Neutral Citation Number: [2008] EWCA Civ 579

Case No: C5/2007/2324

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
IMMIGRATION JUDGE COKER
AA/03084/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2008

Before :

LORD JUSTICE BUXTON
LORD JUSTICE CARNWATH
and
LORD JUSTICE LLOYD

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Between :

AA (Uganda)	**Appellant**
- and -	
The Secretary of State for the Home Deparment	**Respondent**

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- -

Mr Peter Morris (instructed by **Kingston and Richmond Law Centre**) for the **Appellant**
Miss Claire Weir (instructed by **The Solicitor to Her Majesty's Treasury**) for the **Respondent**

Hearing dates : 10 April 2008

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Judgment

Lord Justice Buxton :

1. The facts of this case are very disturbing. It is recorded by the Asylum and Immigration Tribunal (Immigration Judge Coker), from whom this appeal is brought, that the following matters were agreed:

    i) AA was born in 1986 in Northern Uganda. Her father, who had been in the Ugandan Army, was beaten to death in about 1990, and her mother was killed some two years later, at the hands of the rebel Lord's Resistance Army.

    ii) She was then lived with, successively, two aunts and an uncle, all of whom treated her brutally and abusively. The uncle forced her do housework instead of going to school, and intercepted money sent for her support by an aunt Helen who lived in the United Kingdom.

    iii) Travelling on a lawfully issued visa AA was brought to the United Kingdom by Helen on 23 December 2003. She told Helen about the abuse that she had suffered, and Helen stopped sending money to the uncle: who reacted by threatening to kill AA.

    iv) While living with Helen in the United Kingdom AA was raped by Helen's husband, and as a result had an abortion in February 2005. She told Helen of the rape in November 2005, but Helen ridiculed her. AA then attempted suicide.

    v) The police interviewed Helen and her husband in relation to the rape, AA being the complainant, but did not pursue charges. It should however be emphasised that it was accepted throughout the present procedure that the rape had indeed taken place.

    vi) The police arranged for the removal of AA from the household, and she was taken into the residential care of a project for vulnerable young people, where she still lives.

The course of these proceedings

2. AA originally applied unsuccessfully for asylum. An appeal against that decision came before Immigration Judge Denson in 2006. The asylum claim was withdrawn in those proceedings, but a claim was pursued on article 3 and 8 grounds. Immigration Judge Denson rejected that latter claim. Reconsideration was ordered of Immigration Judge Denson's decision, for reasons that do not now concern us. However, by the time that the reconsideration came before Immigration Judge Coker in July 2007 there had come into force the Refugee Or Person In Need Of International Protection (Qualification) Regulations 2006, which require the consideration of whether persons who do not qualify on other grounds should be granted humanitarian protection in the United Kingdom if they are in danger of suffering serious harm in their country of origin. Such a grant is, by paragraph 339O of the Immigration Rules, not available when a person could avoid the serious harm by relocation to another part of his home country and he can reasonably be expected to stay in that other part of the country. Those are the same concepts, of

internal relocation and of whether it would be unduly harsh to expect such relocation, as apply in asylum cases.

3. In the case of AA it was very properly accepted by the Secretary of State that she would be at serious risk of suffering serious harm were she to be returned to northern Uganda. The live issue, therefore, was whether it would be unduly harsh to return her to Kampala, where those dangers would not obtain.

The evidence

4. Immigration Judge Coker records at §10 of her determination that it was agreed by the representatives before her that "the facts as found" by Immigration Judge Denson should stand. As I shall mention below, that agreement produced some confusion during this appeal. The evidence before Immigration Judge Denson, so far as it comes into issue in this appeal, consisted of

- A COI report on Uganda
- A country expert report on Uganda by a Dr Jennings
- A psychiatric report by Dr Frances Marks FRCPsych written early in 2006
- A psychotherapy report by Miss Julia Britton
- A letter from the pastor of a church in London attended by AA.

5. Dr Jennings' report in relation to relocation to Kampala did not impress Immigration Judge Denson, and was not further relied on. In its place there was produced to Immigration Judge Coker at her hearing on 27 June 2007 a report of a Dr Nelson, Senior Research Fellow in the Anthropology Department of Goldsmiths College, who has extensive research interests in the impact of urbanisation on vulnerable women in East Africa. Dr Nelson directed her report specifically at the position on relocation to Kampala, in relation to which she had consulted a number of colleagues with recent experience in that area.

6. We were told from the bar that it had been hoped to produce a more up to date report from Dr Marks, but either because of her retirement or for other reasons that had not proved possible. It does not seem that that was explained to Immigration Judge Coker, something that for reasons shortly to be explained was unfortunate. Miss Britton produced a short updating report, 29 May 2007, which added three paragraphs to her report as it had been before Immigration Judge Denson.

The law

7. The law on internal relocation has been recently been confirmed by the House of Lords in *AH(Sudan)v SSHD* [2007] 3 WLR 832. At §5 of his speech Lord Bingham of Cornhill recalled what he had said in *Januzi v SSHD* [2006] 2 AC 426[21]:

> The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of

> origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so.

Lord Bingham continued:

> It is, or should be, evident that the enquiry must be directed to the situation of the particular applicant, whose age, gender, experience, health, skills and family ties may all be very relevant. There is no warrant for excluding, or giving priority to, consideration of the applicant's way of life in the place of persecution. There is no warrant for excluding, or giving priority to, consideration of conditions generally prevailing in the home country.

And Lord Brown of Eaton-under-Haywood with great respect valuably explained some further aspects of the jurisprudence of undue harshness when he said, at §42,

> If a significant minority [of persons in the home country] suffer equivalent hardship to that likely to be suffered by a claimant on relocation and if the claimant is as well able to bear it as most, it may well be appropriate to refuse him international protection…..For these respondents, persecution is no longer a risk. Given that they can now safely be returned home, only proof that their lives on return would be quite simply intolerable compared even to the problems and deprivations of so many of their fellow countrymen would entitled them to refugee status. Compassion alone cannot justify the grant of asylum.

Basing itself on those principles, the House held that it had been open to the Asylum and Immigration Tribunal in *AH(Sudan)* to conclude that it would not be unduly harsh for former subsistence farmers in Darfur to be expelled to Sudan, not back to Darfur but to slum conditions in refugee camps in Khartoum, granted that many other persons had to endure those conditions; and that this court had not been justified in interfering with that decision.

8. Immigration Judge Coker did not have the benefit of *AH(Sudan)*, which was decided after her determination, but she was shown *Januzi*. From that case she drew, at §43 of her determination, the guidance of Lord Hope of Craighead, [2006] 2 AC 426[47]:

> The words "unduly harsh" set the standard that must be met for [relocation] to be regarded as unreasonable. If the claimant can live a relatively normal life there judged by the standards that prevail in the country of his nationality generally, and if he can reach the less hostile part without undue hardship or undue difficulty, it will not be unreasonable to expect him to move there.

The position of unaccompanied women in Kampala

9. The conditions awaiting AA on her return to Kampala were described in the report of Dr Nelson, from which it is necessary to quote in some detail. Dr Nelson said:

> [AA] has almost no chance of getting a formal sector job. First, she has no qualifications or formal training and her chances of improving her educational status in Kampala are nil….Secondly, in East Africa contacts and information are critical in finding jobs….contacts and assistance from relatives and friends can be critical in even getting to the interview stage of a job application. Her only hope will be some sort of self employment in the informal economy. Here she will also be at a disadvantage because she has no informal home training in any sort of activity which might generate an income in the informal sector (trading, cooking food, sewing, embroidery). The only jobs she could hope to obtain would be that of house servant or bargirl or sex worker (and bargirls are just sex workers by another name). Her chances of finding a job as a house servant will be limited. Almost inevitably these are found through contacts via friends and relatives since people are reluctant to bring a total stranger into their domestic circumstances…Sadly there is an unending demand for bar girls/sex workers (the two occupations are usually linked). That would be her best, perhaps her only chance of employment….In this context of high HIV/AIDS infection rates, [AA] will be condemned to dangerous jobs which will put her at risk of abuse, injury and most significantly of all in danger of contracting HIV/AIDS….Suffering from anxiety and depression, [AA] will be plunged into a very difficult, dangerous and unknown environment. In such an African slum many young people who have grown up there are vulnerable to unwanted pregnancies, early marriages, prostitution, drug abuse, crime, and AIDS….How much more daunting and difficult will it prove to this traumatised young woman?

And Dr Nelson said in a "Conclusion" paragraph:

> As a young woman with no family or husband to call back on [AA] will be especially vulnerable, a fact confirmed time and again by anthropologists and sociologists working in African cities. With little education, no training and no job experience she will be reduced to working in the informal sector in the slums. The most likely employment option she will be reduced to will be that of sex worker. This will put her at great health risk of contracting HIV/AIDs. She will be unable to find secure and decent housing. She will find it difficult to obtain counselling or medication for her psychological conditions.

10. Immigration Judge Coker at §27 of her determination recorded the substance of that evidence, including the opinion that the only chance of employment may be as a bar

girl/sex worker; accepted at §36 that Dr Nelson is an expert in her field; and then said at §38 of the determination:

> I accept Dr Nelson's opinion that individuals in Kampala without access to social or familial networks have great difficulty finding employment and that [AA] would have difficulty finding accommodation without employment and her opportunities for furthering her education would, in the light of that lack of employment be very limited. There are however many young women in that situation.

Miss Weir sought to persuade us that in §38 Immigration Judge Coker was not accepting the most striking of Dr Nelson's conclusions, that effectively what awaited AA in Kampala was a life of prostitution. I cannot agree. If the judge wished to insert that qualification into her general acceptance of Dr Nelson's evidence she undoubtedly would have said so.

Assistance from the church

11. Immigration Judge Coker did however identify a basis on which AA could find support that would protect her from the dangers set out by Dr Nelson. In his earlier determination Immigration Judge Denson said at §38:

> I note that since 4 December 2005 the appellant has been attending the [name provided] Church as evidence[d] from a letter written by the pastor dated 22 March 2006. I note she has settled into the church very well and has a good network of support. I see no reason why she could not also turn to the church in Uganda for similar support if the need arises.

That was said before us to be one of the findings of fact by Immigration Judge Denson that fell within the agreement as to the conduct of the appeal before Immigration Judge Coker: see §4 above. Immigration Judge Coker picked up the point in §§ 42-44 of her own determination, where she said:

> The appellant has been involved in church here in the United Kingdom. The evidence before me indicated that the church in Uganda is active. Although in submissions it was said that the church could not provide the contacts and support that the appellant required there was no evidence that the church was not active in any of the slum or poorer areas of Kampala. Although the appellant's life in Kampala would be difficult and certainly harsher than here in the United Kingdom, I am not satisfied, given her church activity and her belief that she would not be able to find and establish contacts in Kampala that would be of assistance to her…..In Kampala she will have no kinship support but there was no evidence before me that she would not be able to obtain church support.

12. Miss Weir very properly accepted that that passage formed part of the reasoning that led Immigration Judge Coker to conclude that relocation of AA to Kampala would

not be unduly harsh. The conclusions reached on the role of the church both by Immigration Judge Denson and by Immigration Judge Coker were not based on relevant evidence, and were perverse. If the support of the church in Uganda was to offset the dangers otherwise facing AA, the church would have to provide accommodation; employment; and protection from sexual exploitation. The church's role in AA's life in the United Kingdom, relied on by Immigration Judge Denson as a pattern of what the church could do in Uganda, provides AA with none of those things. The evidence went no further than that she attends the church and has friends and associates in the congregation. Her present accommodation, and the rescue of her from the sexual exploitation that she suffered in her aunt's house, was provided by the organisation (identified to the court, but not named in this judgment in the interests of the protection of AA) described in § 1(vi) above. Even if Immigration Judge Denson's observation in his §38 were not pure speculation, based upon no detailed evidence about any relevant activities of the church in Uganda, the parallel with the position in the United Kingdom simply does not make the point contended for.

13. There was some inclination on the part of the Secretary of State to suggest that Immigration Judge Denson's observations about the role of the church was one of the "facts found" by him which had been agreed to stand before Immigration Judge Coker: see §4 above. Even if the observations were open to Immigration Judge Denson, their speculative terms do not enable them to be characterised as the finding of facts. Nor did Immigration Judge Coker directly rely on what had been said by Immigration Judge Denson, but expressed her own view, as set out in §11 above. But that treatment is open to the same objections as that of Immigration Judge Denson. There was no evidence from which Immigration Judge Coker could properly conclude that the church would make a difference to AA's life in Kampala that offset or protected her from the dangers described in Dr Nelson's report.

14. It being conceded that the assumptions about the church's involvement were a step in the AIT's reasoning, on that ground alone the AIT's conclusion cannot stand.

Undue harshness in the context of conditions in Kampala

15. The substance of the AIT's reasoning has been set out in §10 above. For the reasons given in the preceding section of this judgment, that has to be assessed without reference to any support for the finding of lack of undue harshness that is drawn from the protection thought to be provided by the church.

16. Whilst Immigration Judge Coker did not have the benefit of the House of Lords in *AH(Sudan)* she clearly had the jurisprudence that their Lordships confirmed in mind when she said, at the end of her §38, that the situation facing AA was the same as that of many other young women living in Kampala, and quoted Lord Hope of Craighead, who asked whether the claimant could live a relatively normal life judged by the standards that prevail in his country of nationality generally: those standards, or the relevant hardship, being as Lord Brown of Eaton-under-Haywood explained in *AH(Sudan)* that of a significant minority in the country. The evidence before the AIT in this case did not reveal how widespread in the context of Uganda as a whole are the conditions reported by Dr Nelson, and did not suggest that they affect anyone other than young women. The factual case is therefore significantly different from that in *AH(Sudan)* where slum conditions were widespread in Sudan,

and affected everyone, men women and children alike, and of all ages. Immigration Judge Coker should therefore have considered whether it was appropriate to apply the test formulated by Lord Hope of Craighead to a case where the comparator or constituency in the place of relocation is limited to persons who suffer from the same specific characteristics that expose the applicant to danger and hardship in the place of relocation.

17. There is, however, a further and more fundamental reason why it is difficult or impossible to apply the jurisprudence of *AH(Sudan)* to the present case. There, the conditions in the place of relocation involved poverty, disease and the living of a life that was structured quite differently from that from which the appellants had come in Darfur. It had been open to the AIT to hold that exposure to those conditions, shared by many of the refugees' fellow-countrymen, did not amount to undue harshness. But the present case is different. On the evidence accepted by the AIT, AA is faced not merely with poverty and lack of any sort of accommodation, but with being driven into prostitution. Even if that is the likely fate of many of her fellow countrywomen, I cannot think that either the AIT or the House of Lords that decided *AH(Sudan)* would have felt able to regard enforced prostitution as coming within the category of normal country conditions that the refugee must be expected to put up with. Quite simply, there must be some conditions in the place of relocation that are unacceptable to the extent that it would be unduly harsh to return the applicant to them even if the conditions are widespread in the place of relocation.

18. This was a case that called for an enquiry as to whether conditions in Kampala fell into that category. In not addressing that enquiry the AIT acted irrationally and its determination cannot stand. It therefore falls to this court to revisit that decision if there are facts and materials already placed before the AIT that enable the court to form its own view. In this case, and relying only on the evidence that was before the AIT, I would hold for the reasons already indicated that it would be unduly harsh to return AA to Kampala.

19. There are two other considerations relevant to that conclusion. Neither of them was addressed in argument either before the AIT or before this court, and therefore I do not rely on them for my conclusion. However, it is of some importance to put them on record. The first is particular to the present case. The second is of some more general importance.

20. First, it is accepted, indeed asserted, that AA has been the victim of rape; and is a committed Christian. It does not need much imagination to appreciate that forced prostitution would be a particularly burdensome fate for anyone with either of those characteristics.

21. Second, as explained in §2 above, this is a case of humanitarian protection, and not of asylum. The serious harm against which humanitarian protection is available includes, by Immigration Rule 339C(iii), degrading treatment. Immigration Rule 339O(i) then says, in relation to internal relocation,

> The Secretary of State will not make:

(a) a grant of asylum if in part of the country of origin a person would not have a well founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country; or

(b) a grant of humanitarian protection if in part of the country of return a person would not face a real risk of suffering serious harm, and the person can reasonably be expected to stay in that part of the country.

Both of these statements are entirely general, in that, as is a matter of commonsense, any persecution or serious harm in the place of relocation, even if of a quite different category from that on which the original claim was based, would prevent relocation. In the present case the fate awaiting AA certainly raises the issue of whether she is going to suffer degrading treatment. The AIT, at its §48, rejected a claim under that rubric as it is found in article 3. However, it is not possible to know how far that conclusion, which simply relies, without further explanation, on the facts previously found, depends on assumptions as to church assistance that were not open to Immigration Judge Coker. If I had not decided the appeal on other grounds, I would remit that issue for further consideration.

The particular vulnerability of AA

22. Even if the foregoing is wrong, and it was open to the AIT to hold that it would not be unduly harsh to return young women generally to Kampala, it is still necessary to consider whether AA has characteristics that would render remission unduly harsh in her particular case. That is made plain in the authoritative statements of the law cited in §7 above. Lord Bingham said that the enquiry must be directed to the situation of the particular applicant; and Lord Brown of Eaton-under-Heywood that the claimant must be as well able as most to bear the hardship suffered by a significant minority in the country of relocation. It was this aspect of the case that occupied most of the submissions both before the AIT and before us.

23. The two particular characteristics of AA that were relied on as making her particularly vulnerable were, first, that AA has no formal qualifications; and second that she was traumatised and suffering from anxiety and depression. It will be recalled from the extracts set out in §9 above that Dr Nelson relied on both of those matters as showing that AA would be even more vulnerable than the general run of unaccompanied young women in Kampala. The AIT did not accept that either of those matters was made out on the facts, and that therefore Dr Nelson had been wrong to place weight upon them.

24. The matter of qualifications was handled unsatisfactorily before Immigration Judge Coker. She said, at her §41

> [AA] has taken GCSEs and is awaiting her results. She will have some, albeit limited, qualifications.

We were told by Mr Morris that in June 2007 Immigration Judge Coker understood that AA was taking two GCSEs, in English and Maths. She failed the first of those, and could not afford the examination fee for the second. Immigration Judge Coker

could not of course know of the future failure, but it is very unfortunate that she was not told about the problem with fees. Nevertheless, I have to say that the Immigration Judge Coker was overoptimistic in her approach. It does not follow from the fact that someone is taking an examination that they are going to pass it; and a more circumstantial enquiry was required into the relevance of two GCSEs to any sort of job search in Kampala. And no weight was given to Dr Nelson's view that not just qualifications but also connexions were required to obtain any sort of formal employment.

25. However, the more substantial issue concerns the medical evidence.

26. AA was seen early in 2006 by Dr Marks, a highly qualified psychiatrist. Dr Marks was principally concerned with the risk of suicide, in respect of which she said, at §79 of her very full report, that if AA were to return to Uganda she would present a very severe suicidal risk. Dr Marks then continued, at §§ 82-85:

> Because she has had such a deprived life with little effective parenting she is an extremely vulnerable woman who suffers from severe and chronic psychiatric symptoms… She has symptoms of post traumatic stress disorder and probably had an acute stress reaction when she was sexually assaulted…The severity, chronicity and multiplicity of her problems are such that she will not make a spontaneous recovery in spite of the fact that she is a very determined girl and one who shows considerable resilience. She requires a specialist treatment regime from a team experienced in the treatment of adults with post traumatic stress disorder and chronic depression.

Dr Marks then set out the treatment, in terms of medication and counselling, that she thought AA to require, and referred at §92 of her report to WHO reports that indicated that there were unlikely to be any facilities for such treatment in Uganda.

27. That advice seems only to have been followed up by a referral to Miss Britton at a psychotherapy service for young people. In a report dated 13 April 2006 Miss Britton explained the concern that she and her colleagues had felt about AA's mental state, but explained the difficulty of starting intensive therapy when AA's immigration status and future in the UK were still in doubt. In a further report on 29 May 2007, which was before Immigration Judge Coker, Miss Britton reported that AA had attended 18 sessions between February and October 2006, and continued:

> By October there was a sense of [AA] having achieved a functional equilibrium. Whilst she continued to have symptoms consistent with PTSD it felt she was more stable. To go on working with the underlying issues demanded a more secure external world. [AA] and I therefore agreed that she would have less frequent contact with me during this period of uncertainty. I have seen her twice since December and again have been struck by her remarkable resourcefulness and resilience. However, I am in no doubt that she remains extremely vulnerable and will need to return to regular

> psychological treatment once the issues surrounding her immigration status are resolved. I remain as concerned as before about the risk of psychological deterioration and risk of self-harm should she be returned to Uganda. I believe [AA] to be a young woman with potential for development should she be allowed access to on-going support and psychological treatment within a stable and safe environment.

28. We have already noted how unfortunate it was that Immigration Judge Coker was not told by those representing AA before her that unsuccessful attempts had been made to secure an up-to-date report from Dr Marks. Had she known that, she might have approached the issue of AA's psychological state rather differently. What she said was this, at §§ 33-34 of her determination:

> 33. I acknowledge and accept that Ms Britton is an experienced psychotherapist but note that there is no medical evidence other than the psychiatric report prepared by Dr Marks on behalf of the Medical Foundation in early 2006. That report specifically assessed her psychological symptoms. There has been no updated report of similar detail provided since the intense psychotherapy sessions. I would have expected such a report to be produced given Dr Marks analysis of the appellant's psychiatric profile and recommendation of counselling. Although there is reference by Ms Britton (in the new part of her recent report) to the appellant still showing symptoms of PTSD there is no evidence before me that Ms Britton is qualified to diagnose PTSD or on what basis she has reached that conclusion-in marked contrast to the analysis of Dr Marks in the early part of 2006. There is no credible evidence before me that the appellant is at risk of self harm if returned to Uganda; her one previous attempt at self harm in November 2006 arose following the rape here in the United Kingdom; she does not appear to have been receiving any on-going psychiatric treatment and her psychotherapy sessions have reduced significantly to the extent that she has had only two since October 2006.
>
> 34. The case of N requires that for there to be a breach of Article 3 there must be 'truly exceptional circumstances' in the appellant's present medical condition. Although Dr Marks made reference to the appellant being a suicide risk in February 2006 the current report by Ms Britton does not refer to a current suicide risk and gives no analysis of her current psychological condition other than in general terms. Bearing in mind the burden and standard of proof, I am not satisfied that the appellant is at current suicide risk whether here in the United Kingdom, en route to Uganda or on arrival in Uganda.

29. The AIT did have to address the article 3 issue, because AA made a claim under that article. In addressing the further question of the relevance of the medical evidence to the issue of internal relocation the AIT may well not have been assisted by the way in which the case was presented by AA's advisers. However, the structure of the decision makes it impossible to conclude otherwise than that the passages set out above were intended to serve as the analysis of the medical position not only for the article 3 claim but also in relation to undue harshness. The AIT did not have the benefit of the observations of the House of Lords in *AH(Sudan)*. Had that authority been before Immigration Judge Coker she would immediately have appreciated that to apply the article 3 standard in an internal relocation case is the egregious and inexplicable error to which Lord Bingham of Cornhill referred in §11 of his speech in that case. And she would have appreciated that she needed to address specifically the question asked by Lord Brown of Eaton-under-Haywood at §42 of whether AA was as well able as most to bear conditions in Kampala.

30. The failure to address that second question, and the use of article 3 analysis to decide all of the medical issues in the case, were both errors of law. And, further, if Immigration Judge Coker had appreciated that she needed to address Lord Brown's question she would have been likely in that context to have taken a different approach to the medical evidence.

31. As we have seen, Immigration Judge Coker gave in effect no continuing weight to the opinion of Dr Marks, expressed in early 2006. If she was going to take that course she needed to address the fact that Dr Marks had diagnosed AA as suffering from severe and *chronic* depression, that needed specialist and detailed intervention. The AIT should not, without further enquiry, have assumed that those problems no longer existed, or had significantly ameliorated, just because there was no further report from Dr Marks. And the assumption that AA's condition was accepted to have improved because she had recently only had a very few psychotherapy sessions did not give weight to Miss Britton's evidence that effective intervention was not possible while AA's future remained in doubt, and the prospect of return to Uganda remained open; but that once that had been resolved she needed to return to regular psychological treatment.

32. The AIT should also have dealt differently with the rest of the evidence of Miss Britton. She may not be qualified to diagnose PTSD, a matter on which I defer to the expertise of the AIT. She is, however, a fully qualified psychotherapist, with four years post-graduate training at the Tavistock Clinic, the leading institution in this field, and seven years subsequent experience in a major hospital. She now works at what appears to be a highly reputable institution, one of the patrons of which is a former President of the Royal College of Psychiatrists. If the AIT was to give no weight to Miss Britton's opinion that AA remained extremely vulnerable and that the previously identified risks remained of psychological deterioration and self-harm should she be returned to Uganda, then more explanation of the AIT's reasoning was required than is to be found in the determination.

33. The AIT having approached the issue of AA's particular vulnerability on the wrong legal basis, it again falls to this court to address that question, if it can do so on the evidence that was before the AIT. On that evidence I have no hesitation in holding that in the context of a diagnosis by a Fellow of the Royal College of Psychiatrists of chronic depression; the absence of the intervention that was recommended on the

basis of that diagnosis; and the confirmation by Miss Britton that severe problems remained; there is no doubt that AA is manifestly less able than most to bear the conditions that await her in Kampala.

The role of this court

34. The Secretary of State relied in support of the determination of the AIT on the guidance given to this court by Baroness Hale of Richmond in *AH(Sudan)* in relation to appeals from specialist tribunals, including conspicuously the AIT. That guidance has recently been revisited by this court in *AS & DD (Libya) v SSHD* [2008] EWCA Civ 289, a SIAC case to which the general guidance about specialist tribunals was seen as relevant. In his judgment in that case the Master of the Rolls said:

> 15. As already stated an appeal lies only on a point of law. It is common ground that SIAC is a specialist tribunal. The approach to an appeal from such a body on a point of law has recently been summarised by Baroness Hale in *AH (Sudan) v SSHD* at [30]:
>
> > "30. … This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see C*ooke v Secretary of State for Social Security* [2001] EWCA Civ 734, [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently. I cannot believe that this eminent Tribunal had indeed confused the three tests or neglected to apply the correct relocation test. The structure of their determination can be explained by the fact that this was a "country guidance" case: but that makes it all the more important that the proper approach to the internal relocation alternative, as explained by the House in this case, is followed in future."
>
> It will be noted, relevantly to the task of this court of considering only points of law, that Baroness Hale's guidance

> as to the limited role of this court extends to decisions by a specialist tribunal on points of law as well as to the lower court's assessment of the facts.
>
> 16. All counsel accepted that that passage set out the principle relevant to an appeal to this court from SIAC. This is perhaps not surprising in a case where this appeal has been heard with that in *Othman v SSHD* and counsel for the respondents in this case are counsel for the appellants in *Othman* and counsel for the SSHD in both cases are the same, whereas the SSHD is the appellant here but the respondent in *Othman*. However that may be, counsel were correct to treat [30] in *AH (Sudan)* as authoritative guidance in appeals from SIAC, although it was itself an appeal from the AIT. Although counsel suggested various glosses on Baroness Hale's statement, we think, with respect, that the passage is clear and well able to stand for itself.

35. I do not need to say that I respect and follow that guidance. In applying it to the present case I would say two things. First, Baroness Hale of Richmond did not express the guidance in absolute terms, but clearly left some margin for this court to perform its supervisory task. I very much doubt whether she would have seen the present case as falling within the guidance. Second, however, if we have to apply the terms of the guidance to this case I have no hesitation in saying that for the reasons set out above it is quite clear that the AIT misdirected itself in law.

Disposal

36. The AIT misdirected itself in law both in respect to whether returns generally of unaccompanied women to Kampala would be unduly harsh; and in respect of whether, even if the AIT was correct on that point, it would be unduly harsh to return AA in her particular circumstances to Kampala. Either of those errors taken separately requires this court to intervene. For the reasons set out above I would quash the determination of the AIT, and substitute a decision that, applying rule 339O(i)(b) of the Immigration Rules, AA cannot be reasonably expected to stay in Kampala. Since it is conceded that AA qualifies for humanitarian protection under rule 339C; and return to no other part of Uganda has been suggested by the Secretary of State; the notice of intention to remove dated 27 February 2006 is quashed.

37. After the foregoing judgment had been completed I had the benefit of seeing the judgment to be delivered by Carnwath LJ. He raises a series of issues that, with respect, may well need further consideration in this or, more likely, in a higher tribunal. None of the issues affect the outcome of this appeal. In particular, neither of the parties sought to question either the guidance given by Hale LJ (as she then was) in *Cooke* and approved by Brooke V-P in *Napp Pharmaceuticals [2002] EWCA Civ 796; [2002] 4 AllER 376* or the guidance given by Baroness Hale of Richmond in *AH(Sudan)*; or the statement of the Master of the Rolls in *AS & DD (Libya) v SSHD*; and we heard no submissions on those issues. And, for the reason indicated in § 35 above it was not necessary to go behind any of those statements in order to reach the correct result in this appeal. I do not therefore think that it would

be appropriate for me to use this judgment to engage with what are, with respect, the undoubtedly important issues that my Lord has raised.

Carnwath LJ:

The present appeal

38. I agree that this appeal should be allowed. The short question, following *AH(Sudan)*, was whether it would be "unduly harsh" in all the circumstances to require this claimant to be returned to Kampala. I bear in mind that, in so far as that involves a factual or policy judgment, it has been entrusted by Parliament to the tribunal not to the court. However, it remains the duty of this court to ensure that the judgment of the tribunal was one that was reasonably and lawfully open to it on the evidence available.

39. On most aspects of his judgment, I am in agreement with Buxton LJ's reasoning. I differ respectfully with him on one point. I am not persuaded that, by her short comment at paragraph 38 on the situation of "many young women" in Kampala, Immigration Judge Coker intended a positive finding that what "effectively… awaited the claimant… was a life of prostitution". I agree that this can be seen as a logical consequence of her earlier findings in relation to Dr Nelson's evidence. But I am sure that, if she had really intended so unpalatable a conclusion, she would have felt obliged to spell it out in clearer terms. I do not read this passage as indicating that she would have rejected the claim solely on this ground, if she had not made the further findings relating to possible avenues of support.

40. However, I agree with Buxton LJ that her findings on those matters cannot stand. As he says (paras 11-14), there was no adequate basis for her conclusions on the prospect of support from the church. Indeed, the double negatives in her reasoning point to the absence of any real evidence to justify the finding. The question was whether, on the evidence, there was a reasonable likelihood of such support being available, in a form which would enable the claimant to find a home and work. A finding that there was "*no* evidence… that she would *not* be able to obtain church support" does not provide the answer. Similarly, I agree with his criticisms of her treatment of the claimant's alleged qualifications (para 24), and more importantly of the evidence relating to her vulnerability (paras 26-33).

41. In those circumstances, on the evidence before the tribunal, there was no realistic escape from the logical consequence of Dr Nelson's evidence which Buxton LJ has drawn. That evidence is that, if the claimant is sent back to Kampala, she is likely to have no alternative option for survival than enforced prostitution. I agree with Buxton LJ that it is unnecessary to explore the application of Article 3 of the human rights convention. Common law principles are sufficiently robust for us to hold that in all the circumstances of this case a decision to return this claimant to Kampala would be "so outrageous in its defiance… of accepted moral standards" (see *CCSU v Minister of Civil Service* [1985] AC 374, 410G) that it could not lawfully be upheld.

The *Cooke* formula

42. That conclusion is sufficient to dispose of this appeal. However, I feel bound to add some comments on the last part of Buxton LJ's judgment, in which he refers to the recent judgment of this court in *AS & DD (Libya) v SSHD* [2008] EWCA Civ 289. He cites the comments of the Master of the Rolls in that case (giving the judgment of the court) on the approach to review of decisions of specialist tribunals, quoting the "authoritative guidance" given by Baroness Hale in *AH(Sudan)* (para [30]), based on her own judgment in *Cooke v Secretary of State* [2002] 3 All ER 279. (For convenience I refer to this extract from her speech in *AH(Sudan)* as "the *Cooke* formula".) In *AS & DD(Libya)* the court noted Baroness Hale's comment that the tribunal's decision should be respected "unless it is quite clear" that there has been a misdirection in law. It observed that her guidance as to "the limited role of this court" extended to "decisions by a specialist tribunal on points of law" as well as to its assessment of the facts.

43. I am with respect troubled by that observation, if it implies that the House of Lords has modified this court's established approach to correction of errors of law by lower courts or tribunals. Nor do I fully understand the basis of the modified approach. One of the purposes of requiring a reasoned decision is to enable a higher court to correct errors of law. If it is "unclear" from a decision whether an error has been made, that is normally taken as an indication of materially defective reasoning, which itself may be a ground for intervention.

44. The principles governing appeals from asylum decisions on a point of law are well-settled. They were comprehensively reviewed and restated in a judgment of this court given by Brooke LJ, as Vice President, in *R(Iran) v SSHD* [2005] EWCA Civ 982. Having summarised the points of law most frequently encountered (including inadequate reasons), he explained that to justify intervention such errors must be "material" (paras 9-10):

> "Each of these grounds for detecting an error of law contain the word 'material' (or 'immaterial'). Errors of law of which it can be said that they would have made no difference to the outcome do not matter…."

Later in the same judgment (paras 92-93), in considering the scope of onward appeals to the Court of Appeal, he referred to the "appropriately modest view of its supervisory role" taken by the court (as illustrated by cases such as *Cooke v Secretary of State*).

45. In spite of changes to the statutory regime, the judgment in *R(Iran)* has been accepted in my experience as continuing to provide authoritative guidance for the exercise of this court's jurisdiction. If in *AS & DD (Libya)* the court intended to suggest that the test of "materiality" in that formulation is to be replaced by one which limits review to errors of law which are "quite clear", I respectfully disagree. I doubt, with respect that Baroness Hale so intended. In any event, the ratio of *AH(Sudan)* is to be found in the speech of Lord Bingham, with whom all the members of the House (including Baroness Hale) agreed. There is nothing in his speech in my view, which is inconsistent with the established principles, or indicative of a wish to change them.

46. I prefer with respect the more limited view taken by this court of the effect of *AH(Sudan)* and of Baroness Hale's comments, in *ECO Mumbai v NH(India)* [2007] EWCA Civ 1330. Sedley LJ (with the agreement of the other members of this court) said:

> "… the House of Lords in *AH (Sudan)* [2007] UKHL 49 has stressed that appellate courts should not pick over AIT decisions in a microscopic search for error, and should be prepared to give immigration judges credit for knowing their job even if their written determinations are imperfectly expressed. This is no more than a paraphrase of a decision which, I respectfully think, is intended to lay down no new principle of law (cf, for example, *Retarded Children's Aid Society v Day* [1978] IRLR 128, §19, per Lord Russell) but to ensure that appellate practice is realistic and not zealous to find fault. Their Lordships do not say, and cannot be taken as meaning, that the standards of decision-making or the principles of judicial scrutiny which govern immigration and asylum adjudication differ from those governing other judicial tribunals, especially when for some asylum-seekers adjudication may literally be a matter of life and death. There is no principle that the worse the apparent error is, the less ready an appellate court should be to find that it has occurred."

Tribunal reform

47. There is, however, a wider significance to Baroness Hale's comments on the respect due to decisions of specialist tribunals. They are only the latest in a number of statements to similar effect in recent cases in the House: see, for example, *Hinchy v Secretary of State* [2005] UKHL 16, [2005] 1 WLR 967 paras [29]-[30], per Lord Hoffmann; *Gillies(AP) v Secretary of State* [2006] UKHL 2 paras [36]ff, per Lady Hale. Parallel with this recognition of the role of such tribunals has come the development (particularly in speeches of Lord Hoffmann) of a more flexible approach to the dividing line between fact and law, in the specialist areas with which they deal: see, for example, *Moyna v Secretary of State* [2003] UKHL 44, [2003] 1WLR 1929, para [20]ff; *Beynon v Customs & Excise* [2004] UKHL 53, para [27]; *Serco v Lawson* [2006] UKHL 3 para [34]. This trend has also reflected in some decisions of this court: see, for example, *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142, para [100]; *Able (UK) Ltd v HM Revenue and Customs)* [2007] EWCA 1207, para [28].

48. The importance of specialist tribunal jurisdictions, as part of the justice system, now has more formal statutory recognition, in the Tribunals, Courts and Enforcement Act 2007 ("TCEA"). The Act provides a new two-tier structure into which most existing jurisdictions will be transferred. Section 1 extends to tribunal judiciary the guarantees of judicial independence conferred on the court judiciary by the Constitutional Reform Act 2005. Section 2 creates the new post of Senior President of Tribunals. Among the matters to which he is required to have regard in exercising his functions is the need for members of tribunals to be "experts in the subject-matter of, or the law to be applied in, cases in which they decide matters" (s 2(3)(c)). There is provision for onward appeal to the Court of Appeal on points of

law with permission; but the Lord Chancellor is given power, by order to restrict the grant of permission to cases where there is "an important point of principle or practice", or "some other compelling reason" (s. 13(6); cf CPR 52.13 "Second appeals to the court"). The Lord Chancellor has indicated his intention to exercise that power (CP30/07 *Transforming Tribunals* para 178).

49. Assuming that the approach embodied in the *Cooke* formula is to be carried forward into the new TCEA world, it will be important to understand both its practical implications, and its limitations, for different categories of case. Those matters may need to be examined further in an appropriate future case.

50. However, while the special role given by Parliament to an expert tribunal must be respected, so must the constitutional responsibility of the Court of Appeal for the correct application of the law (affirmed in the present context by section 103B of the 2002 Act, as amended). In *Moyna* Lord Hoffmann referred to the classic speech of Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14. The House of Lords overturned the decision of the Special Commissioners on whether a particular activity was "an adventure in the nature of a trade". Although their Lordships accepted that this was "an inference of fact", they held that on the primary facts as found by the Commissioners "the true and only reasonable conclusion" contradicted that decision ([1956] AC at p 36).

51. Lord Radcliffe criticised the tendency of the courts to treat such questions as "pure questions of fact", so as to exclude review:

> "As I see it, the reason why the courts do not interfere with the Commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the Commissioners of greater experience in the matters of business or any other matters. The reason is simply that by the system that has been set up the Commissioners are the first tribunal to try an appeal, and in the interest of the efficient administration of justice their decisions can only be upset on appeal if they have been *positively wrong in law*. The Court is not a second opinion where there is a reasonable ground for the first. But there is no reason to make a mystery about the subjects that Commissioners deal with or to invite the courts to impose any exceptional restraint on themselves because they are dealing with cases that arise out of facts found by the Commissioners. Their duty is no more than to examine those facts *with a decent respect for the tribunal* appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado." (pp 38-9, emphasis added)

52. Fifty years on, that remains a leading authority on the approach of the higher courts to tribunal decisions. Apart from the (to my mind) immaterial substitution of the word "clear" for "positive", the *Cooke* formula is in my view entirely consistent with it. So, I believe, is our decision in this case.

Lord Justice Lloyd:

53. I agree that this appeal should be allowed, and that in place of Immigration Judge Coker's dismissal of AA's appeal, the order should be made which is set out in paragraph 36 of the judgment of Lord Justice Buxton.

54. I consider that the Immigration Judge's decision was wrong in law in at least three respects. One of those is that she proceeded on the basis that, if AA were returned to Kampala, she would be able to receive support from the church there at least comparable to that which she has been able to receive from a particular church in this country. There was no evidence to support that conclusion; it was pure speculation. I agree with Lord Justice Buxton's judgment at paragraphs 11 to 14 as to the significance of that error.

55. A second error was this. The evidence before the Immigration Judge included that of Dr Nelson, set out in part at paragraph 9 above, and which the Immigration Judge accepted. That evidence included the statement that the life awaiting AA in Kampala would most likely be one of prostitution. I agree with Lord Justice Buxton, despite the different view expressed by Lord Justice Carnwath, that the Immigration Judge's acceptance of Dr Nelson's evidence must be taken to include acceptance of that proposition as an integral part of the evidence. If the Immigration Judge had intended to accept some of the evidence but not that proposition, she must have said so in terms. If that proposition is accepted, it has a most significant effect on the assessment of whether conditions in Kampala are such that it would be unduly harsh to require a young woman in AA's position to go to live there. I agree with Lord Justice Buxton at paragraphs 15 to 18 as to the error in the Immigration Judge's decision on this point.

56. Thirdly, the decision does not address on a proper legal basis the question of the particular vulnerability of AA. I agree with paragraphs 22 to 33 of Lord Justice Buxton's judgment as to this.

57. I consider that the combined effect of these three errors, and above all the last, compel the conclusion that the only proper result of AA's appeal, on the material before the Immigration Judge, was that it should be allowed.

58. I do not find it necessary to express any view on the point dealt with by Lord Justice Buxton at paragraphs 34 and 35, and at more length by Lord Justice Carnwath. Whatever the position in that respect, it seems to me clear that the decision of Immigration Judge Coker is wrong in law, and equally clear what the outcome of the appeal before her should have been.