Neutral Citation Number: [2018] EWCA Civ 594

Case No: C5/2016/2402

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
MR JUSTICE McCLOSKEY and UT JUDGE BLUM
AA/07855/2013; [2016] UKUT 226 (IAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2018

Before:

LADY JUSTICE GLOSTER
LADY JUSTICE SHARP
and
LORD JUSTICE FLAUX

- -

Between:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
MS (PAKISTAN)	**Respondent**

- -
- -

Gwion Lewis (instructed by **Government Legal Department**) for the **Appellant**
Ronan Toal and **Bryony Poynor** (instructed by **ATLEU**) for the **Respondent**

Hearing date: 7 March 2018

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Approved Judgment

Lord Justice Flaux:

Introduction

1. This is an appeal by the Secretary of State against the decision of the Upper Tribunal (McCloskey J and UTJ Blum) dated 15 February 2016 remaking the decision of the First-tier Tribunal and allowing the respondent's appeal against the decision of the Secretary of State dated 2 August 2013 to remove the respondent from the United Kingdom.

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 under section 84 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") 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.

The factual and procedural background

3. The respondent is a national of Pakistan born on 2 June 1995. He entered the United Kingdom legally on 22 July 2011 as a child, aged sixteen, on a visit visa. The visit visa expired on 20 December 2011 but he remained in the country. The respondent's case is that he was accompanied to the United Kingdom by his step-grandmother, having been deceived by her into thinking that he was coming here to further his education. In fact, he was employed in a series of Asian food shops and went from job to job. He claimed that he was exploited by adults who used him as cheap and illegal labour. He also claimed that he was the victim of land-grabbing in Pakistan and feared being killed by his step-grandmother and her nephews.

4. In September 2012, he came to the attention of the police and was referred to social services. On 9 September 2012 he was served with a form IS151A informing him of his liability to detention and removal. On 25 September 2012 he claimed asylum. There was a screening interview for children with him dated 9 October 2012 and a substantive asylum interview for children dated 13 November 2012. He also produced a witness statement dated 12 November 2012.

5. On 29 November 2012, a formal referral of the respondent was made by Tower Hamlets social services to the Competent Authority ("the authority") under the National Referral Mechanism ("the NRM.") This is the authority that, under domestic law, makes decisions on trafficking under the European Convention on Action Against Trafficking in Human Beings ("ECAT"). The NRM operates under the auspices of the Home Office and therefore the Secretary of State, such that a decision by the authority is effectively one made by the Secretary of State. On 1 February 2013, in a so-called Reasonable Grounds Minute, the authority decided that there were no reasonable grounds to consider that the respondent was a victim of trafficking ("the negative trafficking decision"). The authority accepted that he had been subject to an act of recruitment, transportation, transfer, harbouring or receipt in the United Kingdom within the meaning of Article 4 of ECAT and that he was potentially deceived as to the true purpose of being brought to the United Kingdom (as he was not enrolled in any form of education, as the respondent had expected). However, the

authority did not accept that he had been brought to the United Kingdom for the purpose of exploitation in forced service or forced labour. On the same day, in a separate decision, the Secretary of State rejected the respondent's claim for asylum.

6. On 15 February 2013, a request for review of the negative trafficking decision was made. On 22 February 2013, the decision was maintained by the authority. Judicial review proceedings in respect of the decision were issued on 26 April 2013.

7. On 1 August 2013, the Secretary of State made her decision to refuse to grant the respondent asylum and on 2 August 2013, the Secretary of State made her decision to remove him from the United Kingdom. The respondent appealed against that decision to the First-tier Tribunal. On 3 December 2013, the First-tier Tribunal dismissed the appeal on asylum and human rights grounds. Permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal on 13 January 2014 and by the Upper Tribunal on 18 February 2014.

8. On 1 April 2014, the authority issued a Reasonable Grounds Reconsideration Minute maintaining the negative trafficking decision. That Minute was more detailed than the previous Minute and took account of the findings of the First-tier Tribunal and of the Divisional Court in *R (Atamewan) v Secretary of State for the Home Department* [2013] EWHC 2727 (Admin) which considered the relevant Home Office Guidance to the authority. As before, the authority accepted that the respondent had been subject to an act of recruitment, transportation, transfer, harbouring or receipt. However, as before, it considered that the requirement for trafficking as defined in the ECAT, that he had been brought to the United Kingdom for the purposes of exploitation in forced service or labour, was not met.

9. The authority referred to the finding of the First-tier Tribunal judge that: *"I do not find that this amounted to 'forced labour' but accepted in reality he would have had little choice but to work on the black market as he had no permission to work and needed money to survive."*. The Minute continued:

> "In other words, whilst you may have been subjected to a degree of manipulation, this did not amount to exploitation in the form of 'forced labour'- the work you did was not exacted under the menace of any penalty but was rather done out of pure economic necessity…
>
> …therefore, it is not accepted to the low standard of proof, 'I suspect but I cannot prove', that you were trafficked from Pakistan to the United Kingdom, and then internally within the United Kingdom, for the purpose of 'forced labour' exploitation."

10. On 23 April 2014, the High Court granted permission for judicial review in respect of the negative trafficking decision. However, five days later on 28 April 2014, the judicial review proceedings were withdrawn by consent. In light of the permission for judicial review having been granted, on 19 May 2014 the High Court ordered that the decision of the Upper Tribunal to refuse the respondent permission to appeal was quashed. Subsequently, on 23 June 2014, the Upper Tribunal granted permission to appeal.

11. By a Decision made on 20 August 2014, Upper Tribunal Judge Goldstein determined that the First-tier Tribunal judge had misdirected herself (as was effectively agreed between the parties before him) in failing to make a clear finding as to whether the respondent was a victim of trafficking, concluding that it was sufficient to ascribe to him a lower position on the spectrum of trafficking and omitting clearly to evaluate the nature of his employment in the United Kingdom and whether, even if freely chosen by him, it was nonetheless exploitative.

12. Accordingly the judge decided that the First-tier Tribunal judge had erred in law, such that her determination should be set aside but he directed, as agreed between the parties, that her positive credibility findings relating to the respondent's circumstances in the United Kingdom should be preserved. He ordered the parties to identify the issues to be re-determined at the resumed hearing in advance of a Case Management Review Hearing to be held before him on 7 October 2014.

13. The parties produced a Joint Statement on Issues dated 6 October 2014 for that hearing. This set out as agreed issues in contention on appeal whether on the findings of the First-tier Tribunal and related facts, policy and law, the respondent was subject to exploitation and was a victim of trafficking, subject to forced labour and in a position of vulnerability which was abused by employers to exploit him. It recorded that if the Upper Tribunal were satisfied the respondent was a victim of trafficking, what was not agreed was that, as was contended on behalf of the respondent, the Upper Tribunal had jurisdiction to determine (i) whether the Secretary of State had continuing obligations to the respondent pursuant to Articles 14 to 16 of ECAT; (ii) whether his proposed removal breached Article 16 of ECAT; (iii) whether the Secretary of State was in breach of the respondent's rights under Article 4 of the ECHR. The Secretary of State contended that, if the Upper Tribunal was satisfied that the respondent was a victim of trafficking, it only had jurisdiction to determine whether the respondent was at risk of being re-trafficked if returned to Pakistan.

14. The joint Statement then set out what the Court of Appeal in *AS (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 1469 had held concerning the Tribunal's jurisdiction in respect of trafficking decisions at [16] to [19] of the judgment of Longmore LJ.

15. At the Case Management Review Hearing on 7 October 2014, the Upper Tribunal designated the case to be a guidance case. It appears from the respondent's skeleton argument for the resumed appeal hearing before the Upper Tribunal that there was a further Case Management Review Hearing on 16 July 2015, at which the Upper Tribunal determined that it did have jurisdiction to consider whether the respondent was a victim of trafficking on the basis of Longmore LJ's judgment in *AS*. However, we do not have a copy of any such determination.

16. The resumed hearing then took place before the Upper Tribunal on 8 December 2015 and 20 January 2016. The respondent gave evidence and was cross-examined. The Upper Tribunal promulgated its Decision allowing his appeal on 23 March 2016.

The legal framework

17. Before considering the Decision of the Upper Tribunal in more detail, it is convenient to set out some of the legal framework. At the time that this appeal was lodged,

section 82(1) of the 2002 Act set out that a person against whom an "immigration decision" had been made could appeal to the Tribunal. Subsection (2) then set out the categories of immigration decision, which included, so far as presently relevant at (g) a decision that a person was to be removed from the United Kingdom. The categories of immigration decision did not include a trafficking decision.

18. With effect from 20 October 2014, the section has been amended and much simplified and provides, so far as relevant:

> "**82 Right of appeal to the Tribunal**
>
> (1) A person ("P") may appeal to the Tribunal where—
>
> (a) the Secretary of State has decided to refuse a protection claim made by P,
>
> (b) the Secretary of State has decided to refuse a human rights claim made by P, or
>
> (c) the Secretary of State has decided to revoke P's protection status.
>
> (2) For the purposes of this Part—
>
> (a) a "protection claim" is a claim made by a person ("P") that removal of P from the United Kingdom—
>
> (i) would breach the United Kingdom's obligations under the Refugee Convention, or
>
> (ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;…

19. Prior to 20 October 2014, section 84 of the 2002 Act, which deals with grounds of appeal, provided, so far as relevant, as follows:

> "**84 Grounds of appeal**
>
> (1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds—
>
> …
>
> (c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;
>
> (e) that the decision is otherwise not in accordance with the law;

> (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

20. ECAT came into force in the United Kingdom on 1 April 2009. It was largely implemented by the adoption of policies by the Secretary of State. In *AA (Iraq) v Secretary of State for the Home Department* [2012] EWCA Civ 23, Sir David Keene, giving the lead judgment of this Court, said this at [33]:

> "The identification of a person as a victim of trafficking provides no automatic right to remain on a long term basis in this country, although as will be seen there are provisions dealing with periods of time for the person concerned to recover and escape the influence of traffickers and also dealing with the grant of residence permits in certain circumstances. But decisions on claims by a person to be a victim of trafficking are not immigration decisions for the purposes of the immigration legislation and there is thus no statutory process for appeals. Judicial review would seem to be the only remedy."

That position has not changed with the amendments to the 2002 Act.

21. In his judgment Sir David Keene went on to set out the relevant provisions of ECAT including the definition of "trafficking in human beings" at Article 4(a):

> "'Trafficking in human beings' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

22. He set out that the identification of victims under Article 10 was a two stage process involving an initial decision and a final decision. As he noted, (2) of that Article requires a Party to ECAT to ensure that (i) if the competent authorities have reasonable grounds to believe that a person has been a victim of trafficking, that person is not to be removed until the identification process as victim has been completed and (ii) that such person receives the assistance provided for by Article 12 of the Convention, which includes secure accommodation, emergency medical treatment counselling and legal representation. Article 14 then provides that if the matter proceeds to a conclusive decision that the person is a victim of trafficking, a renewable residence permit is to be issued if the competent authority considers that

their stay is necessary owing to their personal situation or for the purpose of their co-operation in investigation or criminal proceedings.

23. The question which arose in *AS (Afghanistan)* was the extent to which Tribunal judges hearing statutory appeals should regard as conclusive decisions of the authority determining that an appellant has or has not been a victim of trafficking. Having cited the passages from the judgment of Sir David Keene in *AA (Iraq)* to which I have just referred, Longmore LJ noted at [11] of his judgment (with which Ryder and Briggs LJJ agreed) that counsel for the appellant there seemed to be submitting on the basis of *Secretary of State for the Home Department v Abdi* [1996] Imm A.R. 148, that the Secretary of State had failed to follow her policy of giving assistance to victims of trafficking, so that the decision to remove the appellant was not in accordance with the law, which of itself meant that the decision of the authority was appealable to the First-tier Tribunal. Longmore LJ said that "so far" he agreed with counsel for the Secretary of State that this was directly contrary to the dicta in *AA (Iraq)* that a decision of the authority was not an immigration decision and the only remedy in respect of the authority's decision was judicial review.

24. However at [12] and following, Longmore LJ went on to discuss the other way in which Mr Schwenk (counsel for the appellant) put his case:

> "12. Mr Schwenk, however, also submitted that, on appeal to the First Tier Tribunal against a decision to remove AS, the appellant was not confined to arguments about asylum but could make any argument he wished which was relevant to the decision to remove. One such argument he should be permitted to raise was that he was (or had been) a victim of trafficking. The First Tier Tribunal could not (or should not) refuse to entertain such evidence because it was relevant to the decision to remove which was the immigration decision which was being appealed pursuant to section 82(2)(g) of the 2002 Act.
>
> 13. Mr Rawat did not strenuously oppose Mr Schwenk's argument framed in this way and in my judgment he was right not to do so. If the conclusive decision of the Competent Authority was that AS had indeed been a victim of trafficking, it would be very odd if the First Tier Tribunal could not take that into account but had to dismiss an appellant's appeal against a decision to remove without remitting the matter to the Secretary of State to take into account the decision that such appellant had indeed been a victim of trafficking and may need the assistance required by the Convention. That indeed has been decided by the Upper Tribunal in *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* [2013] UKUT 00313 a decision which I would respectfully endorse.
>
> 14. If the First Tier Tribunal is entitled to take into account a decision that an appellant is (or has been) a victim of trafficking it seems odd that, if a perverse decision has been reached that an appellant has not been a victim of trafficking, the Tribunal cannot consider whether the facts of the case do, in

> fact, show that the appellant was a victim of trafficking. *Abdi* is authority for the proposition that a failure by the Secretary of State to apply her own policy is an error of law in the sense that she will have failed to take a relevant consideration into account. If in fact AS has been trafficked but the Secretary of State ignores that fact she will have failed to apply the relevant policy in relation to victims of trafficking. The mere fact that the Competent Authority has made a decision which on analysis is perverse cannot prevent the First Tier Tribunal judge from considering the evidence about trafficking which is placed before him; nor can it, in my judgment, be relevant that no judicial review proceedings have been taken by the applicant in respect of the Competent Authority's decision. The FTT judge should consider the matter for himself."

25. At [16] Longmore LJ referred to the decision of the Upper Tribunal in *SHL v Secretary of State for the Home Department* [2013] UKUT 00312 (IAC) where the appellant was seeking to challenge on appeal the decision of the authority that he had not been a victim of trafficking. The Upper Tribunal said:

> "Finally, we consider that it would have been open to the appellant to challenge the respondent's trafficking decision by an application for judicial review. The Tribunal was informed that such challenges have occurred. However, he did not pursue this remedy. We are of the opinion that backdoor challenges to trafficking decisions made by the respondent under the Trafficking Convention are not permissible in appeals of the present kind. They lie outwith the competence of the First Tier and Upper Tribunals."

26. Longmore LJ disagreed with this approach. At [17]-[18] he said:

> "17. For the reasons given above, I cannot agree with this paragraph of *SHL*. It seems to me that First Tier Tribunal judges are competent to consider whether the Secretary of State has complied with her policy in relation to trafficking; if asked to consider that question, they should then decide whether she has in fact complied with her policy since that it is (or may be) relevant to her removal decision.
>
> 18. In this context it is important to be aware that a decision to refuse asylum is not itself an immigration decision appealable pursuant to section 82(2) of the 2002 Act (any more than a trafficking decision is such a decision). The relevant immigration decision is the decision to remove the appellant under section 10 of the Immigration and Asylum Act 1999 (see s.82(2)(g) of the 2002 Act). It is in reaching the decision to remove that the Secretary of State must consider relevant matters including (where relevant) whether an applicant for asylum is a victim of trafficking. 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."

The Decision of the Upper Tribunal

27. Having set out the chronology of the appeal, the Upper Tribunal set out at [12] the findings of the First-tier Tribunal which were preserved:

> "(i) The Appellant was conveyed to the United Kingdom by his step grandmother, having been deceived by her into thinking that this was for the purpose of being educated.
>
> (ii) The Appellant was a child at the material time, having just attained his 16 th birthday and he was "*under the control of adults*".
>
> (iii) Subsequently he was employed and went from job to job, in circumstances wherein – *"He would have had little choice but to work on the black market as he had no permission to work and needed money to survive."*
>
> (iv) *"He was a child surrounded by adults from his own country and at the very least would have been heavily influenced by them. Clearly he was vulnerable to exploitation."*
>
> (v) The Appellant was initially exploited by adults for the purpose of using him as "*cheap and illegal labour*".
>
> (vi) Subsequently (at some unspecified stage) "*at the most he may have been manipulated*".
>
> (vii) The Appellant's "SEF" account of his life in the United Kingdom prior to arrest by the police (in September 2012) was truthful.
>
> (viii) The Appellant was assisted by adult males of Pakistani origin working in the same industry to move around the country from job to job and, in doing so, he "... *felt he had no choice but to work in these establishments in order to survive*".
>
> (ix) He paid a person for the purpose of using that person's particulars in the event of the Appellant being encountered by the police.

> (x) The Appellant "*... was to some degree exploited by adults in the catering industry ....*"
>
> (xi) Given his movements and changes of job, "*....if he was a victim of trafficking this was very much at the lower end of the spectrum*."
>
> (xii) *"I accept that he may have telephoned his step-grandmother's home shortly after arriving in the UK when he was unhappy with his situation and that he may have been told that a lot of effort had been taken [sic] to get him to the UK and even been threatened by one of his step-grandmother's nephews."*
>
> (xiii) The nature of this threat was a threat to kill him.
>
> (xiv) (As regards the Appellant's account of events in Pakistan) "*I accept that he was a child and may not be expected to remember detail or respond in interview as an adult would be expected to do*.""

28. Before this Court, these findings were not challenged either, except Mr Ronan Toal for the respondent accepted that (xi) could not stand, since that was the error of law which had led to the decision of the First-tier Tribunal being set aside.

29. The Upper Tribunal went on to make its own further findings, confirming that it had found the respondent a credible witness. At [18], it made an "overarching finding" that: "the core elements of [the respondent's] case are believable". On behalf of the Secretary of State, Mr Gwion Lewis indicated that he did not seek to challenge these findings, since it was his case that there was an anterior error by the Upper Tribunal in embarking on this course at all, in circumstances where it had not determined that the negative trafficking decision was perverse or a decision not open to the authority.

30. At [19] to [33] of its Decision, the Upper Tribunal set out the legal framework. In addition to the terms of the ECAT, it set out the terms of Article 4 of the ECHR and the decisions of the Strasbourg Court on the Article, notably *Rantsev v Cyprus and Russia* 2010] 51 EHRR 1 and various domestic authorities on trafficking and exploitation of labour.

31. The Upper Tribunal then went on to consider the treatment of trafficking issues in the Tribunals on statutory appeals under sections 82 and 84 of the 2002 Act. In the course of that analysis, it considered the decision of this Court in *AS (Afghanistan)*. Having cited [17] and [18] of the judgment of Longmore LJ the Upper Tribunal said this at [39] and [40] of its Decision:

> "39. We are satisfied that in the final part of this passage the Court is referring to the standard of perversity (or *Wednesbury* irrationality) mentioned twice in earlier passages. The effect of the decision in *AS (Afghanistan*) is that in appeal proceedings the Appellant may, in certain circumstances, mount an indirect challenge to a negative trafficking decision of the Authority.

> We are satisfied that a challenge of this kind is not confined to perversity (or irrationality) grounds. Rather, it is clear from a consideration of [12] - [18] as a whole that where a removal decision has been preceded by a negative trafficking decision made in breach of the Secretary of State's policy guidance, the removal decision will be erroneous in law and, therefore, embraced by the " *not in accordance with the law*" ground of appeal in section 82 of the 2002 Act (*supra*). We further consider that, in principle, there is no reason why the Tribunal's consideration of negative trafficking decisions should not encompass, in cases where appropriate, other recognised public law misdemeanours such as the intrusion of immaterial considerations, leaving material evidence or considerations out of account, procedural unfairness and bad faith.
>
> 40. We give effect to the approach formulated immediately above in the following way. On behalf of the Appellant it is submitted that the issue of whether the Appellant is a trafficking victim is relevant to the immigration decision under appeal, namely the Secretary of State's removal decision. The specific argument advanced is that this Tribunal should determine that the Appellant's removal would be contrary to section 6 of the Human Rights Act 1998 if either (a) he is at risk of re-trafficking in Pakistan or (b) he has been denied the benefits and protections which would have flowed from a decision that he was a child trafficking victim and a lawful investigation of his claim to be such a victim."

32. The Upper Tribunal went on to consider at [41] what it described as the "able submissions" on behalf of the respondent to the effect that trafficking and the positive duties in Articles 12 to 15 of ECAT have the status of positive obligations under Article 4 of the ECHR and that removal of the respondent would infringe Article 4 and, by virtue of section 6 of the Human Rights Act 1998 would not be in accordance with the law so that the appeal should be allowed. Having set out submissions made on behalf of the Secretary of State, the Upper Tribunal said this at [44]:

> "Giving effect to the binding decision of the Court of Appeal in *AS (Afghanistan)*, we conceive our duty to be to determine whether the immigration decision under challenge in this appeal, namely the decision to remove the Appellant from the United Kingdom and return him to Pakistan in the wake of the anterior refusals of his asylum and trafficking claims, is vitiated by any material error of law in the negative trafficking decisions. In proceeding thus we are conscious of the error of law decision of this Tribunal outlined in [2] above. The factual substratum of our decision is set forth in [10] - [17] above. It was further acknowledged that the Tribunal is empowered to make findings of fact bearing on the Appellant's case that he was a victim of trafficking."

33. At [45] the Upper Tribunal said that, as the appeal had evolved, the crucial question was whether the respondent "has demonstrated that to remove him from the United Kingdom would be in breach of the prohibition against slavery, servitude, forced or compulsory labour and human trafficking and, therefore, in contravention of Article 4 ECHR." At [46] the Upper Tribunal said that it was better equipped than the authority to make pertinent findings because the findings of the authority were the product of a paper exercise, whereas the Upper Tribunal had heard live evidence from the respondent and received other evidence not available to the authority.

34. The Upper Tribunal then went on to elaborate its findings of fact repeating its overarching finding that the core elements of the respondent's case were believable. It referred at [47] to three phases of the respondent's life. First, until his father's death when he was about 11 or 12 during which he had a normal, stable and happy childhood. Second, the next four years before he left Pakistan, "shaped by forced labour, neglect, isolation and physical abuse at the hands of his cousins" when his mother abandoned him and he was "obviously vulnerable".

35. The Upper Tribunal then found at [48] that his journey to the United Kingdom was arranged by his step-grandmother by whom he was accompanied. He was heavily influenced by her and she deceived him. He was not acting voluntarily. The Upper Tribunal found: "We consider this to be a classic case of subtle, psychological compulsion." It is worth noting at this point in the analysis of the Decision that, whilst the respondent relied upon expert evidence on anthropology, Pakistan law, child trafficking and labour exploitation, which at [68]-[69] the Upper Tribunal said it had not relied upon (not least because it failed to comply with the principles laid down by Cresswell J in *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 at 81-2), there was no expert evidence from a psychologist before the Upper Tribunal.

36. At [49] to [52] the Upper Tribunal dealt with the third phase of his life when he arrived in the United Kingdom in the following somewhat hyperbolic terms:

> "49. His arrival in the United Kingdom heralded the beginning of the third phase in the Appellant's life. He had been deceived into believing that he had been brought to the United Kingdom to be in education. The contrast between the vision which this would have engendered and the ensuing reality was acute. This would have exacerbated his vulnerability. We readily infer that the labour which followed had been arranged by his grandmother and that she profited financially from the transaction. This was a callous arrangement motivated bilaterally by financial gain.
>
> 50. Contrary to the promises made the Appellant's life did not entail attending an educational institution and mixing, socially and otherwise, with his peers. Rather, he was plunged into an adult world of work, business and profits. He became an object of cheap and illegal labour. He was ruthlessly exploited by those who employed him. He found himself alone in a foreign country with an alien language and culture. He was bereft of parental and family support and his life was devoid of any parental figure. We consider that he was exploited from the

> moment of his departure to the United Kingdom, within days of his 16th birthday until his encounter with the police some 15 months later. We find that, during the initial phase, the Appellant received no pay for his work. The stamp of compulsion applied to his labour, where he worked, the hours he worked, his accommodation and those with whom he shared accommodation and associated. The Appellant had no true freedom of choice at any stage.
>
> 51. We take account of the fact that the Appellant did not have a single, fixed employment during the period under scrutiny. However, as appears from the preserved findings rehearsed in [12] above, his "mobility" was limited, it was confined to the Asian food industry; it was facilitated by fellow adult employees; and, finally, it was plainly motivated by a naïve and probably desperate hope of finding a better way of living. Moreover, as the preserved findings make clear, he was, properly analysed, acting under compulsion and manipulation at all times. He was not truly free in any real sense. He was, rather, a desperate, frightened and coerced teenager. Accordingly the factors of mobility and more than one employment do not alter our assessment above.
>
> 52. To borrow the phraseology of *Rantsev*, the Appellant was at the material time a commodity who had been bought and sold and put to forced labour for little payment, living and working under poor conditions: see [281]. Servitude and compulsory labour were the hallmarks of his existence. In Article 4 terms, his human dignity was relentlessly violated and he was denied a fundamental freedom."

37. The Upper Tribunal then went on to consider the procedural obligation to investigate potential trafficking derived from *Rantsev*. At [54] it said that the first opportunity the State had to discharge that obligation was at the time of his encounter with the police in late 2012. It concluded:

> "We consider that the most elementary of enquiries at this stage viz late 2012 would have elicited from him an account including the circumstances of his arrival in the United Kingdom and details of subsequent employers and work conditions. This should, in principle, have resulted in prosecutions for offences under, *inter alia*, the Slavery Act 2015, subject of course to the application of the established criteria for prosecution. However, on the evidence before us, there is no indication of even the most elementary of police enquiries."

38. At [55] it said that the second opportunity was when he made his trafficking complaint and there was another opportunity when the authority was required to review its initial negative trafficking decision. At [55] and [56], the Upper Tribunal

was then highly critical of the decisions of the authority, again in somewhat hyperbolic terms:

> "…Given our assessments and findings above, both decisions of the Authority are manifestly unsustainable. They are infected by a failure to conduct proper enquiries and to amass relevant and available evidence. They are further undermined by a failure to properly examine and assess the realities of the Appellant's life during the period of some four years before his departure from Pakistan. Further, the Authority failed to properly analyse the factors of the Appellant's pay, accommodation and mobility and failed to identify the elements of fear and coercion in his work circumstances.
>
> 56. In addition, in its assessment that the Appellant worked due to economic necessity, the Authority failed to recognise that this was not inconsistent with continuing exploitation, manipulation and forced labour. Further, the Authority placed disproportional weight on the failure of this frightened, isolated mid-teenager recently exposed to the culture and language of an alien country to make a formal complaint to the police. Finally, we consider that its approach to the issue of respite and recovery was hopelessly inadequate. In our judgment, these inadequate and cursory decisions would plainly have been vulnerable to successful challenge by judicial review."

39. At [57] the Upper Tribunal expressed the view that *AS (Afghanistan)* made clear that the *Wednesbury* principle is of continuing relevance at this stage, on the basis of which the decisions of the authority are unsustainable on all three limbs: failure to take into account material facts and evidence, the intrusion of distorted factors and assessments and irrationality or as *AS* puts it perversity. The Upper Tribunal then went on to consider the effect of its conclusions. At [59]-[60] it said:

> "59. If the Authority had made a lawful decision the Appellant would have been recognised as a victim of trafficking. This would have entitled him to a "*recovery and reflection period*" of at least 30 days, per Article 13(1) of the Trafficking Convention. At this remove, the loss of this benefit is irreparable. The Appellant would have qualified for a renewal residence permit under Article 14 if the Authority had considered his stay necessary "*owing to* [his] *personal situation*". We consider it highly probable that the Authority, duly armed with all appropriate information, directing itself properly in law and acting rationally would have found this condition to be satisfied. In accordance with Article 14(4), the grant of a residence permit would have been a material consideration in subsequent applications by the Appellant for leave to remain. He has, accordingly, been deprived of a valuable benefit.

> 60. Furthermore, the decision to remove him from the United Kingdom is not in accordance with the law for the discrete reason that none of these factors was taken into account. This was due to the unlawful decisions of the Authority. We note that our analysis and conclusions on the Trafficking Convention issues mirror closely those of the Administrative Court in *Amatewan* (*supra*) As this decision demonstrates, the effect of our analysis and conclusions above is that, in substance, the Appellant now has the status of trafficking victim. In this particular case, this is very much a current and enduring status."

40. At [61] it referred to another significant consequence of the unlawful decisions. Under Article 10(2) of ECAT, victims of trafficking are not to be removed until the criminal process under Article 18 is completed and the victim in question has received assistance under Article 12:

> "In accordance with the latter provisions, a lawful trafficking decision would have entitled the Appellant to a range of services and benefits including appropriate accommodation, psychological support, counselling and legal advice. Recognition of and provision for his specific "*safety and protection needs*" would also have been required."

41. The Upper Tribunal continued at [63]:

> "Accordingly, by virtue of Article 10(2) of the Convention, there exists, by reason of our condemnation in law of the decisions of the Authority, a prohibition against removing the Appellant from the United Kingdom at this point in time. The Secretary of State's removal decision is, in consequence, unlawful. Notably, in *Atamewan* (*supra*) the Court identified the UK Border Agency as the public authority which was under a positive duty to initiate an effective investigation by the police. This duty was considered to be unaffected by the circumstance that the victim had made no complaint to the police and the absence of continuing police investigations."

42. At [64] it stated that the same conclusion could be reached by the different route of Article 4 of the ECHR:

> "The same conclusion is reached by the different route provided by Article 4 ECHR. The Appellant is not simply the historical victim of treatment proscribed by this provision. He is, rather, the continuing victim of an enduring breach by the State of its investigative and procedural obligations identified in [27] above. Within the framework of section 6 of the Human Rights Act, the public authorities who, to date, have failed to discharge these obligations are UKBA, the Authority and the police service. Furthermore, it is inconceivable that an effective police investigation and any ensuing prosecution could be

> conducted without the full assistance and co-operation of the Appellant. Realistically, this will not be feasible if he is removed to Pakistan. Accordingly, to remove him to Pakistan would contravene Article 4 ECHR. The Secretary of State's removal decision is unlawful on this further ground."

43. At [65] the Upper Tribunal concluded that for all these reasons the decision of the Secretary of State to remove the respondent was not in accordance with the law and contrary to section 6 of the Human Rights Act pursuant to section 84(1)(c) and (e) of the 2002 Act.

44. At [66] it went on to consider the question of the risk of re-trafficking if the respondent were returned to Pakistan, concluding against the respondent on this issue:

> "In our judgment the evidential foundation necessary for making this finding is lacking. Having regard to his age (now 19), his increased maturity and the positive aspects of his experiences during the last four years, which are likely to have fortified him as a person and will equip him to identify and avoid risks of this kind, we are satisfied that this case is not made out. Furthermore, on the hypothesis of his return to Pakistan, we are confident that the Appellant will be able to locate and re-establish himself in a manner which will distance himself sufficiently from the three persons concerned, his step-grandmother and her two nephews, to efficaciously eliminate such risk of re-trafficking as may arise. There is nothing in the evidence, including the experts' reports…warranting a different assessment."

45. The Upper Tribunal concluded at [67] that the respondent's protection claim was also fatally undermined by the availability of safe internal relocation.

Grounds of appeal

46. On behalf of the Secretary of State Mr Lewis pursued five grounds of appeal raising alleged errors of law by the Upper Tribunal, although it is fair to say he accepted that Grounds 3 to 5 were really a manifestation of the first two grounds:

(1) The Upper Tribunal erred in law in holding that, in statutory appeal proceedings, an indirect challenge could be made to the negative trafficking decision for a purpose other than resolving the question of fact of whether the respondent had been trafficked.

(2) The Upper Tribunal erred in law in holding that, in statutory appeal proceedings, an indirect challenge may be made to a negative trafficking decision on grounds other than perversity;

(3) The Upper Tribunal erred in concluding that it was better equipped than the authority to make pertinent findings about trafficking. It thereby unlawfully assumed upon itself one of the key functions of the Secretary of State as the authority for which the Upper Tribunal did not have jurisdiction;

(4) The Upper Tribunal committed a breach of natural justice in undertaking an extensive review of whether the State generally had complied with Article 4 of the ECHR when (i) the police were not a party to the appeal proceedings and (ii) the respondent's case before the Upper Tribunal did not squarely challenge the lawfulness of the removal decision on the basis of any police failure.

(5) The Upper Tribunal erred in concluding that its decision as to whether MS was a victim of trafficking meant that there was a prohibition against removing him from the United Kingdom from that point onwards. The Upper Tribunal relied upon Article 10(2) which engages the authority, not the Upper Tribunal.

The parties' submissions

47. Mr Lewis accepted that when making its decision on a statutory appeal a tribunal is entitled to consider a negative trafficking decision. It was common ground that, as held in [14] of *AS (Afghanistan)*, whether someone is a victim of trafficking can be relevant to the tribunal's decision in relation to, for example, a removal decision. However, in this case, the Upper Tribunal had gone much further than reviewing the trafficking decision, taking the opportunity to examine in much more detail whether the State had complied with Article 4 of the ECHR, when its function was only to decide whether the removal decision of the Secretary of State could stand. Mr Lewis emphasised the need for caution in not making the obligations under ECAT a surrogate for Article 4 of the ECHR.

48. In relation to both the first two grounds of appeal, Mr Lewis submitted that Longmore LJ had been careful in *AS (Afghanistan)* to limit the circumstances in which an appellant could indirectly challenge on appeal under section 84 of the 2002 Act a negative trafficking decision, which he or she had not challenged by way of judicial review, to cases where that decision was perverse or not open to the authority, another way of saying the same thing. The Upper Tribunal had been wrong when, at [39] of its decision, it said in effect that such a challenge could be made on a statutory appeal not just for perversity but on any ground which would have been open to the Court on a judicial review of the decision. Since the Upper Tribunal was a creature of statute, it had no jurisdiction to assume such powers.

49. He submitted that *AS (Afghanistan)* demonstrated that what was involved was a two-stage approach. First, determination of whether the decision was perverse or irrational and second, only then, if it was, could the factual case as to whether someone, against whom the authority had made a negative, albeit perverse decision, had been trafficked, be re-run. Limiting the scope of the first stage to cases of perversity struck the appropriate degree of deference to the particular expertise of the authority in victim identification.

50. At various stages of its Decision the Upper Tribunal draws an equation between the obligations under Articles 10 and 12 to 15 of ECAT (and the authority's role in fulfilling those obligations on the part of the United Kingdom) and the procedural obligation under Article 4 of the ECHR to investigate potential trafficking and identify and prosecute perpetrators recognised at [288] of *Rantsev*. Mr Lewis submitted that any such equation and the conclusion that what the Upper Tribunal regarded as a *Wednesbury* unreasonable and unlawful negative trafficking decision amounted to a breach of Article 4, was wrong and contrary to the decision of the

Court of Appeal in in *Secretary of State for the Home Department v H* [2016] EWCA Civ 565. To understand that submission, it is necessary to look at the decision in *H* in a little detail.

51. In that case, the Secretary of State had appealed against a declaration of the High Court that, as the competent authority, she had breached Article 4 of the ECHR because she had failed to apply her own policy guidance (Victims of human trafficking-competent authority guidance of October 2013) properly before making a negative trafficking decision. This Court decided that a breach of the policy guidance alone did not mean there was a breach of Article 4 of the ECHR. Applying the decisions of the Strasbourg Court in *Rantsev* and *CN v United Kingdom* [2013] 56 EHRR 24, the Court held that the procedural obligation under Article 4 of the ECHR arose when there was a "credible suspicion" that a person had been trafficked. The ECAT has a wider scope, being concerned:

> "with the immediate treatment to be accorded to those in respect of whom there are reasonable grounds to believe that they are victims of trafficking. It is also concerned with their medium term treatment for immigration purposes in the event that it is accepted administratively that they have been trafficked. It is also concerned with the criminalisation of behaviour associated with trafficking and the need to investigate and prosecute offences." ([30] of the judgment of Burnett LJ (as he then was) in *H*).

52. At [31], Burnett LJ went on to hold that the authority was only responsible for part of the satisfaction of the United Kingdom's obligations under ECAT. It is not an investigative body for the purpose of alleged crime or prosecution:

> "Its task is to decide whether there are reasonable grounds to believe that a person has been trafficked and then, if appropriate, whether he has in fact been trafficked. The purpose of doing so is to provide humanitarian support, to allow the cooling off period and then to inform immigration decisions. It is true that as part of that process the police will be informed if the Competent Authority concludes that there are reasonable grounds to believe an offence has been committed. In that way an investigation will follow whether or not the person concerned initiates the process. But a positive decision by the Competent Authority is not a necessary step to the making of a criminal complaint."

53. Burnett LJ went on to emphasise at [35] and [37] to [39] that the role of the authority was not the discharge of the procedural obligation of the United Kingdom under Article 4 of the ECHR:

> "35. …The involvement of the Competent Authority is not for the purpose of discharging the procedural obligations of the United Kingdom under article 4 ECHR. In short the application of the Guidance is not the mechanism by which the United

Kingdom satisfies the procedural obligation under article 4. That becomes all the more clear when considering its role.

37. The decision of the Competent Authority in this case was for all practical purposes applying a threshold the same as "credible suspicion" or "arguable claim". For reasons enumerated by the judge its conclusion was flawed. The respondent's disappearance has deprived the Competent Authority and the respondent himself of a fresh decision. But absent a decision that such reasonable grounds exist, or a finding of a court that the "credible suspicion" hurdle has been overcome, the question whether an investigative process has failed to comply with the procedural obligation under article 4 cannot arise. The judge made no such finding; indeed remitting the matter for a fresh decision left open the possibility that the Competent Authority could decide again, and lawfully, that reasonable grounds to believe did not exist. Were that to have happened the procedural obligation would not have arisen.

38. Even having surmounted the reasonable grounds hurdle, had the Competent Authority then considered whether the person concerned was in fact a victim of trafficking, that second decision making process would not be concerned with the identification of wrongdoers and their possible prosecution. That function is the responsibility of the police and Crown Prosecution Service. The Competent Authority may make its own investigations, including seeking to interview the person concerned, but it is not a body with any constitutional responsibility for investigating or prosecuting crime, or identifying wrongdoers.

39. Its functions under the guidance are squarely focussed upon the alleged victim, and his welfare. Its role in a possible criminal investigation is limited to informing the police of a credible allegation of wrongdoing, having made a positive reasonable grounds decision. If it fails to do so, the person concerned may inform the police (as happened here via his solicitors). It is difficult to envisage how a failing even at the second substantive decision stage by the Competent Authority could feed into an assessment whether the United Kingdom was in breach of the article 4 procedural obligation. Perhaps, if it failed to notify the police of a positive reasonable grounds decision, and the person concerned was removed from the United Kingdom before the police could investigate a crime justiciable in this jurisdiction, its failure might found a successful complaint under article 4. But ordinarily in these circumstances there will have been a referral to the police whose function it is to investigate crime. It is possible to envisage a complaint that a police investigation was inadequate and, given its centrality in the prosecution of criminal

> wrongdoers, gave rise to a violation of the article 4 procedural obligation. But in the absence of a procedural obligation being assumed by a single public body (as may be the case, for example, with many coroners' inquests and article 2), a suggested violation would engage an evaluation of the overall response of various public bodies involved."

54. Accordingly, Mr Lewis submitted that the equation drawn by the Upper Tribunal, for example at [55] and [64], between what it saw as the failings in the decision-making of the authority and a breach of the United Kingdom's procedural obligation under Article 4 of the ECHR was contrary to the subsequent decision of this Court in *H*.

55. In relation to Ground 3, Mr Lewis submitted that the decision of the Upper Tribunal at [46] that it was better equipped than the authority to make findings about trafficking, whilst it was not an error of law in itself, was illustrative of where the Upper Tribunal had gone wrong in embarking on this exercise in the first place.

56. In relation to Ground 4, that the Upper Tribunal had breached natural justice and overreached itself in making general criticisms of the conduct of the State, Mr Lewis referred to what Burnett LJ said in the last sentence of *H* about an alleged violation of the procedural obligation in Article 4 involving an evaluation of the overall response of the public bodies involved. Here, the other agencies involved apart from the Secretary of State as the authority, such as the police, were not parties to the proceedings before the Upper Tribunal and had had no opportunity to provide an explanation or evidence. The Upper Tribunal had criticised the police at [54] without their being able to deal with the criticism.

57. Ground 5 concerns the decision at [60] to [63] that there was a prohibition by virtue of Article 10(2) of ECAT against removal of the respondent rendering the removal decision unlawful. Mr Lewis submitted that the Article did not provide the Upper Tribunal with jurisdiction to act in that way. It was for the authority to make a trafficking decision and if it makes a "reasonable grounds" decision, then there is a prohibition. That decision is not for the Upper Tribunal and this was another example of the Upper Tribunal overreaching itself.

58. On behalf of the respondent, Mr Ronan Toal submitted that if this Court were to accept Mr Lewis' submissions we would in effect be fundamentally rewriting section 85(4) of the 2002 Act and unlawfully delegating to the executive the decision-making jurisdiction of the tribunals to determine whether the respondent was a victim of trafficking. This would be contrary to well-established principle that it was the function of the tribunals to decide whether challenged decisions were unlawful, not merely to review whether the decision-maker had acted irrationally or misdirected himself. This was clear from *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167 where the House of Lords disapproved earlier appellate authority such as *Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716; [2003] 1 WLR 2979 which had assigned to what was now the tribunals a more limited reviewing role. Mr Toal referred to what Lord Bingham of Cornhill said in [13] and [15] of *Huang*,:

> "13. …By contrast, the appellate immigration authority, deciding an appeal under section 65, is not reviewing the

> decision of another decision-maker. It is deciding whether or not it is unlawful to refuse leave to enter or remain, and it is doing so on the basis of up to date facts.
>
> 15. The first task of the appellate immigration authority is to establish the relevant facts. These may well have changed since the original decision was made. In any event, particularly where the applicant has not been interviewed, the authority will be much better placed to investigate the facts, test the evidence, assess the sincerity of the applicant's evidence and the genuineness of his or her concerns and evaluate the nature and strength of the family bond in the particular case. It is important that the facts are explored, and summarised in the decision, with care, since they will always be important and often decisive."

59. Mr Toal also relied upon passages to the same effect in the judgment of Lord Reed JSC in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799, particularly at [46] and [50]:

> "46….It is the duty of appellate tribunals, as independent judicial bodies, to make their own assessment of the proportionality of deportation in any particular case on the basis of their own findings as to the facts and their understanding of the relevant law.
>
> 50. In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give appropriate weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest in the deportation of foreign offenders, as explained in paras 14, 37-38 and 46 above, and also consider all factors relevant to the specific case in question. The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in *MF (Nigeria)* - will succeed."

60. Mr Toal also relied upon statements to the same effect as to the duty of the Special Immigration Appeals Commission in hearing a statutory appeal by Jackson LJ (at [55(vi)] and Elias LJ at [96]-[97] of *J1 v Secretary of State for the Home Department* [2013] EWCA Civ 279. He submitted that the approach urged by the Secretary of State would be going back to *Edore* and ignoring what appellate courts had said was the duty of tribunals. It was for the Upper Tribunal to decide whether the respondent

had been trafficked on the basis of the up-to-date facts available to it, which was why what it had said at [46] about being better placed than the authority was entirely in accordance with what Lord Bingham had said in *Huang*.

61. Mr Toal also submitted that the approach for which the Secretary of State contended would circumscribe the jurisdiction of the Tribunal more narrowly than that of criminal courts considering cases where the defence is that the defendant committed the relevant crime whilst the victims of trafficking. The question of how the criminal courts should approach the trafficking decision of the authority was addressed by Lord Judge CJ, giving the judgment of the Court of Appeal Criminal Division in *R v L(C)* [2013] EWCA Crim 991; [2013] 2 Cr App R 23 at [28]-[29]:

> "28. Neither the appellants nor the interveners accept that the conclusive decision of UKBA (or whichever department becomes a competent authority for these purposes) is determinative of the question whether or not an individual has been trafficked. They, of course, are concerned with the impact of a decision adverse to the individual. We are asked to note that the number of concluded decisions in favour of victims of trafficking is relatively low, and it seems unlikely that a prosecutor will challenge or seem to disregard a concluded decision that an individual has been trafficked, but that possibility may arise. Whether the concluded decision of the competent authority is favourable or adverse to the individual it will have been made by an authority vested with the responsibility for investigating these issues, and although the court is not bound by the decision, unless there is evidence to contradict it, or significant evidence that was not considered, it is likely that the criminal courts will abide by it.
>
> 29. In the final analysis all the relevant evidence bearing on the issue of age, trafficking, exploitation and culpability must be addressed. The Crown is under an obligation to disclose all the material bearing on this issue which is available to it. The defendant is not so obliged, but if any such material exists, it would be remarkably foolish for the investigating authority to be deprived of it. Without any obligation to refer the case to any of the different organisations or experts specialising in this field for their assessments or observations, the court may adjourn as appropriate, for further information on the subject, and indeed may require the assistance of various authorities, such as UKBA, which deal in these issues. However that may be, the ultimate responsibility cannot be abdicated by the court."

62. Mr Toal submitted that the Tribunal had been right to conclude that in *AS (Afghanistan)* this Court was not imposing a perversity threshold before the tribunal could make findings of fact as to whether the decision of the authority was one the tribunal should follow. This was clear from the reference to *Abdi*. Again, to understand this submission, it is necessary to look at that case in some detail. It concerned the application of the Somali Family Reunion policy ("the policy") of the Secretary of

State. Mrs Abdi (whose husband was a soldier in the Somali National Movement Army) was granted refugee status in the United Kingdom. She applied for various members of her family (including her own children) to be granted visas to join her here pursuant to the policy. The Secretary of State refused the application in respect of everyone other than her own children on the basis that Mrs Abdi was not the head of the household.

63. On appeal against that refusal, the adjudicator found as a fact that she was the head of the household and concluded that the Secretary of State had either failed to give consideration to the policy or, if he did, he misunderstood the policy or in applying it took into account matters he should not have done. Accordingly, the decision was not in accordance with the law. The decision of the adjudicator was upheld on appeal by the Tribunal and then by the Court of Appeal. Peter Gibson LJ held at [159] that the basis of the decision of the Secretary of State was not that he ignored the policy, but that he did not consider the respondents to be dependants of Mrs Abdi. The Secretary of State thus proceeded on a misapprehension of the material facts:

> "I therefore agree with the adjudicator and the Tribunal that in consequence the Home Secretary did not properly take the policy into account and so did not give effect to it. That was an error which made his decision not in accordance with the law for the purpose of s. 19(l)(a)(i)" [of the Immigration Act 1971, the statutory appeal process which preceded section 84 of the 2002 Act].

64. Mr Toal submitted that since *Abdi* was a case where the full range of powers on judicial review were open to be deployed, the Court of Appeal in *AS (Afghanistan)* had intended that the same position would prevail on indirect challenges to a negative trafficking decision on a statutory appeal against a removal decision by the Secretary of State.

65. Mr Toal also submitted that this wider interpretation of *AS (Afghanistan)* was also supported by what Collins J said about that case in *XB v Secretary of State for the Home Department* [2015] EWHC 2557 (Admin) at [32]:

> "That the FTT had no jurisdiction is clearly wrong in law cannot be and has not been disputed. Section 33(6A) requires it to be considered and it is in any event always material in deciding whether a person should be removed. In *AS (Afghanistan) v SSHD* [2013] EWCA Civ 1469 the Court of Appeal decided that the Tribunal in hearing an appeal should decide whether an individual had been trafficked if that issue was raised. The NRM decision was of course material but was not conclusive. Longmore LJ, giving the only reserved judgment, used the adjective 'perverse', saying that it would be odd if the Tribunal could not decide differently if the NRM decision was perverse. I do not think he was importing the Wednesbury test. It would be strange if he was since the Tribunal may have had different factual material or may have properly formed a different view of evidence than that formed by the NRM. In paragraph 18, Longmore LJ observed:-

> "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".
>
> It seems to me that if a Tribunal is satisfied that the decision of the NRM was wrong, it not only is entitled to but should decide the contrary."

66. The same wider approach had been adopted by the Supreme Court in *Hounga v Allen* [2014] UKSC 47; [2014] 1 WLR 2889 where the Supreme Court considered all the evidence and decided that the employee was a victim of trafficking. Mr Toal submitted there was no principled reason for the First-tier and Upper Tribunals to adopt a different approach.

67. Mr Toal submitted that there was also what he described as an analogue between trafficking decisions by the authority and decisions to refuse asylum. There the fact that a specialist case worker has determined that someone is not a refugee would not prevent the Tribunal from considering all the evidence available and engaging in a primary decision as to whether the person is a refugee. The Tribunal should be similarly untrammelled in relation to negative trafficking decisions by the authority.

68. Mr Toal submitted that the submission for the Secretary of State that the decision of the Upper Tribunal was contrary to what the Court of Appeal subsequently said in *H* was a mischaracterisation of the decision of the Upper Tribunal. It had not determined that any breach of Articles 12 to 15 of ECAT would automatically be a breach of Article 4 of the ECHR. Rather the basis of its decision at [64] was confined to concluding that an effective police investigation and subsequent prosecution could not be conducted without the assistance of the respondent which would not be feasible if he was removed to Pakistan. On that basis, removal to Pakistan contravened Article 4.

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.

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.

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.

75. It is striking that when one cuts through the hyperbole in [55] and [56] of its Decision, where the Upper Tribunal was particularly critical of the decisions of the authority, it is difficult to identify precisely what it was in those decisions that the Upper Tribunal was saying was susceptible to a *Wednesbury* challenge. When the Court invited Mr Toal to identify what it was in the decisions which was susceptible to such a challenge, he identified the alleged failure of the authority in the Reconsideration Minute to determine that there had been exploitation. He submitted that in the light of

the findings made by the First-tier Tribunal (set out in the preserved findings at [12] of the Decision of the Upper Tribunal) the failure of the authority to make a finding of exploitation and, thus, of trafficking, was perverse.

76. However, it is important to keep in mind that the authority was not being invited to consider exploitation in the abstract, but exploitation through forced service or labour. The decision of the authority that there was not such exploitation, which I quoted at [9] above, was clearly open to it on the findings made by the First-tier Tribunal judge, specifically that there had not been forced labour, and that decision was not perverse or otherwise susceptible to a *Wednesbury* challenge. To describe the decisions of the authority as "inadequate and cursory", as the Upper Tribunal did at [56], was a complete distortion of the true position, which was careful and detailed consideration and re-consideration of the respondent's case by the authority.

77. What the Upper Tribunal has in fact done is to engage in a complete redetermination of the issue as to whether the respondent was trafficked and to reach a decision that he was, despite having failed to identify any specific respect in which the decisions of the authority were open to a *Wednesbury* challenge. What the Upper Tribunal did was to treat the trafficking decision as if it were an "immigration decision" under section 82 of the 2002 Act susceptible to the procedure applicable to the determination of statutory appeals under section 84 of the 2002 Act. However, as already noted, trafficking decisions are not in the list of decisions susceptible to appeal, either before or after the changes to sections 82 and 84 effected in 2014. Accordingly, it is clear that the Upper Tribunal exceeded its jurisdiction.

78. The fallacy in the approach of the Upper Tribunal also manifests itself in the submission of Mr Toal on behalf of the respondent that to allow the present appeal would be to rewrite section 84 or to ignore appellate decisions as to the functions and duty of Tribunals. The short answer to that submission is that those appellate decisions all concern statutory appeals (under section 84 of the 2002 Act or under the Special Immigration Appeals Commission Act 1997) against decisions of the Secretary of State which are susceptible to such a statutory appeal, which a trafficking decision is not.

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, 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.

90. For all these reasons, I consider the appeal of the Secretary of State should be allowed.

Lady Justice Sharp

91. I agree.

Lady Justice Gloster

92. I also agree.