (b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.
>
> (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—
>
> > (a) the decision must comply with the principle of proportionality;
> >
> > (b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

[…]

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.)."

28. Schedule 1(7) to the 2016 Regulations makes provision concerning the "fundamental interests of society"

"For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;

(b) maintaining public order;

(c) preventing social harm;

(d) preventing the evasion of taxes and duties;

(e) protecting public services;

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public

> offence) and maintaining public confidence in the ability of the relevant authorities to take such action;
>
> (g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);
>
> (h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);
>
> (i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;
>
> (j) protecting the public;
>
> (k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);
>
> (l) countering terrorism and extremism and protecting shared values."

Appeals against findings of fact

29. The operative findings reached by the judge were primarily findings of fact and weight. There is a wealth of authority concerning the restraint with which appellate courts and tribunals should approach findings of fact and weight reached by first instance judges. Some of the principles were summarised in *Joseph (permission to appeal requirements)* [2022] UKUT 218 (IAC) at paras 13 and 14 (where "FTT" means the First-tier Tribunal, and "UT" means the Upper Tribunal):

> "13. … Maintaining the distinction between errors of law and disagreements of fact is essential; it reflects the jurisdictional delimitation between the first-instance role of the FTT and the appellate role of the UT, and reflects the institutional competence of the FTT as the primary fact-finding tribunal. The distinction, however, is often blurred, with unhelpful consequences. As Warby LJ put it in *AE (Iraq) v Secretary of State for the Home Department* [2021] EWCA Civ 948; [2021] Imm AR 1499 at [32]:
>
> > "Commonly, the suggestion on appeal is that the FTT has misdirected itself in law. But it is not an error of law to make a finding of fact which the appellate tribunal might not make, or to draw an inference or reach a conclusion with which the UT disagrees. The temptation to dress up or re-package disagreement as a finding that there has been an error of law must be resisted."

> 14. Warby LJ recalled the judgment of Floyd LJ in *UT (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1095 at [19]:
>
> > "… although 'error of law' is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter."

30. In *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600 at [62], the Supreme Court held:

> "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

DISCUSSION

31. At the outset, I record that Mr Tufan did not submit that the appellant's recent reoffending undermined the judge's findings that he would not so reoffend. The task of this tribunal is to determine whether the judge's decision involve the making of an error of law on the basis of the materials before at the time of the hearing, not to scrutinise the judge's findings of fact with the benefit of hindsight.

32. My analysis will be structured as follows. First, I will address the Secretary of State's submission that the judge's failure expressly to cite or otherwise refer to paragraph 7 of Schedule 1 to the 2016 Regulations was an error of law. Secondly, I will address the individual criticisms of the judge's operative reasoning relied upon by the Secretary of State. Thirdly, I will address the appellant's criticisms of the judge's decision advanced in the rule 24 notice.

Paragraph 1(7) of Schedule 1 to the 2016 Regulations

33. There is no merit to the submission that the judge failed properly to have regard to paragraph 1(7) of Schedule 1. A judge is not required to set out every piece of relevant legislation in his or her decision, still less is there any obligation on a judge to refer to every submission raised.

34. In her lengthy decision, the judge carefully set out paragraphs 3 to 5 of Schedule 1, which concern considerations relating to the prospective risk posed by an EEA citizen, the weight to be attached to various factors relating to their integration, and the proportionality of removing an EEA national who is able to demonstrate through the provision of substantive evidence that they are less likely to represent a threat of reoffending. Those factors lay at the heart of the judge's analysis at paragraphs 61 to 83 of her decision.

35. Paragraph 7 of the Schedule addresses the Secretary of State's view as to what the fundamental interests of society are, in relation to different facets of the public interest. Not all considerations will be relevant to all cases. Some were relevant to these proceedings, such as the public interest in tackling offences likely to cause harm to society, such as drugs offences, persistent offending, and protecting the rights and freedoms of others. Other considerations are of less

relevance to these proceedings, such as acting in the best interests of a child, and countering terrorism extremism.

36. While it is true that the judge did not refer to the provision, in my judgment it was not an error for her not to do so. The premise of the judge's analysis was entirely consistent with paragraph 7. Her analysis was based on the footing that, were the appellant to reoffend in the manner feared by the Secretary of State, his conduct *would* represent a genuine, present and sufficiently serious threat affecting the fundamental interests of society. The appeal was allowed because she reached findings of fact that the appellant would *not* so reoffend, not that, if he were to do so, the conduct would not amount to a threat affecting the fundamental interests of society.

37. In any event, as held in *AA Nigeria v Secretary of State for the Home Department* [2020] EWCA Civ 1296 at [34], per Popplewell LJ:

> "Experienced judges in this specialised tribunal are to be taken to be aware of the relevant authorities and to be seeking to apply them without needing to refer to them specifically, unless it is clear from their language that they have failed to do so."

38. Nothing turns, therefore, on the omission of an express reference to this paragraph of Schedule 1.

The judge's findings of fact

39. In my judgment, each of the operative findings reached by the judge were findings of fact and weight, or the exercise of judicial discretion, that were properly open to her on the evidence before her.

40. It is necessary to view the judge's findings in the round, recalling that she reached them having had the benefit of hearing live evidence from the appellant plus three witnesses, with careful legal argument, and reams of documentary evidence including the report of Dr Davies. The judge thus had the benefit of considering "the whole sea of evidence" (to adopt the terminology of *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114.iv]), whereas this tribunal will merely be "island hopping" (*Fage v Chobani*, [114.iv]) in the course of reviewing those findings.

41. Para. 7 of the grounds of appeal contends that the judge erred by ascribing significance to the fact that appellant did not reoffend in the seven months between his release from detention and the hearing. I consider this to be a disagreement of weight. It was open to the judge, particularly in the light of the remaining reasons she gave, to ascribe significance to this factor. Another judge may well not have approached matters in that way, but in doing so the judge did not reach findings that no reasonable judge could have reached.

42. The grounds contend that the appellant was not a "model prisoner", on account of two incidents in the young offenders' institution. The judge described those violent altercations as "discouraging" (para. 67). However, the reasons she gave for ascribing little significance to them were open to her; the appellant was essentially being kept in solitary confinement during the pandemic, save for 45 minutes each day, and his behaviour was attributable to frustration arising from his autism spectrum diagnosis ("ASD"). It would have been helpful for the judge to have identified which part of Dr Davies' report attributed the appellant's

violent behaviour to his ASD. Certainly, the report suggests that social interactions could be challenging for the appellant (see para. 1.3). At para 3.3.17, the report summarises the way in which ASD can impact the behaviour of those in correctional facilities. These were generous findings and, again, another judge may have approached matters differently, but they were founded on the evidence, and the judge gave sufficient reasons for them (such reasons, of course, are to be construed by reference to the materials that were before the judge, as well as those expressly relied upon in the decision: see *English v Emery Reimbold & Strick Ltd. (Practice Note)* [2002] EWCA Civ 605 at [118]).

43. The remaining criticisms of the grounds of appeal are all further disagreements of weight; it was open to the judge to conclude that the appellant had understood the consequences of his actions. That he had not expressed remorse in relation to the vulnerable person whose flat he "cuckooed" (para. 63) is a disagreement with the judge's findings of fact and the emphasis she chose to adopt when drafting her decision. She had the benefit of hearing "glowing" reports from the appellant's boxing academy, which he had attended post-release, which she considered in the round with all remaining evidence. She was entitled to reach those conclusions.

44. Similarly, the Secretary of State's submissions, at para. 9 of the grounds of appeal, that the judge should have preferred the OASys report to the conclusions of Dr Davies, is a disagreement of weight. The report's conclusions that the appellant represented a "medium" risk of violent reoffending, and a high risk of non-violent offending did not lead to the irresistible conclusion that the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, when viewed in the context of the remaining evidence in the case. Put another way, this was not a report which assessed the appellant to be at an exceptionally high and immediate risk of causing serious harm, or which otherwise expressed the risk posed by the appellant in terms which left no room for the exercise of judgment following a careful assessment of all the evidence in this case in the round.

45. Against that background, the judge was entitled to conclude that the appellant's deportation would be disproportionate. He is a young man who came to this country as a child. He has, on the judge's findings, very few links in Portugal. At the time of the hearing before, there was evidence which entitled the judge to conclude that he represented a low risk of reoffending, for the reasons she gave. In those circumstances, the judge was entitled to conclude that the high threshold for deporting a person with the right of permanent residence under the 2016 regulations had not been met.

46. In conclusion, therefore, while another judge may have reached a different conclusion, and while the Secretary of State disagrees with her conclusion, the Secretary of State's grounds of appeal do not demonstrate that the decision of the judge involved the making of an error of law.

THE RULE 24 NOTICE

47. Since I have dismissed the Secretary of State's appeal, it is not necessary to address the points raised in the rule 24 notice. However, for completeness I will do so in any event.

48. I reject the submissions contained in the rule 24 notice, and Mr Toal's skeleton argument, that the judge erred by not considering Articles 4 and 8 of the ECHR.

49. First, the appellant had not made a human rights claim to the Secretary of State. The grounds of appeal to the First-tier Tribunal exclusively focussed on the 2016 Regulations and did not raise a ground of appeal under the Human Rights Act 1998 (see absence of *any* grounds of appeal from Box 3, entitled *Human Rights Decision*, on the IAFT-5 Form *Appeal against your Home Office decision* completed by Mr Goldberg of Turpin Miller dated 22 December 2020).

50. Secondly, the jurisdiction of the First-tier Tribunal as constituted to hear this appeal was to focus solely on the appellant's grounds of appeal under the 2016 Regulations. Mr Toal's reliance on section 86(2)(a) of the 2002 Act is therefore misplaced. While certain provisions of the 2002 Act apply to appeals under the 2016 Regulations, they do so with the modifications specified by Schedule 2 to the 2016 Regulations.

51. The following modifications are relevant. Under paragraph 2(1) of Schedule 2, section 84 of the 2002 Act (grounds of appeal) has effect as though the *sole permitted ground of appeal* were that the decision breaches the appellant's rights under the EU Treaties (insofar as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU Withdrawal Agreement: see paragraph 6(1)(cc)(bb) of Schedule 3 to the 2020 Regulations). The ground of appeal to be determined under section 86 of the 2002 Act as applied to an appeal under the 2016 Regulations is the modified ground of appeal relating to the EU Treaties; not a ground of appeal that the removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998.

52. It is possible to raise a ground of appeal from section 84 of the 2002 Act in its form as unmodified by the 2016 Regulations within the confines of an appeal under the 2016 Regulations, but only in response to a notice issued under section 120 of the 2002 Act: see para 2(2) of Schedule 2 to the 2016 Regulations. The appellant did not respond to the Secretary of State's section 120 notice in these proceedings: see para. 87 of the Secretary of State's decision dated 14 December 2020. See also *Armiteymour v Secretary of State for the Home Department* [2017] EWCA Civ 353 at, for example, para. 30.

53. Thirdly, the First-tier Tribunal's general duty to act compatibly with the European Convention of Human Rights under section 6 of the Human Rights Act 1998 does not entail considering matters that are immaterial to the overall outcome of the decision. In circumstances where, as here, the First-tier Tribunal allowed the appeal under the 2016 Regulations, no question of its decision inadvertently placing the UK in breach of its obligations under the ECHR could arise.

54. For those reasons, the First-tier Tribunal in these proceedings did not enjoy the jurisdiction to purport to allow the appeal on ECHR grounds in addition to under the 2016 Regulations.

55. Mr Toal's submissions concerning Article 4 ECHR are misplaced in any event. All the material before the judge concerning the appellant's potential status (as it then was) as a victim of human trafficking related to matters that had taken place within the United Kingdom, while he enjoyed a right to reside under the 2016 Regulations. Putting the above jurisdictional difficulties to one side, nothing before the judge could have merited a decision to allow the appeal on Article 4 ECHR grounds, of her own motion, or at all. It is hardly surprising that submission was not raised or pursued by counsel who appeared before the judge. The judge did not err by not addressing a point that was not raised, and which was incapable of making a difference.

56. I therefore reject the appellant's criticisms of the judge contained in the rule 24 notice and Mr Toal's skeleton argument.

CONCLUSION

57. In conclusion:

a. The Secretary of State's appeal is dismissed.

b. The grounds raised by the appellant in the rule 24 notice do not disclose an error in the judge's decision.

POSTSCRIPT

58. On 29 September 2022, the appellant was recognised as a victim of trafficking by the Competent Authority. That development is not relevant to the analysis in this decision; indeed, Mr Goldberg's letter dated 24 November 2022 stated that he only wished to make an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the event that the Upper Tribunal found that decision of the judge involved the making of an error of law and proceeded to remake the decision.

59. I have amended the anonymity order made by the judge, which extended to members of the appellant's family. It is difficult to see why the order needs expressly to cover the anonymity of the appellant's family. I have amended the order to cover the appellant only. I accept that in light of the appellant's confirmed status as a victim of human trafficking, it is presently appropriate to maintain the order for anonymity.

Notice of Decision

The appeal is dismissed.

The decision of Judge Karbani did not involve the making of an error of law such that it must be set aside.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 January 2023