**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/02558/2018 (V)

**THE IMMIGRATION ACTS**

| **Heard at Cardiff Civil Justice Centre** | **Decision & Reasons Promulgated** |
|---|---|
| **On 9 July 2020 remotely** | **On 27 July 2020** |

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**FYH**
**(ANONYMITY ORDER MADE)**

Respondent

**Representation:**
For the Appellant: Mr C Howells, Senior Home Office Presenting Officer
For the Respondent: Ms G Capel, instructed by Wilson Solicitors

**DECISION AND REASONS**

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the respondent (FYH). This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Although this is an appeal by the Secretary of State, I will for convenience refer to the parties as they appeared before the First-tier Tribunal.

## Background

The appellant is a citizen of China who was born on 15 May 1958.

She claims that she came to the UK illegally in 2005 as a result of an arrangement made with a Snakehead in China to whom her family paid 20,000 RMB exclusive of interest.

Having arrived in the UK, the appellant lived with her uncle for about twelve years.

During that time, the appellant formed a relationship with a Mr L who had also been brought to the UK by Snakeheads. He was involved in a kidnap and ransom offence in respect of which the appellant gave the police a statement and Mr L was sentenced to twelve years' imprisonment having been convicted in 2015.

During her time with her uncle, he involved her in buying cannabis and in 2016 she was arrested in relation to that.

The appellant worked as a cleaner. One of her customers, "A" wanted to have sex with her and, when she refused, he sexually assaulted her and did not let her leave. Subsequently, she was raped by a number of men over a period of time whom, she, were paying "A". The appellant was, in effect, held in captivity at "A's" house where men would come and have sex with her. "A" also involved her in drugs and she was eventually stopped and arrested for possession of drugs.

Following her release from custody, she again went to live with "A" after she suggested that they enter a relationship and that she would only have sex with him and not other men. He agreed but throughout the relationship if the appellant refused to have sex with "A" he would threaten to bring other men to the house.

The appellant had a key and, on behalf of "A", collected drugs for him. She was again arrested in May 2017 and again in July 2017 for drug offences involving cannabis.

Between 14 November 2016 and 8 May 2017, the appellant was convicted on three occasions for offences relating to controlled drugs, namely cannabis. In each case, she did not receive a custodial sentence.

However, on 6 July 2017 she was convicted of possession with intent to supply a class B drug (cannabis) and of breach of a conditional discharge. On 17 August 2017, she was sentenced at the Wood Green Crown Court to eight weeks' imprisonment.

On 30 August 2017, the appellant was served with a notice of intention to deport her. On 4 September 2017, the appellant claimed asylum. There followed screening and asylum interviews on 28 November 2017 and 7 December 2017 respectively.

On 9 February 2018, the appellant was referred by the Salvation Army to the National Referral Mechanism ("NRM") and, on 26 February 2018, received a positive Reasonable Grounds decision that she was the victim of trafficking/modern slavery.

On 22 January 2018, the Secretary of State refused her claims for asylum, humanitarian protection and human rights.

On 18 December 2019, the NRM reached a Conclusive Grounds decision in her favour that she is a victim of trafficking/modern slavery.

## The Appeal to the First-tier Tribunal

The appellant appealed to the First-tier Tribunal. Following a hearing on 10 February 2020, Judge Rai allowed the appellant's appeal. The judge accepted that the appellant had been trafficked to the UK and that there was a real risk of her being re-trafficked if she returned to China. The judge found that the Chinese authorities would not be able to provide her with a sufficiency of protection and that internal relocation was not reasonably open to her. On that basis, the judge allowed the appellant's appeal under the Refugee Convention. The judge also allowed the appellant's appeal under Art 8 of the ECHR.

## The Appeal to the Upper Tribunal

The Secretary of State sought permission to appeal to the Upper Tribunal. On 1 March 2020, the First-tier Tribunal (Resident Judge J F W Phillips) granted the Secretary of State permission to appeal. The grounds, upon which permission was granted, were that: (1) in allowing the appellant's appeal the judge had failed properly to apply the relevant country guidance decisions in finding that the appellant would be at risk of being re-trafficked; and (2) in allowing the appeal under Art 8, the judge had wrongly found that the appellant was not a "foreign offender" on the basis that there was no public interest in her prosecution for the drugs offences given the circumstances.

## The Hearing

In the light of the COVID-19 crisis, the appeal hearing to determine whether the judge's decision contained an error of law was listed for a remote hearing by Skype for Business. Neither party objected to the hearing being remote.

As a consequence, on 9 July 2020, the appeal was listed before me to be heard by Skype for Business. I was based in the Cardiff Civil Justice Centre. Ms G Capel, who represented the appellant, appeared remotely by Skype. Mr Howells, who represented the Secretary of State, was unable to connect to the hearing by Skype due to problems with his broadband. However, he connected to the hearing by telephone and was content to proceed with the hearing on that basis.

As a consequence, in addition the detailed written submissions made by the parties in response to the UT's earlier directions, I heard oral submissions from Mr Howells and Ms Capel.

## The Judge's Decision

Judge Rai heard oral evidence from the appellant. The judge accepted the appellant's credibility and her account that led to her being recognised as a victim of trafficking/modern slavery. The judge's factual findings in that regard are not challenged.

Consequently, on the basis that the appellant was a victim of modern slavery by sexual exploitation and forced criminality in the UK together with her finding that the appellant had been trafficked to the UK by snakeheads, the central issues before the judge were (a) whether the appellant could establish a real risk of persecution on return to China at the hands of the snakeheads to whom she owed a debt including being re-trafficked to the United Kingdom; (b) whether, if that were the case, she could obtain a sufficiency of protection from the Chinese authorities; and (c) whether internal relocation was available to her.

In reaching her findings, the judge was directed to a number of country guidance cases dealing with loan sharks or snakeheads. In addition, the judge had a number of expert reports: a country expert report by Joshua Kurlantzick, a trafficking report by Elizabeth Flint and a psychological report by Dr Martha Nikopaschos.

The essence of the argument before the judge appears to have been that the country guidance decisions dating back to 2002 and 2009 had to be seen in the light of the expert evidence, in particular of Joshua Kurlantzick, which established that there was indeed a risk of re-trafficking by snakeheads and an insufficiency of protection from their actions by the state in China.

The judge's consideration of the country guidance cases is at paras 53–55 of her decision. There, she said this:

> "53. The leading country guidance on loan sharks or Snakeheads is ZC & Others (Risk - illegal exit - loan sharks) China CG [2009] UKAIT 00028. It found that HL (Risk - Return - Snakeheads) China CG [2002] UKIAT 03683 is applicable. HL found that
>
> (i) the totality of the evidence does not establish that a returning failed asylum seeker who is indebted to Snakeheads or loan sharks will come to harm on return to China.
>
> (ii) The principal reason for our conclusion that the appellant would not be at risk on return is the lack of any country information to indicate that would be at risk. Nevertheless, logic also supports this conclusion. The Snakeheads and loan sharks are violent and unscrupulous, but they are running what is likely to be a highly profitable business and would prefer to avoid actions which might damage that business. Violent or other persecutory actions against those who are returned to China would be unlikely to result in the recovery of much money, but would be likely to discourage future customers. Amongst the press reports submitted by Mr Yuen are reports of snakeheads going to great lengths to build spectacular houses to show to potential customers, as an indication of the sort of accommodation and lifestyle they can expect if they travel to a western country. If the snakeheads and loan sharks go to these lengths it is not likely that they would risk deterring potential customers

by taking hostile action against those who have returned, usually through no fault of their own. Clearly it is a different matter to ensure that those who remain abroad and are able to pay continue to pay for fear of what might happen to them or their relatives at home.

54. In ZC & Others the Tribunal declined to depart from HL. The UT also stated that with respect to the issues of the appellants registering with the authorities in another part of the country under the hukou system, there is no evidence before me to suggest that the authorities would pass on their details to unlawfully operating groups.

55. However, having considered the objective evidence presented in this case, and the latest country expert reports, there are good reasons for why the ZC & Others should be treated with caution. It is case law that is now 10 years old, and HL even older. The Tribunal in HL specifically said that their conclusions on risk on return from snakeheads was based on an absence of country evidence. The Tribunal does not appear to have considered whether snakehead gangs utilise internal or transnational trafficking as a means by which to recoup the debt owed."

The judge then went on to consider the reports of Elizabeth Flint and Joshua Kurlantzick at paras 56–59 as follows:

"56. The appellant's account of events in China and in the UK are externally plausible having considered the objective evidence by way of trafficking report by Ms Flint and the country expert report by [Joshua] Kurlantzick. Both provide an objective background in which the appellant's fears of the Snakeheads and Mr [L] was …… to be considered. The US State Department TIP Report 2018 referred to in both reports confirms China is a source, destination and transit country for sex trafficking. In terms of prosecutions of trafficking, the same 2018 report found that the government maintained insufficient law enforcement efforts and continued to report statistics for crimes outside the definition of human trafficking making it difficult to assess progress. Joshua Kurlantzick talks specifically about the infiltration of the police by Snakehead gangs. He states '*that in many parts of the country it makes it difficult for survivors to trust that the police and the local officials will relocate them without informing the gangs of their location*'. He goes on to states (sic) *'people who still owed a trafficking [g]ang a debt – at least, a debt as construed by the gang – would be an obvious target for re-kidnapping, especially in Fujian and other Southern and South-Eastern provinces where snakehead gangs operate most widely and have the largest number of members'.* This evidence was not challenged by the respondent.

57. Ms Flint explains in her report that in a situation of *'debt bondage'*, the trafficker's intention is not to ensure that the loan is repaid within the required timescale but to ensure that the victim cannot do so and is trapped into paying off the ever-increasing interest on the loan. This is consistent with the appellant being told by the Snakeheads, work was arranged in a clothing factory in her asylum interview, which was clarified by her representative shortly after the interview to the Snakeheads gave an example to the appellant while still in China that he may be able to find work in a clothing factory in the UK but did not provide a job for her. Her witness statement states that she was only brought to the UK and had to find work herself to pay back the debt. Her son and his family were threatened, and assaulted and had to be moved away from the area to avoid any harm coming to their son. The appellant's grandson. Overall the evidence indicates that the trafficking

> situation in China has evolved in recent years, with criminal organisations operating in a region becoming more organised, professional and diverse. There has been an increased use of violence and coercive measures such as threats, direct force and kidnapping facilitated by organised criminal groups. Both experts consider the appellant would be at real risk of persecution, including re-trafficking by her former traffickers.
>
> 58. There is sufficient evidence on balance taking all the evidence into account to find that the appellant's concerns about being unable to repay the debt on return, and that that would lead to being re-trafficked is credible in her circumstances.
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> 59. In HC & RC (Trafficked women) China CG [2009] UKAIT 00027 (18 July 2019), the respondent conceded at [36] that former victims of trafficking for sexual exploitation could form a particular social group in China."

As can be seen, having set out the relevant CG decisions, and in particular HL, the judge went on to consider expert reports from a trafficking expert and a country expert concerning the current position about how snakehead gangs behave in relation to returnees who owe them a debt.

The judge returned to the issues of risk on return, sufficiency of protection and internal relocation at paras 62–68 of her determination as follows:

> "62. The core of the respondent's submission rests on the appellant not having demonstrated to the required standard that she is a victim of trafficking because of her inconsistent account, as such the four convictions relating to drug offences should not be looked at within the prism of the trafficking. In the event she does demonstrate she is a victim of trafficking, she could still relocate to China.
>
> 63. I have found the appellant is a vulnerable person with mental health difficulties, who has been trafficked to the UK for the purpose of forced criminality and sexual exploitation. With that comes a social stigma particularly at an age in her 60[s]. She is at risk of being further exploited and re-trafficked as she has not repaid the debt to the Snakeheads and originates from Fujian. The appellant has a lack of supportive family ties in China as her husband is elderly, blind and bedridden. Her eldest son and his family have relocated elsewhere following an assault and threats from snakeheads and she has had no contact with him. Her youngest son provides income for the family from temporary work. The appellant herself is uneducated and lacks employment prospects given she did not work whilst living in China.
>
> 64. I am satisfied that from the country expert reports, there is insufficient protection for victims of trafficking. In terms of internal relocation China is ranked Tier 3, of the lowest tier, of countries that have the worst problems with human trafficking. This means China does not fully meet the minimum standards for the elimination of trafficking and is not making significant efforts to do so. With regard to the US TIP report, the police continue to arrest and detain women on suspicion of prostitution. Joshua Kurlantzick states Xi Jinping is ignoring organised crime in regions further from Beijing, particularly in Southern and South-Eastern China. He accepted that local officials across the country are engaged in widespread collusion with organised crime groups and other criminal organisations. He goes on to say that the Chinese Government has not made any clear progress into shutting down/arresting major snakeheads

> or people smuggling gangs. The respondents takes no issue with the expert's qualifications or expertise, but describes him as making '*sweeping assertions made without authority or further information*'.
>
> 65. I remind myself that the starting principle is that country guidance cases are authoritative on any subsequent appeal only insofar as that appeal relates to the country guidance issue in question and depends on the same or similar evidence: Practice Direction 12.2. The Guidance Note at para 11 states that if credible fresh evidence relevant to the issue that has not been considered in the country guidance case or, if a subsequent case includes further issues that have not been considered in the CG case, the judge will reach the appropriate conclusion in the CG case so far as it remains relevant….
>
> 66. I am satisfied that the Tribunal in HL came to their conclusion on the basis of an *absence* of country evidence, whereas Joshua Kurlantzick provides compelling evidence that individuals owing debts to snakeheads are at real risk of serious harm.
>
> 67. For these reasons I conclude that the appellant is at real risk of re-trafficking and will be provided with sufficient protection nor could she internally relocate. [The sense is that it should read 'would *not* be provided with sufficient protection'].
>
> 68. As such I find that the appellant has demonstrated to the lower standard, that she has a well-founded fear of persecution as a woman who has previously been trafficked. For the reason given above she is classified as a member of a particular social group. She continues to be at risk of persecution if returned by virtue of that reason and would be unable to avail herself of state protection or to be able to relocate within China. Therefore the appellant's removal would cause the United Kingdom to be in breach of its obligations under the Refugee Convention."

## The Secretary of State's Challenge

On behalf of the Secretary of State, Mr Howells relied upon the grounds of appeal and his skeleton argument dated 2 June 2020 which he expanded upon in his oral submissions.

First, he submitted that the judge had erred in law by departing from the country guidance decisions in HL, ZC and HC & RC. He submitted that the judge had been wrong to conclude that HL had been "based on an absence of country evidence" (see para 55 of the determination). He submitted that the case of HL, as the judge's citation of it at para 53 of her determination showed, was also based upon an argument of logic that there would be no risk to a returning trafficked person who was indebted to snakeheads. He reminded me that the judge had also said that HL was based upon an "absence" of country evidence at para 66 of her determination.

Secondly, Mr Howells submitted that the judge had been wrong to find that there were "strong grounds based upon cogent evidence" to depart from the CG decisions relying upon the report of Joshua Kurlantzick. He submitted that the judge had failed to deal with the submission, made in the respondent's written submissions following the hearing, that Mr Kurlantzick's conclusions

were “sweeping assertions made without authority or further information”. Likewise, it was wrong of the judge to state in para 56 that the expert’s evidence was “not challenged by the respondent”. Mr Howells submitted that the respondent had specifically challenged that part of Mr Kurlantzick’s report where, at para 45, he had concluded that the police had been infiltrated by snake gangs in many parts of the country and so it was difficult for survivors to trust the police and local officials in relocating and providing a sufficiency of protection. Mr Howells submitted that the judge had been wrong to conclude at para 66 that Mr Kurlantzick’s evidence provided “compelling evidence” that individuals owing debts to snakehead gangs were at real risks of serious harm.

**The Appellant’s Submissions**

On behalf of the appellant, Ms Capel also adopted her written submissions dated 11 June 2020 which she expanded upon in her oral submissions.

First, she submitted that the judge had correctly set out the relevant country guidance decisions in HL, ZC and HC & RC.

Secondly, the judge had correctly directed herself on the effect of country guidance in para 65.

Thirdly, Ms Capel submitted that the judge had not fallen into error in departing from the country guidance. Dealing with a point in the secretary of state’s grounds, but not pursued with any vigour by Mr Howell’s in his oral submissions, Ms Capel submitted that the judge was entitled to take into account that the CG cases were at least ten years old. She referred me to NM and Others (Lone Women - Ashraf) Somalia CG [2005] UKIAT 0076 [140] that the “passage of time” or “substantial new evidence” were relevant in determining whether there was a good reason for departing from a country guidance case.

Fourthly, Ms Capel submitted that the judge had not failed to deal with the respondent’s challenge to Mr Kurlantzick’s evidence. She pointed out that the judge specifically referred at para 64 of her determination to the submission made on behalf of the respondent that his conclusions were “sweeping assertions made without authority or further information”. However, Ms Capel submitted that Mr Kurlantzick was clearly an expert witness and his report was sourced with some sixteen endnotes including endnote 14 in para 45 which referred to “author interviews with Chinese officials, Dec 2014” which was at the end of the sentence which read “the infiltration of the police by Snakehead gangs, in many parts of the country, makes it difficult for survivors to trust that the police and the local officials will relocate them without informing gangs of their location.”

Ms Capel submitted that the judge was entitled to rely upon this expert evidence as “cogent evidence” justifying a departure from the CG decisions and her finding in relation to risk on return, sufficiency of protection and internal relocation.

Fifthly, Ms Capel acknowledged that the AIT in HL had reached its conclusion not simply on the "lack of any country information" that a person would be at risk on return but had also deployed an argument of "logic" that snakeheads would not seek retribution against returnees. Nevertheless, Ms Capel submitted that the judge was fully entitled to reach a different finding if it was based upon cogent evidence such as the expert report of Mr Kurlantzick.

Sixthly, Ms Capel submitted that, in fact, the most recent country guidance case of HC & RC did not exclude a finding in a particular case that there was a real risk from traffickers on return to China. All that case decided, Ms Capel submitted, was that set out in para 2 of the headnote, namely that "women and girls in China do not in general face a real risk of serious harm from traffickers." However, she submitted, the AIT went on to find that:

> "Where, however, it can be established in a given case that a woman or a girl does face a real risk of being forced or coerced into prostitution by traffickers, the issue of whether she will be able to receive effective protection from the authorities will need careful consideration in the light of background evidence highlighting significant deficiencies in the system of protection for victims of trafficking. But each case, however, must be judged on its own facts."

Ms Capel submitted there was nothing in the decision in HC & RC to preclude the judge in this case, based upon the expert evidence, finding in the appellant's favour both as regards risk on return, sufficiency of protection and internal relocation.

## Discussion

The judge set out correctly the conclusions of the AIT in HL at para 53 of her determination. That case decided that, on the evidence before the AIT, it was not established that a returning failed asylum seeker who was indebted to snakeheads or loan sharks would be at risk from those snakeheads or loan sharks. That conclusion, reached in 2002, was endorsed seven years later by the AIT in ZC & Others in 2009.

The judge plainly took that as her starting point. The judge recognised that the effect of a CG decision was to determine in future cases the factual issue which had been determined in the CG decisions (see para 65 of her determination). Although the judge did not directly quote the well-known phrase used by Stanley Burnton LJ in SG (Iraq) v SSHD [2012] EWCA Civ 940 at [47] that a CG decision must be followed unless there are "very strong grounds based upon cogent evidence", the judge clearly had that in mind when looking at the expert evidence and indeed concluded that there was "compelling evidence" on the basis of that evidence that individuals such as the appellant on return would be at real risk of serious harm. The crucial issue in this appeal is whether the evidence that the judge relied upon justified departure from HL and ZC & Others.

First, I see nothing untoward in the judge observing that ZC & Others was now "ten years old" (decided in 2009) and that HL was even earlier (decided in 2002). Of course, the fact that a CG decision was decided some years ago is

not, in itself, a good reason for departing from it. However, the passage time may potentially give rise to a change of material circumstances in the country which might lead to a different conclusion based upon evidence about the current circumstances. In NM and Others, the AIT noted (at [140]) that:

> "There may be evidence that circumstances have changed in a material way which requires a different decision, again on the basis that proper reasons for that view are given; there may be significant new evidence which shows that the views originally expressed will require consideration for revision or refinement, even without any material change of circumstances. It may be that the passage of time itself or substantial new evidence itself warrants a re-examination of the position, even though the outcome may be unchanged."

Secondly, the expert evidence both from Ms Flint and Mr Kurlantzick does support the appellant's case in relation to risk on return, a lack of sufficiency of protection and the unavailability of internal relocation. Mr Howells' challenge was to the integrity of that evidence, in particular of Mr Kurlantzick.

Mr Kurlantzick produced a detailed report dated 28 June 2018 (at pages 208–227 of the bundle) and an addendum report dated 19 June 2019 (at pages 205–207 of the bundle). There can be no doubt reading Mr Kurlantzick's experience and qualifications that he is an expert. I did not, in fact, understand Mr Howells to suggest otherwise. Instead, Mr Howells' submission was that the evidence of Mr Kurlantzick was not sufficiently referenced and was vague and unsubstantiated which was a submission that the judge did not deal with.

I do not accept that the judge failed to have regard to that submission as she specifically refers to it in para 64 when considering Mr Kurlantzick's evidence and what weight she should place upon it. I acknowledge that at para 56, having set out some of Mr Kurlantzick's evidence, she states that the evidence was "not challenged by the respondent" but whilst inconsistent with what she has said in para 64, it is not in itself a reason for regarding her reliance upon that evidence as unwarranted.

As I have already said, Mr Kurlantzick is undoubtedly an expert. The particular passage in his evidence at para 45 is footnoted by reference to interviews with Chinese officials. Given the nature of such evidence, and the importance of anonymity, he could do little more than reference his source in this way. He is, after all, an expert who acquires expertise through experience, research and knowledge about events in the country concerned. Here, he sets out in para 45 evidence which supported the appellant's claim and the judge's ultimate finding:

> "The infiltration of the police by Snakehead groups, in many parts of the country, makes it difficult for survivors to trust that the police and local officials will relocate them without informing gangs of their location.[FN 14] Indeed, there has been no report of prosecutions of village and other level police and other officials have received bribes from trafficking gangs. This lack of prosecution suggests that police and other officials work with snakehead gangs with impunity; it may also testify to the breadth of gangs' networks and to their significant resources, especially in finding people who once went abroad and re-kidnapping them. People who still owed a trafficking gang a debt – at least, a debt as construed by the gang – would be an obvious

> target for re-kidnapping, especially in Fujian and other Southern and South-Eastern provinces where snakehead gangs operate most widely and have the largest number of members." (footnote omitted)

Mr Kurlantzick's evidence does not sit alone in supporting the appellant's claim. At para 57, the judge referred to the evidence of Elizabeth Flint which was supportive of the appellant's account of being trafficked – which is now accepted including that she was the victim of modern slavery in the UK. It suffices to set out a number of extracts from Mr Kurlantzick's report to demonstrate the under-pinning of the judge's findings.

Returning to Mr Kurlantzick's report, at para 12 onwards he deals with "the situation regarding corruption and criminal syndicates", and at para 15 notes that

> "In fact, Fujian province, along with Guangdong province, is the center of snakehead activity in the entire country. Given the sheer number of snakehead groups in Fujian, it would be very difficult for the national and provincial governments to make inroads against Fujian snakeheads, and anyone from Fujian who has dealt with the snakeheads in the past would be in serious danger returning to Fujian, where the snakeheads are most powerful and have informants in every village, *in my experience* (my emphasis)."

Then at para 16, he continues:

> "People who are pursued by organised criminal groups, and are alleged not to have repaid debts, can be particularly threatened by organised criminal organisations, and by arbitrary arrest and detention without due process by a police linked to organised criminal groups."

At para 17, he notes that:

> "People dealing with criminal gangs indeed have little recourse. The police force is viewed as highly corrupt, as the Chinese government has essentially admitted".

At the end of that quotation an endnote refers to an internet page announcing a "crackdown on police corruption".

At para 20, Mr Kurlantzick notes that:

> "The Chinese government has taken a handful of formal steps to crack down on criminal syndicates and assist potential victims of criminal syndicates, including people who have been trafficked and/or fear being trafficked from the country, as well as people who migrated voluntarily, who were physically and/or psychologically damaged by their migration, and may have significant trouble reintegrating into Chinese society, finding work again, and accessing medical and psychological care. But these formal steps, including the Xi administration's recent announcement of a new tough campaign against organised crime and corrupt village and local-level officials, are inadequate in protecting victims and helping people who migrated using snakeheads reintegrating to Chinese society."

At para 25, Mr Kurlantzick deals with re-trafficking:

> "The scope of trafficking of Chinese nationals is extremely broad. Some nationals do indeed engage willingly with snakeheads in order to leave China, while others are essentially kidnapped or forced in other ways into modern-day slavery. People who are trafficked once, victimised once by a loan shark, or voluntarily migrate once are indeed at much higher risk of being retrafficked, because of debts incurred, by trafficking networks to the United Kingdom and other European countries, if they are returned to China. This is because, even though they have voluntarily migrated out of China, they are often followed by trafficking gangs and are traumatised by their previous experiences and unable to find employment and permanent shelter in China, even though reforms of China's *hukou* system has made it much easier, in recent years, for Chinese citizens to move around their country. As a result, even if they once travelled out of China willingly, when they are back in China they are at a very high risk of being retrafficked against their will, since they are among the most vulnerable members of society and may still owe debts to a snakehead gang."

At para 26, Mr Kurlantzick continues:

> "Combined with endemic graft in the police force and a climate of the deteriorating rule of law, the lack of protection for victims means that people cannot look to the law enforcement to help them combat syndicates who might be looking to traffic them upon their return to China."

At para 29, Mr Kurlantzick notes that it would be "extremely difficult" for the appellant to find work in China.

Then at para 30 he states:

> "Snakehead groups also, if they have connections with any police units, could follow people returning to China, since local police forces throughout China are amassing extensive surveillance abilities and massive amounts of personal detail on all citizens in the country."

At para 32, he continues:

> "As a result, it is plausible that a person returned to China who is still of interest to a snake gang group would be followed around the country, especially if she was unable to work or repay her debts. … Snake gang groups further use regular visits to the family of someone who has been retrafficked to get updated information about whether, and when, that person might be returning to the country."

At para 34, Mr Kurlantzick notes that the appellant is a person who left China illegally and then returned to the country would find it

> "even harder for her to enlist the assistance of Chinese law enforcement in protecting her from any future problems with a snakehead gang."

Having set out the appellant's account, which of course the judge accepted, Mr Kurlantzick at para 53 onwards of his report sets out the potential problems for the appellant if she returns to China. At para 55, he continues that if the appellant

> "were returned to China, she could, in my view, be tracked down by the snakehead and loan sharking gang, wherever she eventually lived in China,

> and particularly if she lived in Fujian or other Southern provinces. There is no evidence that, despite the large size of the country, and the recent reforms of the *hukou* system, she would be able to escape the criminal syndicate if she cannot pay her debts – and its potential connections among Chinese officials and law enforcement – or could find long-term shelter upon return. She further would find it difficult to obtain employment of any kind, since she likely would be unable to remain in any one part of the country for long. Without employment, she might be unable to pay her debts to the snakehead and could be endangered physically."

Mr Kurlantzick then goes on to note that the appellant would be "highly vulnerable" even in larger cities (para 56) and then at para 57:

> "indeed, there is no sufficient protection in China available to people who return to the country after migration, especially those with a reach to send people abroad. There is no internal relocation available in China, such relocation would allow [the appellant] to be able to escape the snakehead gang to whom she still owes money, if she cannot pay them back. Such criminal networks likely would have contacts across China."

The judge had this report and, as is clear from some of the comments, plainly took it into account even beyond the parts that were quoted by her, in particular at para 56. For example, at para 64 of her determination, the reference to China being ranked Tier 3 in terms of trafficking, is plainly based upon para 22 of Mr Kurlantzick's report.

In my judgment, the judge was entitled to rely upon the expert opinion of Mr Kurlantzick supported, in particular in relation to the modern slavery and trafficking issues in the UK and the appellant's circumstances by the report of Elizabeth Flint, in concluding that there was "very strong grounds based upon cogent evidence" to reach a different conclusion to the country guidance cases of HL and ZC & Others. The "logic" point made by the IAT in headnote (ii) of HL had to give way to the different expert evidence before the judge.

This evidence formed a reasonable and rational basis for concluding that the appellant was at real risk from her traffickers if she returned to China both in terms of being re-trafficked or otherwise subject to serious harm. The judge was entitled to take into account, as she found and that is not now challenged, that the appellant is a vulnerable person. That was supported by the expert psychological report.

The judge was entitled to find, in addition, that the Chinese government would be unable to provide a sufficiency of protection against snakeheads and that internal relocation was not an option open to her given her circumstances and the risk that she might be tracked down by the snakeheads.

Finally, I also accept Ms Capel's submission that nothing in HC & RC precluded the judge reaching the decision that she did. Paragraphs (1) and (2) of the headnote read as follows:

> "(1) Although the Chinese authorities are intent upon rescuing and rehabilitating women and girls trafficked for the purposes of prostitution, there are deficiencies in the measures they have taken to combat the problem of trafficking. The principal deficiencies are the lack of a

> determined effort to deal with the complicity of corrupt law enforcement officers and state officials and the failure to penalise as trafficking acts of forced labour, debt bondage, coercion, involuntary servitude or offences committed against male victims.
>
> (2) Women and girls in China do not in general face a real risk of serious harm from traffickers. Where, however, it can be established in a given case that a woman or a girl does face a real risk of being forced or coerced into prostitution by traffickers, the issue of whether she will be able to receive effective protection from the authorities will need careful consideration in the light of background evidence highlighting significant deficiencies in the system of protection for victims of trafficking. But each case, however, must be judged on its own facts. China is a vast country and it may be, for example, that in a particular part of China the efforts to eliminate trafficking are determined and the level of complicity between state officials and traffickers is low. If an appellant comes from such an area, or if she can relocate to such an area, there may be no real risk to her."

In my judgment, this decision dating back to 2009 itself recognises that there may, in a particular case, be a real risk to a woman from her traffickers in China and also that, on a fact-sensitive basis, there may be cases where a sufficiency of protection is not established and internal relocation is not safe. Those are fact-sensitive matters and in respect of which the judge was entitled to rely upon the expert evidence to reach her findings.

For these reasons I am satisfied that the judge was entitled to depart from the earlier country guidance cases on the basis that there was "very strong grounds based upon cogent evidence" derived from the expert reports, in particular that of Mr Kurlantzick and to find that the appellant would be at real risk of being retrafficked (or other serious harm) at the hands of the snakehead gang who originally trafficked her to the UK; that she would be unable to obtain a sufficiency of protection and that internal relocation would not be reasonably and safely available to her within China.

For these reasons, therefore, the First-tier Tribunal did not err in law in allowing the appellant's appeal on asylum grounds.

## **Article 8**

The Secretary of State also challenged the judge's conclusion that the appellant's return to China would breach Art 8. Given her conclusion in respect of the asylum claim, which I have decided she was entitled to reach, it is perhaps unnecessary to reach a conclusion in relation to the Art 8 finding.

Before me, both representatives engaged with the judge's reasoning in relation to Art 8, in particular whether the judge was entitled to find that the appellant was not a "foreign criminal" so that s.117C of the Nationality, Immigration and Asylum Act 2002 (as amended) did not apply because the appellant's conviction (for which she was sentenced to less than twelve months' imprisonment) had not caused "serious harm" and she was not a "persistent offender" (s.117D(2)(c)(ii) and (iii)). There are, undoubtedly, difficulties with the judge's reasoning in that regard; in particular in taking into account what

the judge called her "forced criminality". It is not readily apparent why that was relevant in assessing whether the *consequences* of her offending caused "serious harm" or whether, given the repetition of offending, that offending was not "persistent" (see the approach of the Court of Appeal to s.117D(2)(c)(ii) and (iii) in R(Mahmood) v UTIAC and SSHD [2020] EWCA Civ 717 at [34]-[45] and [71]). Any "excuse" or "mitigation" for her offending would not deflect from a finding that it "caused serious harm" or that she "keeps breaking the law" and that therefore she is a "persistent offender" if those findings would otherwise be the appropriate findings on the facts. Also problematic is the judge's finding that her offending was so mitigated by the circumstances in which she was required to commit the offences in the UK that there is "*no* public interest" in deporting her. Whilst the mitigation might be relevant to the "weight" to be given to the public interest, her deportation, if she is a "foreign criminal", "*is* in the public interest" (see, s.117C(1), my emphasis).

At the conclusion of the hearing, I invited the representatives to indicate what their position would be in relation to the Art 8 decision if the judge's conclusion on the asylum claim stood. Ms Capel, quite fairly, indicated that without taking instructions from the appellant (who was not present in the hearing) she could not say. Mr Howells, likewise, was reluctant to express a view other than to acknowledge, as the judge had found in para 74, that if the appellant was a victim of trafficking and at real risk of persecution on return, her Art 8 claim should succeed.

I do not consider the judge's reasoning in relation to whether the appellant is a "foreign criminal" to be sustainable for the reasons I gave above. However, in the light of my conclusion that the judge's decision to allow the appellant's appeal on asylum grounds stands, it would be pointless to set aside her decision that the appeal should also be allowed under Art 8. Given the findings in the asylum appeal, the inevitable conclusion is that the appellant cannot be deported and her removal would necessarily breach Art 8. The judge decided as much in para 74. Any re-hearing of her art 8 claim would be wholly superfluous because she was, and would be, bound to succeed under Art 8 given the conclusion in the asylum appeal. Consequently, I do not consider it appropriate to set aside the Art 8 decision in her favour.

## Decision

For the above reasons, the decision of the First-tier Tribunal to allow the appellant's appeal on asylum grounds did not involve the making of an error of law. That decision, therefore, stands.

In relation to the decision to allow the appeal under Art 8, for the reasons I have set out above, it is not appropriate to set aside that decision and so the decision to allow the appeal under Art 8, on the basis I have set out, also stands.

Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

**Andrew Grubb**

Judge of the Upper Tribunal
15, July 2020