Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13159/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 November 2017	**On 10 November 2017**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HC
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr I. Jarvis, Home Office Presenting Officer
For the Respondent: Mr J. Trussler, Counsel instructed by Kinas Solicitors

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State against the First-tier Tribunal's decision promulgated on 27 July 2017 allowing the appeal of [HC] on asylum grounds. The decision that was made by First-tier Tribunal Judge T. Jones was that, on consideration of the evidence, the challenges made by the Secretary of State were not made out, that the appellant was a credible witness and that he had been trafficked and would be trafficked or at risk if he returned to his home. That is the conclusion that the judge reaches in paragraph 59 of the decision. As a result he allowed the appeal

of [HC]. I shall refer to [HC] as 'the appellant' as he was before the First-tier Tribunal.

2. The problem with the way this case was approached was that on the very day of the hearing and before the appellant had had an opportunity to look at it, the Secretary of State produced a letter from the competent authority in relation to the Trafficking Convention and what is referred to as 'the NRM decision'. This arises from the National Referral Mechanism, a body which is tasked with identifying and supporting victims of trafficking. The Border Agency, as it then was, is the competent authority for making decisions, and consequently, to that extent it is a very unusual position where the decision of the Secretary of State under the guise of the competent authority has a distinct and very different function from the normal decision making process. That is clear from the decision in *AS (Afghanistan) v The Secretary of State for the Home Department* [2013] EWCA Civ 1469 in which Longmore LJ gave the decision of the Court of Appeal with which the other two Lord Justices agreed.

3. It is not an easy matter to contemplate, all the more so since this particular report was thrust on the appellant at a very late stage and the appellant himself was only provided with a limited opportunity to take instructions. Mr Trussler, who appeared on behalf of the appellant at the First-tier Tribunal, did his level best to obtain a statement and did so and presented that to the judge, but as far as we are aware, neither the judge nor the Presenting Officer was aware of the decision in *AS (Afghanistan)*.

4. The significance of the decision is in the approach that the First-tier Tribunal has to adopt in relation to a 'conclusive' decision. It is not like a decision in an earlier appeal made by a judge and, using *Devaseelan* principles, becomes the starting point, but no more; nor is it like an ordinary decision of the Secretary of State which the Tribunal is free to agree or disagree with and to substitute its findings as appropriate. It has a particular status and that emerges principally from the Trafficking Convention and the National Referral Mechanism which requires the competent authority to make decisions. Clearly, it is a decision which can be reviewed, but it is clear that the basis of the review of a decision made by the competent authority is a challenge on public law principles, namely, amongst other things, whether it is perverse or irrational. This emerges from paragraph 14 of the judgment in *AS (Afghanistan)*.

5. It is as well to bear in mind that *AS (Afghanistan)* was a case where the decision of the competent authority was indeed very questionable. On the facts it seems that it was perverse, although the Court of Appeal drew back from reaching that conclusion. What is said in paragraph 7 of the decision is:

> "This decision could be said to be questionable in that Ms Farrell appears to have accepted AS's account of what actually happened to him namely that he was kept captive and required to work until 'the debt' was repaid. Although this appears on any view to be 'forced labour', Ms Farrell seems to

> think that it would only be forced labour if suffered by someone under 18. There does not appear to be any warrant for this in the Trafficking Convention or the Guidance issued by the Home Office for Competent Authorities. If, therefore, a challenge to Ms Farrell's decision had been mounted by way of judicial review, on the grounds of Wednesbury unreasonableness, any such challenge might have had some prospect of success."

6. I do not think I would be overstepping my function by saying that on the evidence in *AS (Afghanistan)* the decision of the competent authority was on its face a perverse one and was unlawful. Longmore LJ in the Court of Appeal was having to grapple with the weight that is to be attached to a decision of the competent authority which, on any sensible view, could not be said to be lawful. He said this in paragraph 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. ... 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".

7. It follows from that line of argument that the competent authority's decision is a decision which can be challenged. Although it is called a '*conclusive decision*', it is a decision which can be challenged, but it is apparent that it can be challenged on public law grounds on principles which may include being *Wednesbury* unreasonable. Although it may well extend to the other heads of challenge known in public law terms, there is no reason to think that the judge had in mind this distinction. It does not emerge from the decision itself and, unsurprisingly, the judge did not have the benefit of any research on the relevance of *AS (Afghanistan).* In these circumstances I consider that the process was fundamentally unfair: a late document was produced without realising what were the ramifications in legal terms of that lately produced document.

8. The way the judge approached it was perfectly understandable were it not for the decision in *AS (Afghanistan)*. He went through the letter and simply reached conclusions which disagreed with it. I need refer only to one example. In paragraph 17 of the decision the competent authority considered a part of the appellant's account where he spent two weeks in Greece in July 2014. It was said that these were not the actions of somebody who was under the influence of traffickers. His account was stated in these terms:-

> "You further state that in July 2014 the men took you to Greece for ten days during which time they made you beg on the beaches. Again these actions are believed to be inconsistent. It is unclear why they would take the risk and the expense of transporting a child illegally across the international

borders to beg for money, something they already had you doing within Albania".

9. Now, the response to that is found in the statement and it says in paragraph 9, in response to the passage in paragraph 17 I have quoted, '*I can only assume I was taken to Greece to make more money, but I didn't make more money so I was taken back to Albania*.' That is a perfectly permissible response if what one was dealing with was an ordinary letter by the Secretary of State which was the subject of a statutory appeal. It is very different when it comes to perversity because, in my judgement, it could not be said that the conclusion reached in paragraph 17 of the letter of the competent authority was perverse. Looking in the context of this case as a whole, a 10-day trip to Greece as a victim of further trafficking was a matter the credibility of which the decision maker was fully entitled to consider. It is clear that the decision maker did not find it credible. He expressed it in terms of being inconsistent, but what he meant was that he did not believe it. Why should these traffickers take somebody for a two week spree to Greece and (presumably at considerable cost) maintain control over him, such that he would fall within the definition of somebody who was being trafficked. He dismissed the objection made by the competent authority and concluded, not simply on relation to this element but in respect of all the other elements, that the appellant was credible. In doing so I am satisfied that the judge got it wrong.

10. I do not suggest that there are not difficult decisions to deal with. On the one hand there is a decision made which has not been subjected to a judicial review, and no criticism can be made that this was not carried through. Here, however, is a decision which can only be challenged on *Wednesbury* grounds. Compare this with the appellant himself who gives evidence, who gives an account which is, according to the judge who hears it, a credible account. It must therefore place the First-tier Tribunal Judge in a particular position of difficulty. But that difficulty cannot be resolved by simply not taking any cognisance of the fact that we are dealing with a decision by a competent authority which has a particularly distinct and discrete place in the pantheon of decisions made by decision makers in the process of immigration control. I am satisfied the judge's approach skewed his decision on credibility and consequently his conclusion found in paragraph 59 that he was satisfied as to the appellant's claim that he would be trafficked if returned to his home.

DECISION

1. The First-tier Tribunal Judge made an error on a point of law.
2. I set aside the decision of the First-tier Tribunal Judge.
3. I direct that the decision is to be re-made in the First-tier Tribunal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify

him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL