IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003464

First-tier Tribunal No: HU/57550/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 14 January 2025

Before

UPPER TRIBUNAL JUDGE LODATO

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CL
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant:	Ms Young, Senior Presenting Officer on 25 September 2024, and Dr Ibisi, Senior Presenting Officer on 6 December 2024
For the Respondent:	Mr Hughes, counsel on 25 September 2024, and Ms Capel, counsel, on 6 December 2024, both instructed by Duncan Lewis solicitors

Heard at Phoenix House (Bradford) on 25 September 2024
and subsequent hearing heard at Manchester Civil Justice Centre on 6 December 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family is granted anonymity.

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

DECISION AND REASONS

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Introduction

1. The Secretary of State appeals with permission against the decision of Judge Cole ('the judge'). By his decision of 17 June 2024, the judge allowed the appeal against the Secretary of State's refusal of CL's claim.

2. To avoid confusion, we will refer to the parties as they were before the judge: CL as the appellant and the Secretary of State as the respondent.

Background

3. The appellant arrived in the UK on 22 November 2010 using a counterfeit Hungarian passport. His use of this false document was the subject of criminal proceedings brought against him. He was convicted at Liverpool Crown on 28 April 2010 and sentenced to a period of imprisonment of 18 months. On 13 May 2011, the appellant was issued with a notice of liability to be deported. This process concluded on 8 December 2011 when a deportation notice was signed against him. In the years which followed, the appellant was not removed from the UK, and he brought a series of further claims and legal challenges to various decisions taken by the respondent. It is unnecessary to summarise this extensive procedural history as it was not in dispute and is fully detailed within the refusal of the human rights claim dated 18 November 2021. This refusal decision was the subject of the appeal proceedings before the judge.

4. The refusal decision letter of 18 November 2021 is headed "decision to refuse a human rights claim". In a section headed "consideration of submissions", the respondent itemised the evidence and material which was assessed. The list includes expert evidence, and a range of material relied upon to support the factual claim that the appellant had been the victim of trafficking and sexual exploitation in the past and would be vulnerable to further exploitation in the future. Between [9] and [13], the respondent considered the appellant's claim that he was a potential victim of trafficking. It was noted that the Single Competent Authority had determined, on 12 February 2015, that there were not reasonable grounds to find that he was a victim of trafficking.

5. Under the heading "consideration of protection claim", the respondent summarised previous protections claims brought by the appellant which were certified as clearly unfounded in decisions dated 4 November 2011 and 8 November 2011 respectively ([19]-[21]). Attention next turned to the human rights claims.

6. Between [22] and [78] of the refusal decision, detailed and lengthy consideration was given to the appellant's claims that his family life with his British partner and his step-children were sufficiently strong to outweigh the public interest in his deportation. In the context of the Article 8 analysis, the respondent considered the application of the statutory exceptions against deportation and found that there would not be unduly harsh consequences for the appellant's family members, that he did not meet any of the requirements for the private life exception and that there were not very compelling circumstances to render his removal disproportionate. There was no consideration of the trafficking claim in the Article 8 analysis.

7. The respondent considered, between [79] and [108], the expert medical evidence relied upon to establish that the appellant would encounter Article 3 conditions on return. The leading authorities on Article 3 health claims and the risk of suicide were considered. The trafficking claim was not the subject of express consideration in this context.

Appeal to First-tier Tribunal

8. The appellant appealed against the refusal decision on 25 November 2021. He raised a single ground of appeal that the decision was unlawful under section 6 of the Human Rights Act 1998. The type of appeal was headed "refusal of a human rights claim".

9. In a skeleton argument prepared by counsel dated 3 February 2023, the appellant sought to raise two 'new matters' at [7] and [12]. The first was that the appellant's removal would breach the UK's obligations under the Refugee Convention and the second was that the real risk of being re-trafficked meant that removal would breach Articles 3 and 4 of the ECHR. However, in identifying the issues in the appeal, at [11], it was argued that the question of whether the appellant had formerly been the victim of trafficking and sexual exploitation was in issue "as matters currently stand". Consent was refused by the respondent in her undated review and the appellant was invited to pursue these matters via "formal channels". An updated skeleton argument was provided by appellant's counsel dated 27 May 2024. At [11], it was suggested that notwithstanding the refusal of consent for the new matters to feature in the appeal proceedings, the trafficking dimension of the claim remained of relevance to the Article 3 and Article 8 claims which were before the tribunal.

10. In his decision promulgated on 17 June 2024, the judge noted, at [7], that the appeal was against the refusal of a human rights claim and then addressed his mind to the new matters raised by the appellant. The judge made the following observations at [9]-[15] in establishing the issues to be determined and the jurisdictional limits of the matters before him:

> *This case has a complex procedural history. Thus, a significant amount of time was spent at the outset of the hearing clarifying with the parties the issues to be resolved in this appeal.*
>
> *The first issue related to a potential 'new matter'. Having discussed this in detail, it was clear that the 'new matter' was whether removal of the Appellant from the UK would breach the UK's obligations under the Refugee Convention. This is clearly a 'new matter' under section 85(6) of the Nationality, Immigration & Asylum Act 2002 as it constitutes a ground of appeal of a kind listed in section 84 and the Respondent had not previously considered the matter.*
>
> *Mr Buckingham confirmed that the Respondent did not give consent for the Tribunal to consider this 'new matter'. Thus, this appeal is limited to Human Rights matters.*
>
> *It is noted that the Respondent in the decision letter did consider whether the Appellant was a victim of trafficking and Protection issues. Therefore, all of the relevant factual matrix of this case has been considered by the Respondent in the decision letter. It is just that the factual matrix has been*

> *considered in the context of Human Rights rather than the Refugee Convention.*
>
> *The Article 3 Protection issues in this matter relate to whether the Appellant will face a real risk of serious harm on return to his home country. This issue will require resolution of the Appellant's identity and home area, and whether the Appellant was a victim of trafficking. If these matters are resolved in the Appellant's favour, then the subsequent issue is whether the Appellant would be at real risk of re-trafficking and exploitation.*
>
> *There are then further Article 3 issues. These relate to whether the Appellant would be at real risk due to self-harm and suicide, and also whether the Appellant would be at real risk of destitution and conditions of material deprivation.*
>
> *Finally, there are Article 8 issues. The issues for resolution in this regard are whether it would be unduly harsh for the Appellant's partner, FN, and her children, Mn and Mh, to remain in the UK without the Appellant or whether there are very compelling circumstances.*

11. The approach signalled above in relation to considering the trafficking claim through the lens of humanitarian protection principles was a thread which continued through the findings section of the decision headed "Article 3 – Protection & Trafficking issues". At [33], [100], [110], [112] and [119]-[123] the judge couched his findings in the language of a protection ground of appeal by repeatedly referring to the lower standard of proof or a reasonable degree of likelihood. At [121], the judge considered sufficiency of protection which is a natural bedfellow of a protection ground of appeal. In the concluding section of the decision, at [158]-[159] the judge clearly found that the appellant had established a real risk of suffering serious harm on return and he qualified for humanitarian protection.

12. Over the course of almost 100 paragraphs, the judge meticulously analysed an extensive range of expert, narrative and documentary evidence relied upon by both sides to reach findings on the appellant's disputed identity and nationality, history of trafficking and serious exploitation, the appellant's admitted lies and criminality and his vulnerability to suffering further exploitation if returned.

13. Before turning his mind to the remaining Article 3 and Article 8 issues in the appeal, the judge said this at [123]:

> *As I have allowed the Article 3 Protection appeal on these grounds, there is no requirement for me to consider other issues as they will not be material to the outcome. However, I will do so due to the extensive and complex history of this matter and the fact that all the issues were fully argued before me. This will mean, though, that my decision and reasons on the following matters will be relatively brief.*

14. It is fair to say that despite indicating that he would take the additional matters briefly at [123], the remaining issues were the subject of further detailed consideration over the course of 33 paragraphs. In the assessment of whether the appellant's mental health conditions operated to meet the applicable Article 3 legal threshold, the only express reference to the trafficking dimension of the

appellant's claim is at [137] where it was noted that this background enhanced his vulnerability to the risk of suffering living conditions which would breach Article 3. His diagnosis of PTSD (which was found by the expert witnesses to have been precipitated by his experiences as a victim of trafficking) was a further factor weighing in favour of his mental health being sufficiently serious to meet the AM (Zimbabwe) threshold. The judge's consideration of the appellant's Article 8 claim was almost entirely focussed upon the impact his deportation would have on his partner and step-children. We could discern nothing in this part of the decision which referred to any of the findings reached in the context of the trafficking dimension of the claim.

15. Ultimately, the appeal was allowed on humanitarian protection grounds and human rights grounds.

Appeal to the Upper Tribunal

16. The respondent applied for permission to appeal relying on a single ground that the judge had misdirected himself in law. It was suggested that the judge erred in law in applying humanitarian protection legal principles and allowing the appeal on a protection ground of appeal when the respondent had expressly refused to give consent for this matter to feature in the proceedings. This legally flawed approach was said to have infected the remainder of the decision including the unduly harsh assessment under Article 8 because the findings which underpinned the trafficking decision went to his ability to parent his step-children from abroad. Ultimately, it was suggested in the grounds that the entirety of the decision fell to be set aside. Permission to appeal was granted by First-tier Tribunal Judge Barker on 26 July 2024.

17. The matter first came before the Upper Tribunal on 25 September 2024, when I sat with Upper Tribunal Bruce. At this 'error of law hearing' Ms Young, who appeared for the respondent, invited us to find that [123] of the judge's decision strongly suggested that the humanitarian protection analysis was used as the unsafe foundation for the assessment which followed under Article 3 and Article 8. Ms Young adopted the point advanced in the grounds that the question of whether the appellant could effectively parent his step-children from abroad was inextricably linked to the findings reached under humanitarian protection principles. She clarified that there was no challenge to the substance of the judge's findings of fact nor to the adequacy of his reasoning, only that he had no jurisdiction to decide a humanitarian protection ground of appeal which was never before him.

18. On the appellant's behalf, at the September hearing, Mr Hughes did not forcefully defend the judge's application of humanitarian protection principles and recognised that he appeared to adopt the language of deciding a protection ground of appeal. Instead, counsel concentrated on whether any error was material. He argued that the judge was duty-bound to consider the trafficking dimension of the appellant's claim as this had always been front and centre of his factual case. If the error was the application of humanitarian protection principles, it was submitted that it was difficult to conceive of any other outcome if the conventional Article 3 legal framework had been applied instead. He further argued that even if he was wrong on the first point, the judge had reached lawful and adequately reasoned decisions to allow the appeal on Article 3 and Article 8 human rights grounds which were untainted by the findings reached on the trafficking claims assessed under humanitarian protection principles.

19. Following the September hearing, the legal framework summarised at paragraphs 21-22 below were sent to the parties to enable them to make further written submissions in relation to whether the judge was correct to find that the protection issues amounted to a 'new matter'. Both sides provided further written submissions and relied on JA (human rights claim: serious harm) Nigeria [2021] UKUT 0097 (IAC). In the final paragraph of the Secretary of State's further skeleton, the following observation was made:

> *The Respondent accepts, in light of the decision in JA that the Tribunal is entitled to find that a person is at risk of serious harm in the context of an application for leave to remain that could potentially fall within Article 3.*

20. The appeal was listed for a further hearing to enable the parties to provide additional oral submissions. The matter came before me sitting alone on 6 December 2024. Dr Ibisi, appearing on behalf of the Secretary of State, further clarified the respondent's position in respect to the appeal. She accepted that the substance of the judge's decision was lawfully within the ambit of an Article 3 human rights ground of appeal and that the overall outcome could well have been the same if the judge had expressed himself exclusively using the language and legal tests that go with an appeal on Article 3 grounds. It was further explained that the appeal against the decision may not have been brought at all if the judge had used the correct terminology. Ms Capel argued that the respondent's position had shifted to a significant degree such that it could no longer be said that the judge materially erred in law. The appeal was characterised as being a challenge to form rather than substance.

Discussion

21. In deciding whether the decision discloses an error of law, the starting point must be the scope of the appeal before the judge. Sections 82 and 84-86 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') provide as follows (where 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;*
> *(b) P's protection claim is refused if the Secretary of State makes one or more of the following decisions—*

(i) that removal of P from the United Kingdom would not breach the United Kingdom's obligations under the Refugee Convention;

(ii) that removal of P from the United Kingdom would not breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(c) a person has "protection status" if the person has been granted leave to enter or remain in the United Kingdom as a refugee or as a person eligible for a grant of humanitarian protection;

(d) "humanitarian protection" is to be construed in accordance with the immigration rules;

(e) "refugee" has the same meaning as in the Refugee Convention.

(3) The right of appeal under subsection (1) is subject to the exceptions and limitations specified in this Part.

84 Grounds of appeal

(1) An appeal under section 82(1)(a) (refusal of protection claim) must be brought on one or more of the following grounds—

(a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;

(b) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

[…]

85 Matters to be considered

(1) An appeal under section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

[…]

(4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.

(5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.

(6) A matter is a "new matter" if—

(a) it constitutes a ground of appeal of a kind listed in section 84, and

(b) the Secretary of State has not previously considered the matter in the context of—

(i) the decision mentioned in section 82(1), or

(ii) a statement made by the appellant under section 120.

> ***86 Determination of appeal***
> *(1) This section applies on an appeal under section 82(1).*
> *(2) The Tribunal must determine—*
> *(a) any matter raised as a ground of appeal, and*
> *(b) any matter which section 85 requires it to consider.*

22. The statutory scheme was considered in Mahmud (S. 85 NIAA 2002 – 'new matters') [2017] UKUT 00488 (IAC). At [30], it was decided that "a 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84". At [31], it was noted that in practical terms a new matter is a factual matrix which has not been previously considered by the Secretary of State. At [32], the following observation was made: "actual consideration in a decision letter of the new factual matrix relied upon is required for a matter to fall outside section 85(6)(b) and therefore not be a 'new matter'". At [45]-[46], the following structured approach was adopted:

> *Counsel for the Respondent submitted that the following provides a structure for a Tribunal to assess whether it has jurisdiction to consider particular material, as follows:*
> *(1) What is the 'matter' which it is alleged constitutes a 'new matter' for the purpose of section 85(5)? What are its ingredients both in fact and in law?*
> *(2) Does the 'matter' constitute a ground of appeal of a kind listed under section 84?*
> *(3) Has the Respondent previously considered the 'matter' in the context of the decision referred to in section 82(1)?*
> *(4) Has the Respondent previously considered the 'matter' in the context of a statement made by the appellant under section 120?*
> *(5) If the 'matter' is a 'new matter', has the Respondent given consent for the Tribunal to deal with the 'new matter'?*
>
> *This proposed structure approaches the matter by way of identification of the relevant law and facts and then follows through consideration of the constituent parts of section 85 of the 2002 Act. That is an appropriate and sensible process to adopt as a matter of practice. The issue of whether a 'matter' is a 'new matter' is inevitably a fact sensitive one to be assessed in each appeal, but should be identifiable by something being raised that is distinguishable from and outside of the context of the original claim and decision in response to it, as well as something which constitutes a ground of appeal in section 84 of the 2002 Act.* [underlining added]

23. As alluded to above, for the purposes of the subsequent December hearing, the parties relied on JA. Between [26] and [29], the Presidential panel considered the procedural implications of a human rights claim raising factual matters which would ordinarily feature in a protection claim:

> *Where, as here, a human rights claim is made, in circumstances where the respondent considers the nature of what is being alleged is such that the claim could also constitute a protection claim, it is appropriate for the respondent to draw this to the attention of the person concerned, pointing out they may wish to make a protection claim. Indeed, so much would appear to be required of the respondent, in the light of her international obligations regarding refugees and those in need of humanitarian protection.*

> […] *however, there is no obligation on such a person to make a protection claim. The person concerned may, as in the present case, decide to raise an alleged risk of serious harm, potentially falling within Article 3 of the ECHR, solely for the purpose of making an application for leave to remain in the United Kingdom that is centred on the private life aspects of Article 8, whether by reference to paragraph 276ADE(1)(vi) or outside the Rules. If so, then, as in the present case, the "serious harm" element of the claim falls to be considered in that context.*
>
> […]
>
> *This is not to say, however, that the failure of a person to make a protection claim, when the possibility of doing so is (as here) drawn to their attention by the respondent will never be relevant to the respondent's and, on appeal, the First-tier Tribunal's assessment of the "serious harm" element of a purely human rights appeal. Depending on the circumstances, the assessment may well be informed by the refusal to subject oneself to the procedures that are inherent in the consideration of a claim to refugee or humanitarian protection status. The appellant may have to accept that the respondent and the Tribunal are entitled to approach this element of the claim with some scepticism, particularly if it is advanced only late in the day. That is so, whether or not the element constitutes a "new matter" for the purposes of section 85(5) of the 2002 Act. On appeal, despite the potential overlap we have noted at paragraph 18 above, a person who has not made a protection claim will not be able to rely on the grounds set out in section 84(1), but only on the ground specified in section 84(2).*
>
> [Underlining added]

24. We are satisfied that the trafficking claim was a factual matrix which was plainly considered by the Secretary of State. The underlying expert evidence which underpinned this claim was manifestly assessed as demonstrated by the itemisation of a number of these reports in the refusal letter. The section of the refusal letter headed "potential victim of trafficking claim" considered this aspect of the appellant's case but relied exclusively on the 2015 decision of the Single Competent Authority in finding that there were not reasonable grounds to accept that he was the victim of trafficking. On no sensible interpretation can it be said that the trafficking claim was something new and distinct from the factual matrix considered by the Secretary of State.

25. We are satisfied that, in substance, the judge has done precisely what was suggested to be procedurally appropriate in JA. The protection elements of the Article 3 claim were assessed in the context of the Article 3 human rights ground of appeal which was always before the judge. Reading Mahmud and JA together, the elements of the claim which touched on the risk of the appellant suffering serious harm amounted to a new matter to the extent that the judge was precluded from formally deciding a protection ground of appeal because the respondent withheld consent for him to do so. However, the factual matrix going to the trafficking dimension of the appeal, and the risk of serious harm he claimed to face on return was a matter which was properly before the judge to decide in the context of the extant human rights ground of appeal applying Article 3 legal principles. The judge ought not to have conflated the legal principles which would

have been engaged if a protection ground of appeal was before him such as referring to the "lower standard of proof" and "humanitarian protection". However, it is equally clear to us that he had the correct Article 3 legal principles well-in-mind when deciding that there was a real risk that the appellant would be exposed to inhuman and degrading treatment on return. We agree with Ms Capel that [158] and [160] of the judge's decision reveals that the judge ultimately applied the correct legal test. However, it was manifestly a material legal error to allow the appeal on humanitarian protection grounds because he had no jurisdiction to do so once the respondent had decided not to consent to this ground of appeal featuring in the appeal.

Disposal

26. We are satisfied that it is appropriate to set aside the decision to allow the appeal on humanitarian protection grounds. However, we can see no reason to interfere (and we were not invited to do so by the respondent) with any of the judge's detailed and cogent findings of fact. The fact-finding exercise undertaken by the judge could only result in the conclusion that the appeal fell to be allowed on Article 3 human rights grounds as he himself found at [160]. We are minded to remake the decision so that the appeal only succeeds on Article 3 and Article 8 human rights grounds.

Notice of Decision

The decision involved a material error of law. We set aside the decision to allow the appeal on humanitarian protection grounds and remake the decision so that the appeal succeeds only on Article 3 and Article 8 grounds. To that extent, the Secretary of State's appeal is allowed.

Paul Lodato

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 January 2025