Neutral Citation Number: [2011] EWCA Civ 132

Case No: C5/2010/0768

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
THE IMMIGRATION APPEAL TRIBUNAL
APPEAL NO: AA/01314/2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2011

Before :

LORD JUSTICE MAURICE KAY (Vice President of the Court of Appeal, Civil Division
LORD JUSTICE CARNWATH
and
LORD JUSTICE THOMAS

- -

Between :

PO (Nigeria)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Miss Dinah Rose QC and Ms Parosha Chandran (instructed by **Messrs Wilson & Co**) for the **Appellant**
Miss Susan Chan (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date : 12 January 2011

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Judgment

Lord Justice Maurice Kay :

1. The appellant is a victim of human trafficking. She is a citizen of Nigeria. She was born on 5 July 1979 and arrived in the United Kingdom on 10 January 2005. She was brought here by a man called Osagie. He had persuaded her that he would employ her in his factory in this country. At the time, the appellant was living in poverty in Benin City. Her father had died before she was born and her mother had died when giving birth to her. She was brought up by an aunt to whom she was very close. She was convinced by Osagie's promises of financial security which would enable her and her aunt to escape from poverty. It was only after she and Osagie arrived in this country that she discovered his true purpose. It was to use her for his sexual gratification and that of two associates and to deploy and exploit her for purposes of prostitution. She was required to earn and hand over large sums of money, initially fixed at £20,000 but later raised to £50,000. Osagie's treatment of her was horrific. In March 2005 she escaped. On 31 March 2005, she was arrested. It soon became apparent that she was an illegal entrant. She told the police about Osagie and about her experiences at his hands. She was handed over to immigration officers who detained her. It was at that stage that she applied for asylum. A few days later she was released from detention and came into the care of a charity which provided her with accommodation and arranged for her to receive medical care. She has a diagnosis of severe depression and post-traumatic stress disorder. None of this is disputed.

2. On 13 April 2005, the Secretary of State refused the asylum application. Protracted proceedings in the AIT ensued. On 10 October 2005 Immigration Judge Malins allowed the appellant's appeal on asylum and human rights grounds. The Secretary of State sought and obtained an order for reconsideration. On 5 March 2007, Immigration Judge Grant dismissed the appellant's appeal on asylum, humanitarian protection and human rights grounds. On 24 October 2007, following an oral hearing, Sedley LJ granted her permission to appeal to the Court of Appeal. That appeal was allowed by consent pursuant to an order of Laws LJ dated 7 January 2008. Immigration Judge Grant's Determination was set aside and the case was remitted for further reconsideration. The Statement of Reasons attached to the order of Laws LJ expressly preserved some of the findings of Immigration Judge Malins in the original Determination. The Statement included these provisions:

> "5. … It is further agreed that the issues of
>
> (a) whether or not the appellant would be exposed to a real risk of persecution from her former trafficker in her home town; and
>
> (b) whether the appellant was a member of a 'social group'
>
> had been determined in the appellant's favour by the first Immigration Judge and were not matters which fell to be reconsidered at the second stage.
>
> 6. The parties are therefore agreed that the matters for redetermination on remittal should consist of –

> (a) whether or not the Nigerian authorities could offer a sufficiency of protection to the appellant, whether in her home town or elsewhere in Nigeria;
>
> (b) whether internal relocation would be unduly harsh;
>
> (c) whether the appellant's claim under Article 8 and/or 3 should succeed …
>
> 7. It is further agreed that the AIT's findings at paragraph 12.1 and 12.2 of the first Determination should stand …"

3. The findings at paragraph 12.1 of the first Determination add little to what I have already related. Paragraph 12.2 states:

> "(a) I find the appellant is a woman of 26, of basic education and no qualifications. She gave me the impression of being meek, vulnerable and generally unable to cope with the harsh situation in which she finds herself and possibly, too, with situations less harsh;
>
> (b) the appellant has no family at all in Nigeria …
>
> (c) the appellant came willingly to the UK in total ignorance of the true purpose of her journey arranged by Mr Osagie but rather expecting to secure mainline employment to improve her life and that of Aunt Becky – then still living …
>
> (e) that the man who so efficiently arranged the appellant's trafficking is a professional violent criminal with a power base in Nigeria and probably in the UK and with easy ingress to and egress from the UK – however arranged ...."

Paragraph 12.2 also incorporated at (e) part of the report of Ms Bisi Olateru-Olagbegi, an expert witness relied upon by the appellant, to which I shall return later.

4. On 28 July 2008, the appellant gave birth to a son. She is no longer in touch with the father. At some point since her arrival in this country, her aunt in Nigeria died.

5. When the remitted case was redetermined in the AIT, it came before a panel of three, including two Senior Immigration Judges. It had been identified as a suitable vehicle for giving country guidance. The Determination bears the citation *PO(Trafficked Women) Nigeria CG* [2009] UKAIT 00046.

The Determination of the AIT

6. The Determination runs to 221 paragraphs. It contains both country guidance and consideration of the specific case of the appellant. Its exposition is such that it is not always easy to see the full extent of the country guidance. However, it is clear that the AIT addressed at least the following general issues: (1) whether the Nigerian state provide a sufficiency of protection to victims of trafficking; (2) the availability and adequacy of shelters in Nigeria for such victims; and (3) the enhanced risk to a returned victim when she has been trafficked by a gang. As to the first issue, the AIT concluded that, in general, the Nigerian state is both able and willing to discharge its duty to protect its own nationals from traffickers. Although this had been disputed by the appellant through her expert witness, Ms Olateru-Olagbegi, she does not challenge this conclusion on appeal. What she does seek to challenge is the way in which the AIT approached the issue of shelters and its application of the guidance (but not the guidance itself) on gangs.

7. The findings of the AIT in relation to the appellant were that she and her child would receive adequate care and facilities in a shelter in her home area and that she had been the victim of an individual rather than a gang, with the result that she was not in the enhanced risk category. The AIT also went on to make the alternative finding that, even if (contrary to the primary finding) the appellant would be at risk in her home area, it would not be unduly harsh or unreasonable to expect her to relocate to another part of Nigeria "where facilities similar to those offered in Benin would be available to her and she would, in time, be given help in rehabilitation".

The present position and the grounds of appeal

8. Since the dismissal of her appeal by the AIT, the appellant and her child have been granted indefinite leave to remain in the United Kingdom. We are told that this was because of "other reasons" which have not been detailed to us. To that extent, the appeal is no longer of great personal consequence to her. However, nor is it of merely academic interest. There are two grounds of appeal. The first is in the form of a criticism of the country guidance on the adequacy of the shelters in Nigeria, it being suggested that the approach of the AIT to that issue was legally flawed. The second relates to the application of the guidance on the subject of gangs. For reasons to which I shall return, I am satisfied that we ought to continue to address it.

9. Ground 1 contends that a vital part of the guidance on the availability and adequacy of shelters was based on the irrational and procedurally inappropriate acceptance of material that was contained in an email which came to hand in the course of the hearing in preference to the evidence of the appellant's expert who had not been significantly challenged on this issue. It is a ground which has as much to do with fairness as with substance.

10. Ground 2 is concerned with the finding that the appellant was trafficked not by a gang but by an individual who acted alone in Nigeria. It is presented as a point of law in the formulation that the AIT

> "erred in law by requiring the appellant to prove by personal evidence that her trafficker had operated as part of a gang in

> Nigeria as a necessary element in establishing that she would be at risk on return."

11. The point is of interest beyond the parameters of this case because, if the ground is well-founded, there is a mismatch between the guidance on gangs and (a) the way in which the AIT proceeded to apply it within the same country guidance case and (b) the way in which the guidance is summarised by the AIT itself in its headnote to this country guidance decision.

Ground 1: the guidance on shelters

12. At paragraphs 183–190 of its Determination, the AIT set out some of the evidence and conclusions about the availability of, and facilities in, shelters for victims of trafficking. (The background evidence is summarised more extensively at paragraphs 152-166). In so doing, it indicated passages in the evidence of Ms Olateru-Olagbegi which it did not accept. Perhaps the clearest articulation of the conclusions of the AIT about shelters is to be found in its application of its findings about prevailing conditions to the specific case of the appellant in paragraphs 200-201:

> "There are medical and counselling facilities available in the shelters from trained social workers and nurses who are clearly very familiar with dealing with the victims of trafficking suffering from post-traumatic stress disorder. We believe that in the event that the appellant or her baby should require any medical facilities, these will be provided, either by the medical doctor on call at the shelter or by her being transferred to the nearest hospital.
>
> On her return to Nigeria, the appellant could, if she wished, be met at the airport and be taken to a NAPTIP shelter where she will be proved with the care and protection she needs, together with medical facilities and counselling suitable for her and her baby … The evidence clearly shows that she will be permitted to remain in the shelter for as long as is necessary to secure her protection and that facilities are in place to offer her training to enable her to earn a living … "

13. The reference to NAPTIP is to the National Agency for the Protection of Trafficking in Persons. The background material, in particular a report of the Danish Immigration Service, *The Protection of Victims of Trafficking in Nigeria: a fact finding mission to Lagos, Benin City and Abuja, 9-26 September 2007* (the Danish Report) also describes shelters run by various NGOs. However, it is clear that, in the case of the appellant, the AIT focused on the NAPTIP shelters, of which there are seven, including ones in Lagos and Benin City.

14. In form, much of the Danish Report is a summary of what the fact-finders were told by key individuals in Nigeria, including Ms Olateru-Olagbegi. Where their accounts differed, the Report did not generally adopt one rather than another. One of the points attributed to Ms Olateru-Olagbegi was that

> "NAPTIP lacks facilities for mental-health counselling which is much-needed by the returnee victims and which has greatly affected their results in the reintegration of victims."

She and others differed in their accounts of how long a woman could stay in a shelter.

15. At the hearing, the appellant relied on a number of reports prepared by Ms Olateru-Olagbegi specifically for use in this case. The second report, dated 26 July 2005, included the following:

> "2.2.16 … Although NAPTIP offers counselling and provides some medical services for deportees in their shelters the level of expertise and personnel for counselling or therapy for victims is still very low if not non-existent in these shelters."

It is a lengthy document and I refer only to the minimum amount necessary to deal with this ground of appeal.

16. The hearing in the AIT began on 6 November 2008 and was adjourned part-heard to 7 January and 13 January 2009. On 6 November, Ms Olateru-Olagbegi gave evidence and was cross-examined via a telephone link with Nigeria. She expressed views consistent with those set out in her reports but added that, now the appellant has a baby, she would not be accepted in a shelter because they do not have facilities for the care of babies. Only children aged 8 and above are accommodated.

17. It appears that the oral evidence about babies not being accepted came as a surprise to the Home Office Presenting Officer (HOPO). On 24 November 2008 he sent an email to NAPTIP seeking the answers to these questions:

> "Would a returning victim with a young baby be admitted to a NAPTIP centre? I should add that it has been suggested that NAPTIP would not admit such a victim as NAPTIP centres do not have adequate relevant facilities. Please comment.
>
> Would a returning victim of trafficking with a baby be met at an airport?
>
> Do NAPTIP centres have counselling and/or medical facilities for victims who suffer from post-traumatic stress disorder?"

18. The reply, from Mrs L N Oguejiofore, Director of Counselling and Rehabilitation at NAPTIP, stated

> "(i) Yes, a returning victim with a young baby will be admitted to a NAPTIP shelter without delay. It is erroneous to suggest that the Agency would not admit such a victim in her shelters presently … the Agency also works in collaboration with the Federal Ministry of Women Affairs if the need for temporary fostering arises.

> (ii) Yes, a returning victim of trafficking with a baby will be met at the Airport. The Agency has been receiving victims from Airports if it is necessary.
>
> (iii) Yes, NAPTIP shelters have resident Nurses and Clinics and work in collaboration with both private and public Hospitals. We also have a Medical Doctor on call at all the shelters.
>
> (iv) Yes, NAPTIP shelters have social workers and Nurses who have undergone series of training in areas of psychosocial and psychotherapy and are ready to counsel and treat any victim who is suffering with post-traumatic stress disorder."

19. When the hearing resumed on 7 January, counsel for the appellant objected to the reception of this email as evidence. However, Ms Olateru-Olagbegi had already provided a detailed addendum report dated 5 January 2009, in which, whilst conceding the airport point, she took issue with Mrs Oguejiofore's email in relation to the other matters. In short, she maintained that, notwithstanding the good intentions of the government and the enthusiasm of the staff, funding problems resulted in there being no child care facilities such as crèches or private facilities for nursing mothers, no medical facilities beyond first-aid and the facility for hospital referrals in emergency and no qualified mental health therapists to treat victims of post-traumatic stress disorder. She repeated parts of her previous reports and referred to recently published objective material.

20. The AIT decided to admit the NAPTIP email and the latest report of Ms Olateru-Olagbegi on condition that she be available for further cross-examination by telephone link. No such condition was imposed in relation to Mrs Oguejiofore. In the event, the HOPO did not avail himself of the opportunity to cross-examine.

21. I have already referred (at paragraph 12 above) to the conclusions of the AIT on these matters. There is no doubt that it placed significant reliance on the contents of the email. Miss Chan does not dispute that some of the reasoning in paragraphs 200-201 is based on the email. It is also obvious that that reasoning, together with earlier passages, being an important part of a country guidance decision, will influence subsequent cases.

22. This, then, is the context of the first ground of appeal which is expressed as follows:

> "In reaching findings on the care services that were likely to be provided to the appellant in the … NAPTIP shelters, the [AIT] erred in law in that (1) it preferred without rational justification email 'evidence', … which was obtained … during the hearing and which was unverified by a statement of truth or expertise and contested by cross-examination to the oral and written testimony of the appellant's expert witness and the objective country evidence. This was a conclusion to which no Tribunal could rationally have come; and (2) it found that the appellant was likely to receive rehabilitation services and training in

> those shelters. This too was a conclusion to which no Tribunal could rationally have come."

Although the appeal is therefore put on irrationality grounds, it seems to me that, if made out, it could also be put on the basis of procedural unfairness, at least in relation to the email. Either way, I do not accept Miss Chan's submission that it is an appeal simply on facts but dressed up as points of law.

23. What cannot be disputed is that the AIT was not impressed by and rationally rejected the evidence of Ms Olategu-Olagbegi on other issues which are not the subject of this appeal – most strikingly the question of sufficiency of protection against traffickers provided by the Nigerian police and criminal justice system. It said (at paragraph 177) that

> "as a campaigner, we believe her evidence was not as objectively based as it might otherwise have been."

and that, on this issue, it found her evidence to be "at odds with the weight of the background evidence before us" (paragraph 179). However, it does not necessarily follow that, because her evidence on one or more issues was considered to lack objectivity and was rationally discounted, the same applied to her evidence on other issues. Indeed, the AIT did not say that she was totally unreliable. It accepted that she is "expert in issues of human trafficking in Nigeria" (paragraph 166) and her evidence was found to be "very helpful" (paragraph 172) on one matter which is not the subject of this appeal. Moreover, she was accepted in the Danish report as an important contributor of source material.

24. In these circumstances, I have a deep unease about the way in which Ms Olateru-Olabegi's evidence about the shelters was rejected. It is clear that the rejection related specifically to the NAPTIP shelters and that the material contained in Mrs Oguejiofore's email played a crucial part in the rejection. I regard it as a flimsy basis for the conclusions to which it led. I say this not so much because of its informality (Miss Rose did not emphasise such things as the absence of a statement of truth in her oral submissions) but because its content was hotly contested and yet not permitted to be the subject of cross-examination, even though availability for cross-examination was imposed as a condition for receiving Ms Olateru-Olagbegi's detailed report in response. It is also significant that (1) the HOPO chose not to challenge that report by cross-examination and (2) it was supported by the inclusion of recent material from objective sources. For example, it referred to a 2008 *Country of Origin Information Report* of December 2008 which stated (at paragraph 31.07) that

> "while Nigeria assisted an increased number of victims, the quality of care provided was compromised by inadequate funding to shelters."

25. Also, a USAID study of September 2007 stated (at page 25) that counsellors in a NAPTIP shelter

> "often lack specialised training in trafficking-related trauma."

26. These matters lead me to the conclusion that the first ground of appeal is well-founded on the issue of care services in NAPTIP shelters. Miss Rose also seeks to advance similar points about the rejection of Ms Olateru-Olagbegi's evidence about other aspects of training and rehabilitation but it is not necessary to rehearse them in detail. Nor is it necessary to address the many detailed points made by Miss Rose and Miss Chandran in a permitted post-hearing written submission. They are matters that can be left for another occasion.

27. It is axiomatic that the AIT must apply "anxious scrutiny" to asylum and human rights cases, not least when considering background evidence in a country guidance case. In *CL(Vietnam) v Secretary of State for the Home Department* [2008] EWCA Civ 1551, Sedley LJ said (at paragraph 32):

> "I find it disturbing that a document as bland and jejeune as the letter which … was relied upon by the Home Office when deciding something as important as the safe return of a child to another country. The letter is plainly a recital of a formal answer obtained from the Vietnamese authorities."

28. In my view that resonates in the present case, particularly when one considers the way in which the email entered into the proceedings and the way in which it was approached at the hearing.

29. I would allow the appeal on ground 1 on this basis. Miss Rose also makes wide-ranging submissions drawing on the *Council of Europe Convention on Action against Trafficking of Human Beings* (16 May 2005) and the decision of the Strasbourg Court in *Rantsev v Cyprus and Russia* of 7 January 2010 which postdated the decision of the AIT in the present case. It is an important decision which draws attention to the engagement of Article 4 of the ECHR (prohibition of slavery and forced labour) in trafficking cases. These are matters that will no doubt be considered by the AIT on a future occasion. They were not before it in the present case.

Ground 2: the "gang" point

30. When the AIT came to its conclusions in relation to the appellant, it attached considerable significance to the fact (as it found) that Osagie was not part of a gang in Nigeria. The relevant passages are as follows:

> "197. In considering whether or not this appellant is likely to face reprisals from her trafficker, it is important to bear in mind that the appellant was not trafficked by members of a gang. There is no evidence that Mr Osagie was himself a member of a gang in Nigeria, or that he employed gang members when the appellant was duped into travelling to the United Kingdom. Indeed, there is no evidence that Mr Osagie was involved with any third party in Nigeria; his only associates … 'Mark' and 'Philip' … appear to have been employed only in the United Kingdom. The appellant travelled willingly to the United Kingdom in total ignorance of the true purpose of her journey

> arranged by Mr Osagie. This is not, therefore, a situation where the appellant is at risk from unidentified members of a trafficking gang … as opposed to identified gang members …
>
> 199. There is no evidence that Mr Osagie has any other associates [apart from 'Mark' and 'Philip'].
>
> 200. It has been suggested … that were [the appellant] to be returned to Benin she would be at risk from Mr Osagie and his 'network'. We do not accept that."

31. It is common ground that trafficking by a gang or network gives rise to an increased risk on return to the country where the gang or network is based. However, I agree with an observation made by Thomas LJ in the course of the hearing that "gang" and "network" are elusive concepts and no more than shorthand for the ability, resources and ruthlessness to exercise illegal power over individuals on a significant scale. In an earlier part of the Determination, where the AIT was setting out country guidance in general terms, unrelated to the circumstances of this appellant, it had described how victims are required to produce "target earnings" and how, if they escape and return to Nigeria before achieving their targets, they will be at risk of retrafficking or other mistreatment. The AIT stated:

> "192… .It must always be remembered that within Nigeria there are gangs of people traffickers operating who generate enormous sums of money from their activities. The evidence seems to us to be clear that where a victim escapes the clutches of her trafficker before reaching the target earnings, then the traffickers are very likely to go to extreme lengths in order to locate the victim or members of the victim's family to seek reprisals.
>
> In the absence of evidence that a trafficked victim has been trafficked by an individual, it should be borne in mind that it is likely that the trafficking will have been carried out by a collection of individuals, many of whom may not have had personal contact with the victim."

There followed an illustrative account of how different members of a gang may carry out different tasks in their nefarious enterprise but that they may each have a contingent interest in the target earnings and an incentive to seek reprisals if it is not forthcoming.

32. The ground of appeal in relation to gangs is formulated in these terms:

> "The Tribunal erred in law by requiring the appellant to prove by personal evidence that her trafficker had operated as part of a gang in Nigeria, as a necessary element in establishing that she would be at risk on return."

33. Miss Rose is not critical of the guidance set out in paragraph 192. Her complaint is that, when it turned to the particular case of the appellant, the AIT departed from the guidance and fell into legal error by imposing an unrealistic burden on the appellant and by failing to take into account matters that it ought to have taken into account. There is, of course, a burden on an appellant. The point sought to be made is that here she was being subjected to an additional burden of which the guidance relieved her.

34. The submissions on behalf of the Secretary of State on this issue are (1) as the appellant has now been granted indefinite leave to remain, the point is wholly academic in that it is confined to the factual findings in relation to the trafficking of this appellant, it has no wider import, and it is therefore not appropriate for us to consider it; (2) the appellant is simply trying to reopen sustainable factual findings; and (3) in any event, even if there is shown to be a material legal error in relation to the gang point, there is an alternative finding (at paragraph 204 of the Determination) that it would not be unduly harsh or unreasonable to expect the appellant to relocate to a different part of Nigeria where she and her child would not be at risk.

35. I deal first with Miss Chan's "wholly academic" point. She is correct to observe, and Miss Rose does not dispute, that the appellant has no continuing interest in the resolution of this issue. It is common ground that this Court should not hear an appeal that has become academic "unless there is a good reason in the public interest for doing so": *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, 457, per Lord Slynn of Hadley. I am satisfied that there are unusual circumstances in this case which give rise to "a good reason in the public interest". The report of the decision of the AIT, with its country guidance citation and status, begins with a brief summary in headnote form of the guidance. This has become a common practice and is generally of great assistance, especially where the guidance itself is to be found in a short passage of a very long determination. The headnote is not the product of an external law reporter but is prepared by the AIT itself. Carnwath LJ will have more to say about this practice and procedure in view of his experience as Senior President of Tribunals. The headnote version of the guidance in the present case includes the following:

> "There is in general no real risk of a trafficking victim being retrafficked on return to Nigeria unless it is established that those responsible for the victim's initial trafficking formed part of a gang whose members were to share in the victim's earnings or a proportion of the victim's target earnings in circumstances where the victim fails to earn those target earnings. It is essential that the circumstances surrounding the victim's initial trafficking are carefully examined."

36. We are told that it has become common for immigration judges to use that formulation as if it were the guidance. We have been shown an example (presently under appeal, but stayed behind the present case) in which the headnote is set as if it were the guidance: *FO v Secretary of State for the Home Department*, AIT, Ref AA/09275/2009.

37. The problem is readily apparent. The headnote to the Determination in the present case does not faithfully reproduce or summarise the guidance set out in paragraph 192. In particular, it imports a burden – "unless it is established that …" – not found

in the guidance, which is to the effect that "it is likely that the trafficking will have been carried out by a collection of individuals", in the absence of evidence that a trafficked victim has been trafficked by an individual. In my view, there is a good reason in the public interest for this Court to identify and facilitate the correction of this discrepancy. I agree with Miss Rose that the imposition of a burden on a victim to establish that she was trafficked by a gang is not only a gloss on the guidance. It imposes an inappropriate burden that honest and meritorious victims would often be unable to discharge. For these reasons, we should address this ground of appeal.

38. The striking thing about the findings at paragraphs 197-200 of the Determination (set out at paragraph 30, above) is that they are expressed in terms that are more consistent with the headnote than with the guidance at paragraph 192:

> "There is no evidence that Mr Osagie was himself a member of a gang in Nigeria … "

39. The "no evidence that" formulation is repeated four times. This suggests that the AIT was indeed requiring the appellant to prove by personal evidence that a gang was involved. In my judgment, this was legally erroneous for the following reasons. First, the true guidance was not to that effect. Secondly, the basis upon which the AIT was expressly required to reconsider the appellant's case included the preserved findings of the Immigration Judge who had first heard her appeal. These included her findings that

> "the man who so efficiently arranged the appellant' trafficking is a professional violent criminal with a power base in Nigeria and probably in the UK."

The preserved findings also included a passage from the report of Miss Olateru-Olagbegi to the effect that Nigerian traffickers

> "especially for international trafficking, usually move with syndicated gangs with different categories of criminal players."

This was and remains uncontradicted.

40. Thirdly, the appellant, whose account on these matters has never been rejected, had referred in her original interview, in her witness statements and in her oral evidence to matters which, while not being direct proof of a gang, were consistent with one. For example, Osagie had referred to "many gangs working for him"; "he has people all over Nigeria"; he is "like Mafia, he has got gangs all over that can kill for him"; "when I first met him, he had three large men with him – he told me they were his bodyguards"; "he said he had gangs in this country – also that if I went back to Nigeria his gangs would find me there as well". These statements, coming from a victim whose account of such matters has been accepted, are difficult to reconcile with the finding that "there is no evidence that Mr Osagie was himself a member of a gang in Nigeria".

41. All this leads me to the conclusion that the AIT not only imposed an inappropriate burden on the appellant. It also failed to take into account her evidence which provided a foundation, together with the preserved findings of the original

immigration judge, and the uncontradicted objective evidence, for a finding that Osagie was not simply an individual trafficker acting alone. Such a possibility was not properly rejected. If such a finding had been made, it would have impacted on the conclusion that the appellant could be safely returned to Benin City.

42. I do not agree with Miss Chan's submission that this ground of appeal is simply an attempt to dress up a factual disagreement as an error of law. The repeated "there is no evidence" formulation amounted to an incorrect approach in law because it demanded more of a victim than the guidance, conditioned by the objective evidence, requires. Moreover, there was evidence, from the appellant herself, that was consistent with the "likelihood" (paragraph 192) that a trafficker is acting as part of a larger group. I cannot escape the conclusion that the AIT, perhaps because of the long delay in producing its Determination, failed to give due consideration to the appellant's evidence.

43. In reaching this conclusion, I have not lost sight of the fact that the primary burden on any appellant to the AIT is to establish her case to the standard applicable in her case. The error in the present case was to require her to establish in her case something which the guidance acknowledged to be likely and with which her evidence was, to put it at lowest, not inconsistent.

44. The next question is that of internal relocation. All I propose to say about it is that, whether or not it would be unduly harsh or reasonable to expect it in this case, the approach of the AIT to it may have been infected by its erroneous approach to gangs and to its defective approach to shelters.

45. For all these reasons, I also consider ground 2 to be well-founded.

Conclusion

46. It follows that I would allow the appeal, set aside the decision of the AIT on both grounds and remit the case for further reconsideration by (now) the Upper Tribunal. It is unfortunate that such a course is necessary in a country guidance case because it will leave a temporary lacuna in guidance. This is particularly unfortunate when much of the evidence – in particular on sufficiency of state protection – has not been challenged on this appeal. It is, however, unavoidable and it should be that the further reconsideration will have more limited areas of dispute than existed on the previous occasion. I should add that country guidance is ultimately and pre-eminently a matter for the AIT and not for this Court. I have not sought in this judgment to express any view on what such guidance should be, nor should I be taken to be implying that, for example, internal relocation will not continue to be a real issue when the facts of individual cases are considered. I repeat that these are predominantly matters for the specialist tribunal.

Lord Justice Carnwath:

47. I agree that the appeal must be allowed for the reasons given by Maurice Kay LJ. I add some comments on the Country Guidance aspects of the case.

48. The concept of Country Guidance cases is now well established. It is given statutory expression in the Nationality, Immigration and Asylum Act 2002, s 107(3) (added in

April 2003), by which practice directions may "require the Tribunal to treat a specified decision of the Tribunal as authoritative in respect of a particular matter". For an up-to-date review of the development of the system and of the modern practice it is unnecessary to do more than refer to Robert Thomas' comprehensive study: *Administrative Justice and Asylum Appeals* (2011) chapter 7.

49. The current Practice Direction was issued in the name of the Senior President on 10th February 2010, at the time of the establishment of the new Immigration and Asylum Chambers. It is in similar terms to that given by the President of the former Asylum and Immigration Tribunal. Paragraph 12.2 provides that a reported Country Guidance determination is to be treated as "an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal…"

50. The wording of the Direction highlights the need for the determination to identify clearly the relevant country guidance issue or issues, as distinct from the more specific issues needed to decide the particular appeal. With great respect to two very experienced judges, this distinction is not clearly drawn in their determination. Although they set out in detail the sequence of the proceedings, leading up to the order remitting it to them, they do not indicate how or when it became a country guidance case, nor the particular issues on which authoritative guidance was to be given.

51. I understand from the file that directions given by SIJ Peter Lane on 28 April 2008 included the following:

> "The Tribunal anticipates that the appeal may be used to give country guidance on risk of trafficking/re-trafficking in Nigeria."

We have also been shown Miss Chandran's skeleton argument (dated 28th September 2008) which indicates her understanding that the case had been set down to give Country Guidance on "human trafficking in Nigeria, sufficiency of protection and internal relocation". Inevitably the focus of the evidence and submissions may change or develop during the course of the hearing. Indeed a case may emerge as a suitable case for country guidance only during the proceedings. However, for the purposes of the Practice Direction it is important that at least by the stage of the final determination there is clarity as to the precise scope of the issue on which formal country guidance is being given.

52. I also feel bound to agree with Maurice Kay LJ that the very length of the determination (some 90 pages) detracted from the clarity of its exposition. The Court of Appeal order had provided a clear indication of the issues which were left open for decision. It also identified the matters which had been decided in the appellant's favour, and were to stand as such. These included the findings that she was a member of a "social group", and that she would be exposed to a real risk of persecution from her former trafficker in her home town. They also included certain of Judge Malins' findings (in paras 12.1-2) as to her personal circumstances.

53. In addition the paragraphs of his decision relating to the evidence of Ms Hove, of the Poppy Project, were to "stand". They related to the claimant's emotional and mental

state, and her need for long term, specialist support if returned to Nigeria. Although this was said to be to "avoid the need for her to give evidence for a third time", the implication was that this evidence was to be treated as generally accepted, subject to the comments of the judge particularly in respect of her lack of direct experience of facilities available in Nigeria.

54. Against this background, I find it surprising that the tribunal thought it necessary to set out the evidence at such length. Some fifty pages were taken up with a full, sequential account of the evidence, written and oral, including long verbatim extracts from the statements and independent reports. I understand that the tribunal's task may have been made more difficult by the accumulation of material over the protracted course of these proceedings, including the "unnecessarily complicated and unclear way" in which the appellant's bundle seems to have been paginated (para 112), and possibly also by the length of the submissions (para 143). It is certainly desirable (and is implicit in the practice direction) that a country guidance case should identify the evidence which has been considered by the tribunal, whether by summary or by reference to documents. However, it is neither necessary nor helpful to set it out in full detail, nor to include extensive quotations, save so far as is required to explain the tribunal's findings and reasoning on the material points.

55. Finally I should comment briefly on the status of the "headnote", which as the Vice-President has shown is inconsistent with the material parts of the determination. The headnote is not part of the determination as such. This is apparent from the fact that it precedes the formal "determination and reasons". As I understand it, the headnote is normally added by the tribunal's reporting committee when authorising the reporting of the decision, although it may in practice be drafted by one of the judges responsible for the decision. It is intended to provide a convenient shorthand summary of the effect of the decision, and is likely to be used as such in subsequent cases.

56. It is certainly useful to have a headnote of this kind. However, it is important that it should accurately reflect the relevant guidance as contained in the determination itself. The present case suggests that there may be a need to review the current practice. It may be that the problem would be reduced if, as I have already indicated, more care were taken to identify the "issue" to which the country guidance is intended to relate. It should then be possible for the panel judges themselves to conclude the determination with their own concise summary of the guidance on that issue. That might then provide the text which could be reproduced in the headnote, without the risk of the sense or emphasis being distorted in an attempted summary by the reporting committee.

57. In the circumstances I agree with the Vice-President that the appeal must be allowed. It is unfortunate that the finalisation of authoritative country guidance on this important issue will be further delayed. Since the present appellant has no direct interest in pursuing the remitted appeal in this case, it seems likely that further guidance will have to await the identification of another suitable appeal.

58. I note, however, that the deficiencies in the decision relate largely to the case-specific aspects albeit there was also a challenge to the Tribunal's findings on rehabilitation services in the NAPTIP shelters, as to which see para 26 of this judgment. Subject possibly to that point, they do not seem to me to undermine the tribunal's general findings on the two main issues: that is, the ability of the Nigerian authorities to offer

protection and the risk of re-trafficking (para 192). For convenience, I have reproduced these paragraphs in an appendix to this judgment. For my part, subject to any guidance by the Chamber President, I see no reason why they should not stand generally as interim guidance, pending further consideration by the tribunal in this or another case.

Appendix
Extract from *PO(Trafficked Women) Nigeria CG* [2009]UKAIT 00046

Ability and Willingness of the Nigerian Authorities to offer Protection to Victims of Trafficking

191. Our consideration of the background materials clearly demonstrates to us that in general the government of Nigeria is both able and willing to discharge its own duty to protect its own nationals from people traffickers. In particular:

(a) The Danish Information Service Report: *The Protection of Victims of Trafficking in Nigeria: a Fact Finding Mission to Lagos, Benin City and Abuja, 9/26 September 2007* (April 2008) points out that the government of Nigeria have recognised the problem of traffickers and, since 2003, the legal and institutional foundation for combating trafficking and, equally important, support for victims of trafficking, have been in place in Nigeria.

(b) The National Agency for the Prohibition of Traffic in Persons and other related matters (NAPTIP) is the principal organisation created by the Nigerian government to combat trafficking. The *Trafficking in Persons (Prohibition) Law Enforcement Administration Act, 2003* established NAPTIP and was enacted as a direct result of Nigeria wishing to fulfil its international obligations under the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.*

(c) NAPTIP's own Legal and Prosecution Department were said in the April 2008 report, to have concluded six cases and another five were said to be pending. 58 victims of trafficking have been rehabilitated, while another 24 were waiting rehabilitation. We accept that with more funds, NAPTIP could do more to help victims, but the same could be said of any government agency with a finite budget.

(d) The US State Department Report suggests that whilst Nigeria is not complying with minimum standards, it is "*making significant efforts*" to do so and has "*demonstrated a solid commitment to eradicating trafficking*". It also spoke of NAPTIP making solid efforts to investigate and prosecute trafficking cases, although the numbers of convicted traffickers remained low. There are clearly several reasons for that, but not, on the evidence before us, any lack of governmental effort or desire.

Risk to Victims of Trafficking in being Re-trafficked on Return to Nigeria

192. It must be born in mind, however, that a claimant may still have a well-founded fear of persecution if she can show that the Nigerian authorities know or ought to know of circumstances particular to her case giving rise to his fear, but are unlikely to provide the additional protection her particular circumstances reasonably require. To that end:

(a) A very careful examination of the circumstances in which the victim was first trafficked must be undertaken and careful findings made. If a victim has been told that she is required to earn a particular sum of money ("target earnings") for the trafficker or gang, before being free of any obligation to the trafficker or gang, then, if the victim should escape before earning the target sums, there may well be a risk to the victim that on return to Nigeria she may be re-trafficked if found. The extent of the risk of the trafficking will very much depend on the circumstances in which the victim was originally trafficked.

(b) It must always be remembered that within Nigeria there are gangs of people traffickers operating who generate enormous sums of money from their activities. The evidence seems to us to be clear that where a victim escapes the clutches of her traffickers before earning the target earnings, then the traffickers are very likely to go to extreme lengths in order to locate the victim or members of the victim's family, to seek reprisals.

(c) In the absence of evidence that a trafficked victim has been trafficked by an individual, it should be borne in mind that it is likely that the trafficking will have been carried out by a collection of individuals, many of whom may not have had personal contact with the victim. Within trafficking gangs, individual members perform different roles. One might, for example, be a photographer who takes the photograph which is used within the victim's passport, whether or not the passport is a genuine one. One gang member may, for example, be a forger who is involved in the preparation of false passports or other documents for use by the victim; one might be a corrupt police official, or a border guard, whose role is to assist in facilitating the victim's passage in some way. Gang members may perform any number of different roles but it is essential to bear in mind that if a victim has been trafficked by a gang of traffickers, as opposed to a single trafficker, then the risk of re-trafficking may be greater for someone who escapes before earning the target earnings set by the trafficker, because the individual gang members will have expected to receive a share of the target sum and will, therefore, be anxious to ensure that they do receive that share or seek retribution if they do not.

Lord Justice Thomas:

59. I agree with the judgments of Lord Justice Maurice Kay and Lord Justice Carnwath.