THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or any member of his family in connection with these proceedings.

18 March 2020

PRESS SUMMARY

MS (Pakistan) (Appellant) v Secretary of State for the Home Department (Respondent)

[2020] UKSC 9

On appeal from [2018] EWCA Civ 594

JUSTICES: Lady Hale, Lord Kerr, Lady Black, Lord Lloyd-Jones, Lord Briggs

BACKGROUND TO THE APPEAL

The Appellant, MS, is a Pakistani national who entered the UK in 2011 at the age of 16 on a visitor's visa. During the four preceding years, while still in Pakistan, he had been subjected to forced labour and physical abuse by relatives. One of them, his step-grandmother, brought him to the UK by deceiving him into thinking this was for the purpose of his education. On arrival, he was forced to work for no pay, as arranged by his step-grandmother for her own financial gain. He then moved from job to job for the next 15 months, under the control and compulsion of adults, as both the First-tier Tribunal ("FTT") and the Upper Tribunal ("UT") later found.

In September 2012, the Appellant came to the attention of the police, who referred him to a local authority social services department. They in turn referred him to the National Referral Mechanism ("NRM"), due to concerns as to his vulnerability and the possibility that he had been trafficked. However, in February 2013, the NRM decided, without meeting or interviewing the Appellant, that there was no reason to believe he was a victim of trafficking. The NRM considered that he was never under the control or influence of traffickers while in the UK and changed jobs freely. The Appellant sought judicial review of this decision in April 2013.

In September 2012, the Appellant had also claimed asylum, but that application was rejected in August 2013. The Secretary of State therefore decided to remove the Appellant from the UK. The Appellant appealed this decision on asylum and human rights grounds to the FTT, who found as above that he had been under compulsion and control. The FTT nonetheless dismissed his appeal. The UT granted permission to appeal and re-made the decision in view of errors of law by the FTT, finding in favour of the Appellant. In addressing the NRM's decision, the UT observed that that could only be challenged by judicial review proceedings, not through the immigration appeals system. However, the UT also held that if an NRM decision was perverse or otherwise contrary to some public law ground, the UT could make its own decision as to

whether an individual was a victim of trafficking. Otherwise, the decision to remove him would be contrary to the European Convention on Action against Trafficking in Human Beings ("ECAT") and the European Convention on Human Rights ("ECHR").

The Respondent appealed to the Court of Appeal, which allowed the appeal for the reason that, in accordance with *AS (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 1469; [2014] Imm AR 513, the UT could only go behind the NRM's decision and re-determine the factual issues as to trafficking if the decision was perverse or irrational or one which was not open to the NRM. The UT had in effect treated the NRM decision as an immigration decision and had also been wrong to consider that the obligations under ECAT were also positive obligations under article 4 of the ECHR, which prohibits slavery, servitude and forced labour.

The Appellant was granted leave to appeal to the Supreme Court. He later wished to withdraw from the proceedings, as his immigration problems had now been resolved. A preliminary issue therefore arose as to whether the Equality and Human Rights Commission ("EHRC"), which had applied to intervene in the proceedings, could take over the appeal.

JUDGMENT

The Supreme Court unanimously allows the appeal. Lady Hale gives the only judgment, with which Lord Kerr, Lady Black, Lord Lloyd-Jones and Lord Briggs agree.

REASONS FOR THE JUDGMENT

As to the preliminary issue, following a hearing in October 2019, the EHRC was permitted to intervene and take over the appeal. An intervener is a party to an appeal (Rules of the Supreme Court, rule 3(1)) and an appeal can only be withdrawn with the consent of all parties or the permission of the Court (rule 34(1)). The appeal therefore remained on foot until the Court permitted otherwise. The Court is permitted to adopt any procedure consistent with the overriding objective, the Constitutional Reform Act 2005 and the Rules (rule 9(7)). The overriding objective is to secure that the Court is accessible, fair and efficient (rule 2(2)). Where an important question of law that may have been decided wrongly below is raised in an appeal, it is open to the Court to permit intervention and allow the intervener to take over the conduct of the appeal **[9] – [10]**.

On the principal issue, the Secretary of State conceded that, when determining an appeal as to whether a removal decision would infringe rights under the ECHR, a tribunal must determine the relevant factual issues for itself on the evidence before it, albeit giving due weight to a decision-making authority's prior determination. It therefore became common ground that a tribunal is not bound by a decision of the NRM nor must it seek a public law ground for finding such a decision flawed **[11]**. This is because a tribunal has statutory jurisdiction to hear appeals from immigration decisions. The Nationality, Immigration and Asylum Act 2002 and Immigration Rules indicate that those appeals are plainly intended to involve the hearing of evidence and determination of factual issues. The House of Lords in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167 had made clear that this was a tribunal's role **[12]** - **[14]**.

The proper consideration and weight to be given to an authority's previous decision will depend on the nature of that decision and its relevance to the issue before the tribunal. In the present case, the FTT and the UT were better placed to decide whether the Appellant was a victim of trafficking than the authority. The more difficult question was the relevance of that factual

determination to the appeals **[15]**. This depended upon the relationship between the obligations in ECAT and the obligations in article 4 of the ECHR **[17]**.

Article 4 of ECAT defines trafficking such that a child, recruited and transported for the purpose of exploitation through forced labour or services, may be considered a victim of trafficking **[18]**. ECAT also imposes other obligations on states, to prevent trafficking and to identify and protect its victims **[19].** In *Siliadin v France* (2006) 43 EHRR 6, the European Court of Human Rights held that states have positive obligations under article 4 of the ECHR to adopt and apply criminal law provisions against slavery, servitude, and forced labour. In *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, it held that trafficking within the meaning of article 4 of ECAT fell within the scope of article 4 of the ECHR. The state had a positive obligation to prevent, to investigate, to protect and to punish **[23] – [26]**. This was confirmed in *Chowdury v Greece* (Application No 2184/15) and in *J v Austria* (Application No 58216/13) **[32] – [33]**. The investigative duty arises whether or not there has been a complaint and must be capable of leading to the identification and punishment of the individuals responsible **[25]**.

In the present case, the UT decided that the Appellant was indeed a victim of trafficking. Once brought to the attention of police, the Appellant was removed from the risk of further exploitation, while the UT held that he would not be at risk of re-trafficking if returned to Pakistan. However, there had not yet been an effective investigation into the breach of article 4, as the police took no action after referring him to social services. Such an investigation is required and cannot take place if the Appellant is removed to Pakistan. The appeal is therefore allowed and the UT's decision on this ground restored **[34] – [36]**.

References in square brackets are to paragraphs in the judgment