



IN THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-006345

UI-2022-006346

First-tier Tribunal No: PA/11516/2016

PA/08513/2018

THE IMMIGRATION ACTS

Decision & Reasons Issued:

31st October 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GS

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Secretary of State: Mr T Lindsay, Senior Presenting Officer

For Mr GS: Ms G Loughran , Counsel, instructed by Wilson Solicitors LLP

Heard at Field House on 3 October 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

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

DECISION AND REASONS

Introduction

1. This case concerns an important preliminary issue, namely whether the appellant's appeals, as originally brought under section 82 of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"), are to be treated as statutorily abandoned by virtue of section 92(8) of the 2002 Act as a result of his departure from the United Kingdom subsequent to the hearing before the First-tier Tribunal.
2. For the sake of continuity I shall refer to the parties as they were before the First-tier Tribunal. Therefore, the Secretary of State is once again "the respondent" and Mr GS is "the appellant".

3. The respondent appeals with permission against the decision of First-tier Tribunal Judge Roots (“the judge”), who allowed the appellant’s linked appeals against the respondent’s refusals of a protection and a human rights claim. The appealable refusal decisions are dated 4 October 2016 and 14 June 2018 (a supplementary reasons letter was issued on 10 December 2020, but this did not carry with it a right of appeal).
4. It is apparent from these dates that this case has a protracted history. I will only summarise it here. The appellant, a citizen of the DRC born in 1994, came to the United Kingdom in 1998. His father had come to the United Kingdom prior to this and had been recognised as a refugee. The appellant followed after and, on 28 November 2002, he was granted refugee status and indefinite leave to remain in line with his father’s status. In 2008, the father’s refugee status was ceased, with a consequent cessation of the appellant’s refugee status. The appellant’s indefinite leave to remain was maintained.
5. In June 2011, the appellant was convicted of robbery and possession of an imitation firearm. For these offences, in January 2012 he was sentenced to 6 years’ imprisonment in a Young Offenders’ Institution. The respondent initiated deportation action and made a deportation order against the appellant in March 2014. An appeal against that decision was allowed by the First-tier Tribunal by a decision promulgated on 18 March 2015. That decision was subsequently upheld by the Upper Tribunal on 5 January 2016. The respondent then indicated that the country situation in the DRC had changed and that the appellant could be deported. Further representations were made, culminating in the 2016 refusal of the appellant’s new protection and human rights claims. An appeal was lodged. It seems as though the appeal was put on hold because of outstanding criminal matters.

6. In August 2017, the appellant was convicted on two counts of possession of Class A drugs with intent to supply, for which he was sentenced to 3 years and 4 months' imprisonment. This prompted further deportation action by the respondent (I am not entirely sure that this was necessary, given the pending appellate proceedings at that time). Additional representations were made by the appellant and deemed to constitute new claims. The 2018 refusal of those protection and human rights claims was then issued. A second appeal was lodged.
7. There then followed a very lengthy case management journey through the First-tier Tribunal, with the two linked appeals finally coming before the judge on 17 November 2021.
8. By this point, the appellant's protection and human rights claims can be summarised as follows. He asserted that his offending had taken place whilst he was a victim of trafficking in this country. He claimed that he would be at risk on return to the DRC as a failed asylum seeker who had been convicted of offences in the United Kingdom. Further, he had lived for the great majority of his life in this country, had ties here, and no ties whatsoever in the DRC.
9. The respondent did not accept that there was a risk on return. The issue of trafficking had not been referred to the National Referral Mechanism and there had been no specific decision on this. The appellant's offending had been very serious and there were no very compelling circumstances in his case. In addition, a certificate under section 72 of the 2002 Act had been issued and the appellant was said to be a danger to the community.

The judge's decision

10. There is an important feature of the judge's decision which I note here, but will need to return to in more detail. It is common ground that his decision was originally sent out to the appellant on 22 December 2021. It is now also common

ground that, for reasons unknown, the decision was not at that point sent to the respondent: this was only done on 1 September 2022. The misadministration by the First-tier Tribunal led to the crucial jurisdictional issue of abandonment, which falls to be considered in this case.

11. The judge produced what I would respectfully describe as a conscientious piece of work. It is well-structured and deals with all of the numerous issues requiring consideration. I hope I do the judge no disservice by only summarising the core conclusions here in brief terms.
12. Firstly, based on the evidence before him (including expert reports), the judge found that the appellant was a victim of trafficking in the United Kingdom: [47]-[53].
13. Secondly, the judge concluded that the appellant had rebutted the presumption under the section 72 certificate that he was a danger to the community: [54]-[61].
14. Thirdly, the appellant's claim that he would be at risk on return to DRC as a failed asylum seeker who had been convicted of offences in the United Kingdom was found not to engage the Refugee Convention due to the absence of a necessary reason (status): [62]-[64].
15. Fourthly, having regard to certain passages within the respondent's CPIN and the particular circumstances of the case, the judge concluded that there was a real risk that the appellant would be detained for questioning beyond a day and that in turn placed him at risk of Article 3 ill-treatment: [65]-[72].
16. Fifthly, having considered Article 8, the judge concluded that there were very compelling circumstances in the appellant's case, with very significant weight placed on the trafficking issue.

17. Accordingly, the judge allowed the appeals on human rights grounds, specifically Articles 3 and 8. The appeal was dismissed on Refugee Convention grounds.

The grounds of appeal and grant of permission

18. The respondent put forward three grounds.
19. Firstly, it was said that the judge failed to provide adequate reasons for his conclusion that the appellant would be at risk on return. This was with reference to other particular passages in the same CPIN on which the judge had relied.
20. Secondly, it was said that the judge erred in finding that the appellant was a victim of trafficking, notwithstanding that the NRM process had not been followed. Further, the judge placed “undue weight” on the appellant being a victim of trafficking and on expert evidence when assessing very compelling circumstances.
21. Thirdly, it was noted that the appellant had left the United Kingdom on 15 July 2022 in order to travel to the DRC, before returning to this country. The respondent contended that that resulted in the appeals being treated as statutorily abandoned, pursuant to section 92(8) of the 2002 Act.
22. Permission to appeal was granted by First-tier Tribunal Judge Mills on 22 November 2022. The grant of permission was focused on the abandonment ground, but was not limited.

Procedural history in the Upper Tribunal

23. On reviewing the case in preparation for listing the error of law hearing, I issued directions to the parties for the provision of skeleton arguments addressing, in particular, the abandonment issue. There then ensued a further period of delay, in part caused by an adjournment in order to accommodate Ms Loughran, who had

been instructed throughout and had drafted a detailed skeleton argument on the appellant's behalf.

The abandonment issue: relevant legislative framework

24. The relevant provisions of section 104 of the 2002 Act read as follows:

“104 Pending appeal

(1) An appeal under section 82(1) is pending during the period –

(a) beginning when it is instituted, and

(b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).

(2) An appeal under section 82(1) is not finally determined for the purpose of subsection (1)(b) while –

(a) an application for permission to appeal under section 11 or 13 of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination,

(b) permission to appeal under either of those sections has been granted and the appeal is awaiting determination, or

(c) an appeal has been remitted under section 12 or 14 of that Act and is awaiting determination.”

25. Section 92(8) of the 2002 Act reads as follows:

“Place from which an appeal may be brought or continued

...

(8) Where an appellant brings an appeal from within the United Kingdom but leaves the United Kingdom before the appeal is finally determined, the appeal is to be treated as abandoned unless the claim to which the appeal relates has been certified under section 94(7) or section 94B.”

26. The appellant's appeals were not certified under section 94(7) or section 94B of the 2002 Act.
27. Section 92(8) is the successor to the abandonment provision originally found in section 104(4) of the 2002 Act prior to its repeal by Schedule 9 to the Immigration Act 2014. Section 104(4)(b) had provided:
- “An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant
- ...
- (b) leaves the United Kingdom.”
28. Historically, a similar provision had been in place for many years: see section 33(4) of the Immigration Act 1971, as amended by the Asylum and Immigration Act 1996.

The abandonment issue: general matters

29. The current proceedings concern an appeal by the respondent to the Upper Tribunal, pursuant to section 11 of the Tribunals, Courts and Enforcement Act 2007. My task is to decide whether or not the judge made any errors of law and, if he did, whether his decision should be set aside, pursuant to section 12 of that Act. It is self-evident that the judge had not been concerned with any issue of abandonment, given that the appellant's departure from the United Kingdom occurred many months after the hearing and in respect of which he was entirely unaware.
30. However, the issue of abandonment goes to the jurisdiction of the Upper Tribunal to entertain these proceedings at all. That is not simply in respect of the respondent's appeal, but encompasses the entirety of the proceedings which were originally brought under section 82 of the 2002 Act: LB (Jamaica) v SSHD [2011] EWCA Civ 1420.

31. Therefore, I am bound to address the issue of abandonment as a preliminary matter. If I conclude that section 92(8) of the 2002 Act applies, I cannot go on to consider the question of whether the judge erred in law and it has not been suggested that the judge's decision would stand as the resolution of the appellant's appeals. Conversely, if I find in the appellant's favour on the question of abandonment, I must then address the respondent's complaints against the judge's decision.

The abandonment issue: application to rely on an unreported decision of the Upper Tribunal

32. Contained within the respondent's skeleton argument was an application under paragraph 11 of the Practice Directions of the First-tier Tribunal and Upper Tribunal to rely on an unreported decision of the Upper Tribunal, HBK v SSHD PA/01040/2021. This decision of a panel (comprising Upper Tribunal Judges Hanson and Mandalia) addressed the issue of abandonment in the context of a voluntary departure from the United Kingdom.
33. I am cautious before granting such an application. It is always open to a party to simply rely on the points raised in the unreported decision without needing to adduce it. However, Ms Loughran had no objection to the application and the decision is reasoned and of potential relevance to the present case. I granted the application. I will deal with what is said in HBK, to the extent necessary, later in my decision.

The abandonment issue: the parties' respective submissions

34. Mr Lindsay and Ms Loughran have been of great assistance. I am grateful for their considered and focused submissions, both written and oral. I will only summarise their respective arguments here.

35. In essence, Mr Lindsay's case was fairly straightforward. Put shortly, there is no discretion within section 92(8): if an individual voluntarily leaves the United Kingdom, that is the end of it. Here, the appellant was not removed by the respondent and he left of his own volition. As a matter of fact, his appeals were pending when he left in July 2022, albeit he was unaware of this. However, in reliance on HBK, ignorance of the law in no defence.
36. Mr Lindsay placed a good deal of emphasis on the failure of the appellant's representatives to have made enquiries or to have double-checked on the position before the departure in July 2022. He submitted that none of the matters relied on by the appellant, such as an email relating to reporting conditions, were relevant. With reference to the unreported decision in HBK and the Court of Appeal's judgment in MM (Ghana) v SSHD [2012] EWCA Civ 827, a narrow approach was to be taken the question of abandonment. Fairness did not enter the equation.
37. I record here that the respondent's skeleton argument (not drafted by Mr Lindsay) made reference to several decisions of the Upper Tribunal, including Niaz (NIAA 2002 s.104: pending appeal) [2019] UKUT 399 (IAC), Saimon (Cart Review: "pending") [2017] UKUT 371 (IAC), and Anwar (rule 17(1): withdrawal of appeal) [2019] UKUT 125 (IAC). To my mind, these do not add anything of substance to what is said in the Court of Appeal judgments to which I refer in my decision.
38. Ms Loughran's case was framed in terms of the appellant's departure from United Kingdom having been involuntary by virtue of the honest and reasonable belief that proceedings had come to an end. She submitted that the purpose behind section 92(8) of the 2022 Act was to allow for the efficient disposal of proceedings where an individual had taken a conscious decision to no longer pursue their appeal. The present case was significantly different. This case could be readily distinguished from, for example, MM (Ghana). Ms Loughran relied on certain passages in SR (Algeria) v SSHD [2025] EWCA 1375, submitting that the appellant should not be fixed with the harsh consequences of abandonment simply because of

the First-tier Tribunal's administrative failing. In addition, the respondent had failed to engage with the appellant's representatives prior to and after his departure from the United Kingdom.

The abandonment issue: relevant facts

39. Before turning to my conclusions on the preliminary issue, I must set out the relevant factual matrix. The great majority of this is now undisputed. Where matters remain contentious, I will state my findings, together with supporting reasons.
40. As mentioned earlier, it is common ground that the judge's decision was initially sent out to the appellant on 22 December 2021. I am satisfied on the evidence provided that the appellant's representatives did not in fact receive the judge's decision at that point and it was then sent to them on 6 January 2022.
41. Following a Subject Access Request by the appellant's representatives, it is also now common ground that the judge's decision was not sent out to the respondent until 1 September 2022.
42. In the ordinary course of events, the timeframe for the losing party (here, the respondent) to make an application for permission to appeal to the Upper Tribunal was 14 days after the First-tier Tribunal decision was sent out to that party: rule 33(2) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Thus, the relevant deadline would have been 5 January 2022 if the initial promulgation on 22 December 2021 had been effective on both parties.
43. It is undisputed that neither the appellant nor his representatives had any knowledge at that stage of the First-tier Tribunal's failure to have sent the judge's decision to the respondent. In addition, I find that there was no reason for them to have had any doubt as to the effective promulgation. It follows that the appellant

and his representatives proceeded on the basis that effective promulgation had occurred and the clock for the respondent to make an application for permission to appeal was running.

44. At that time, the appellant was subject to a reporting condition. When he was unable to report due to illness on 5 January 2022, he received an email from the relevant reporting centre, stating that:

“You are no longer required to report as a decision has been made on your case.
Please contact your solicitor if you have one...”

45. I find that this was reasonably interpreted by both the appellant and his representatives as meaning that the reporting was being withdrawn because the First-tier Tribunal had made its decision on his case. That is the eminently reasonable inference to be drawn by the use of the words “decision” and “case” in the email. This would have supported the view that the appellant had succeeded in his case and that the respondent was not pursuing an onward appeal.
46. On the evidence before me, I find that there was no communication from the respondent to the appellant’s representatives, or indeed to the First-tier Tribunal, regarding the issue of non-receipt of the judge’s decision at any time between December 2021 and April 2022.
47. On 25 April 2022 the appellant applied for a travel document. This was granted on 4 July 2022. Initially I questioned whether this process had involved (at that point or previously) the granting of leave to remain to the appellant, on the provisional view that his indefinite leave to remain from 2002 would have been invalidated as part of the deportation action taken by the respondent. However, on reflection and in light of the helpful position statement provided by Mr Lindsay in response to my post-hearing directions, I am satisfied that the indefinite leave had continued throughout. In short, the decision to make deportation order was made under the

UK Borders Act 2007. As a result, his indefinite leave to remain was not invalidated pending the final outcome of his appeals brought under section 82 of the 2002 Act: sections 78 and 79 of that Act. It follows from this that there was no new grant of leave to remain and the appellant was able to apply for, and be granted, the travel document on the basis of his pre-existing indefinite leave to remain.

48. I find as a fact that at no stage during the travel document application process did the respondent raise the issue of non-receipt of the judge's decision with either the appellant or his representatives. Whilst I accept there was no duty on the respondent to do this, it is, I am bound to say, rather surprising that nothing was said at that time. It would have been a relatively simple task to have informed the appellant that his appeal was, as far as the respondent was concerned at that point, pending and he should be aware of that fact when considering leaving United Kingdom (which was the obvious intention behind applying for a travel document).
49. I also find that at that stage the respondent made no contact with the First-tier Tribunal to enquire about what she presumably believed was an outstanding decision on the appellant's appeals. That failure is, in my view, inexplicable.
50. I find that the appellant's representatives did not themselves make enquiries with the respondent as to the status of the appellant's appeals. Mr Lindsay placed a good deal of emphasis on this during his submissions. However, whilst it would of course have been possible (and perhaps prudent through an abundance of caution) for the representatives to have double-checked the position, in my judgment that is far from justifying the attribution of criticism. On the evidence before me, at the time of the travel document application they had no reason to believe that the judge's decision had not been sent out to the respondent. Indeed, the fact that the decision had been sent to them, combined with the reporting condition email and the silence from the respondent, all pointed in favour of the appellant's case having been finally determined.

51. I find that the appellant did in fact travel to the DRC on 15 July 2022, with the intention of returning to this country, and that he then attempted to return on 28 July 2022. I find that he was prevented from travelling at Schiphol Airport in Amsterdam. I find that he was informed that he had no leave to enter the United Kingdom and was then detained by the Dutch authorities. I find that, in pre-action protocol correspondence dated 29 July 2022, the appellant's representatives provided the respondent with the judge's decision, the appellant's Biometric Residence Permit and his travel document. I find that the appellant's representatives had no reason to believe that there had been any issue with the promulgation of the judge's decision at that stage. It is clear to me that the representatives held the reasonable view that there had been, at least, an administrative error on the respondent's part when denying that the appellant had leave to enter United Kingdom.
52. Inexplicably, the respondent's response, dated 6 August 2022, made no reference whatsoever to the judge's decision. When the appellant's representatives sent a further email two days later making it abundantly clear that, as far as they were concerned, the appellant had won his appeal (again, attaching relevant documents including the judge's decision), the respondent once again failed in her response to make any reference to the non-receipt issue. Once again, I find that the appellant's representatives had no reason to believe that the respondent's stated position had anything to do with non-receipt of the judge's decision.
53. I am satisfied that the respondent contacted the First-tier Tribunal for the first time on 26 August 2022, stating that she had not received the judge's decision. This prompted the re-promulgation on 1 September 2022.
54. I find that the respondent received the re-promulgated decision on 1 September 2022, following which she then made an in-time application for permission to appeal. On that same date, the appellant's representatives also received (for the

second time) the judge's decision. No explanation was provided by the First-tier Tribunal for the administrative error which had occurred back in December 2021.

55. Quite understandably, the appellant's representatives then made enquiries with the First-tier Tribunal as to why re-promulgation had occurred. The explanation (such as it was) was not received until 22 September 2022. This provided no substantive reasons for what was described simply as "an administrative error".
56. On 14 September 2022, the respondent belatedly stated her position to the appellant's representatives, confirming that she had not in fact received the judge's decision until it was re-promulgated two weeks earlier. She confirmed that the window for making an application for permission to appeal to the Upper Tribunal remained open and that the appellant's appeals were regarded as pending.
57. The following day, having stated her position that the appellant's appeals had been abandoned when he left United Kingdom, the respondent made a decision to permit the appellant to re-enter this country on an exceptional basis. The appellant duly arrived back in the United Kingdom on 29 September 2022.
58. Bringing all of the above together, I find that both the appellant and his representatives held an honest and, on any rational view, reasonably justified belief that, prior to 1 September 2022, the appeals before the First-tier Tribunal had been successful and had not been the subject of challenge by the respondent. I find that there was no basis on which the appellant and his representatives could have been aware of the true factual state of affairs. Only on receipt of the re-promulgated judge's decision on 1 September 2022, would it have been apparent that the appeals may have remained pending. I use the term "may" advisedly: there had been a lack of information from the First-tier Tribunal and the position would not have been clear-cut at that stage. I find that the appellant's representatives were not fixed with what I consider to be the clearest understanding of the situation (on the information then available) until receipt of the respondent's letter of 14 September 2022.

59. I find that the appellant quite clearly intended to pursue his appeals throughout. I have no doubt that he would not have travelled to the DRC if he had been aware of the true position. I find that he left United Kingdom on 15 July 2022 in the genuine and reasonably held belief that he has succeeded in his appeals and that there was no procedural impediment in making the journey to the DRC. The appellant's belief was, I find, shared by his representatives.
60. All of this paints a rather sorry picture of misadministration by the First-tier Tribunal, coupled with the respondent's general inaction, a failure to engage with information provided to her by the appellant's representatives over time, and a failure by her to have made what might have been thought of as fairly obvious enquiries with the First-tier Tribunal.

The abandonment issue: conclusions

61. My conclusions are now stated in the context of the factual matrix set out above. I propose to approach the issue of abandonment in two stages.
62. The first stage is to decide whether, at the time when the appellant travelled to the DRC, his appeals brought under section 82 of the 2002 Act had been "finally determined" such that section 92(8) was potentially applicable.
63. It has not been the subject of disputation between the parties and it is clear to me that, as of 15 July 2022 when the appellant travelled to the DRC, his appeals had not been "finally determined" and were therefore "pending" within the meaning of section 104 of the 2002 Act: section 104(1) and section 104(2)(a). On my findings of fact, the appellant and his representatives were unaware of this state of affairs, but that is immaterial in respect of the legal position. The judge's decision had not been sent to the respondent prior to 1 September 2022 and therefore the relevant time

period for making an application for permission to appeal did not start to run until that point.

64. The second stage is to decide whether the appellant's departure in July 2022 entailed him leaving (the word used in section 92(8) being "leaves") the United Kingdom. This can be sub-divided into two questions: (a) did the appellant in fact leave the United Kingdom? (b) if so, was this a voluntary act?
65. The authorities on the meaning of "leaves" in what was section 104(4) of the 2002 Act (the predecessor to section 92(8)) are relevant to my consideration, but none of them are precisely on point in terms of the factual scenario with which I am concerned. In addition, much of what has been said previously was *obiter*, albeit of persuasive value. That the Court was concerned with the predecessors to section 92(8) is beside the point because the wording was the same.
66. In Shirazi v SSHD [2003] EWCA Civ 1562 and MM (Ghana), the individuals concerned had been attempting to bring onward appeals themselves and had been, or should have been, aware of the consequences of their voluntary departures from the United Kingdom. The contrast with the present case is obvious.
67. In any event, I respectfully take three aspects of these judgments as being correct. Firstly, it is irrelevant whether the individual concerned intended to leave the United Kingdom for a short duration, or on a permanent basis: [24]-[29] of MM (Ghana). Secondly, there need be no intention on the part of the individual to give up their residence in the United Kingdom: [13] of Shirazi. Thirdly, the word "leaves" bears a physical meaning: [32] of MM (Ghana).
68. In light of the above, I am bound to conclude that the appellant physically left the United Kingdom on 15 July 2022 and that the fact that he intended to return cannot of itself preclude the application of section 92(8) of the 2002 Act. This answers the first of the two questions posed in paragraph 64, above.

69. The second question is crucial to my consideration. The authorities make it clear that an individual who “leaves” the United Kingdom must have done so voluntarily: [13] of Shirazi, [32] of MM (Ghana), and [16(i) and (v)] of SR (Algeria). Although SR (Algeria) concerned an individual who had been removed by the respondent, thereby precluding the application of section 98(2) of the 2002 Act, the construction of the word “leaves” discussed by Sales LJ (as he then was and with whom Underhill LJ agreed) at [16] is worth setting out in full:

“16. My reasons for construing the word "leaves" in this way are as follows:

(i) To my mind, as a matter of ordinary usage, the word "leaves" has a strong connotation of an action being taken by an agent on a voluntary basis (e.g. "The protester did not leave the building but was removed from it by a security guard");

(ii) In certain contexts it may be possible for the word to be used to refer to simple physical relocation of a person, however that relocation might be achieved, whether by deliberate action taken by the person as agent or by actions taken by others to relocate that person. However, there are no indications from the context here that such a wider meaning was intended. On the contrary, I think that both the linguistic context and the wider context and scheme of the legislation support the narrow meaning of "leaves" referred to above. As to the linguistic context, the word "leaves" appears in a composite opening phrase in which there is a single subject, the “appellant”, who does two things: she “brings an appeal” and she “leaves the United Kingdom”. The first clearly imports a notion of voluntary agency on the part of the appellant, since bringing an appeal is not something which is done to an appellant, and I see no reason to change the sense of the appellant being a voluntary agent doing something when one comes to the second verb in the same phrase. The use of the word "but" supports this view: the appellant has acted voluntarily to commence an appeal, but then acts voluntarily in another way so that it should be treated as abandoned.

(iii) Rule of law considerations in this context support the same conclusion. In a state governed by the rule of law, where the state itself is the subject of ongoing

litigation, it would breach rule of law principles for the state to be able to defeat the litigation not by defending it on the merits before a court or tribunal, but by physically removing the opposing party so that she is prevented from bringing her claim before a court or tribunal, as appropriate, for determination according to law. Parliament is taken to legislate for a state governed by the rule of law with rights of access to justice: see, for example, *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 AC 604, paragraphs [26]-[28]. Accordingly, Parliament must be taken to have intended to use the word "leaves" in the narrow sense referred to above, where it is the voluntary act of the appellant which has the stated effect of the appeal being abandoned;

(iv) The narrower interpretation of the word "leaves" also accords with what I think is the manifest object and purpose of the provision, namely to make it possible to strike out an appeal with a minimum of procedural fuss when an appellant has voluntarily left the United Kingdom, since such action is generally inconsistent with the serious pursuit of an appeal launched on an in country basis. To give the word "leaves" a wider meaning would involve going beyond that object and purpose without any good reason to do so;

(v) It is also significant that in those cases in which predecessor provisions, including section 104(4)(b) of the 2002 Act, set out above, have been considered in this court, the judges expressing views as to their meaning have been careful to say that the word "leaves" refers to the appellant "by his voluntary action" physically leaving the United Kingdom: see *MM (Ghana) v Secretary of State for the Home Department* [2012] EWCA Civ 827 at paragraph [32] and *Shirazi v Secretary of State for the Home Department* [2003] EWCA Civ 1562; [2004] INLR 92 at paragraph [13]. These observations have not been critical to the points in issue in those cases, which in fact concerned voluntary departures by an appellant. However, they are in line with my own view that the natural interpretation of the word "leaves" in this context is that it connotes voluntary action on the part of the appellant in question."

70. Having regard to the reasoning of Sales LJ, the observations in Shirazi and MM (Ghana), and the highly unusual facts of present case, I accept Ms Loughran's central submission and have concluded that the appellant's departure from the

United Kingdom on 15 July 2022 was not a voluntary act, his departure should be seen as involuntary and, as a consequence, his appeals are not to be treated as abandoned pursuant to section 92(8) of the 2002 Act. My reasons for this are as follows.

71. Firstly, I reiterate the fact that none of the authorities are directly on point with the present case and, in my judgment I am not bound by precedent to reach a conclusion favouring the respondent's position. The facts of this case are so unusual (described by the respondent at one point as being "unique") that the absence of any directly applicable decided case is unsurprising.
72. Secondly, I am not suggesting that the appellant was in some way constructively removed from the United Kingdom by the respondent. On the narrowest of views, which on the facts I would regard as being artificial, the appellant left this country of his own "free will". However, the authorities do not by way of *ratio* confine the meaning of "leaves" to cover everyone who has physically left the United Kingdom other than by way of enforced removal. Although very different from the circumstances of the present case, I note the hypothetical example provided by Toulson LJ (with whom Sullivan LJ agreed) at [24] of MM (Ghana) of an "exceptional" case in which an individual who had been kidnapped and taken out of the country could not be said to have left voluntarily. The possibility that exceptional circumstances may exist rendering a departure involuntary was not doubted in SR (Algeria).
73. Thirdly, unlike the authorities to which I have been referred, the appellant had been successful at first instance. He was not pursuing an onward challenge at the time of his departure. On the facts, he and his representatives reasonably believed the proceedings to have been "finally determined". It follows, in my judgment, that the "ignorance of the law is no defence" argument relied on by the respondent and addressed by the Upper Tribunal in HBK at [13] has no application. The present case is not about an ignorance of the legal position; the appellant, through his

representatives, was aware of the statutory framework and he believed (albeit mistakenly) that the appellate process had run its course. Instead, this case concerns a reasonably justified ignorance of the facts, specifically the failure of the First-tier Tribunal to have sent out the judge's decision to the respondent.

74. Fourthly, there is, in my judgment, a rule of law consideration in play here, albeit not in the same form as elucidated at [16(iii)] of SR (Algeria). On the respondent's case, the appellant's success before the First-tier Tribunal and ability to defend that success now is to be extinguished by circumstances entirely beyond his control and in respect of which, on a reasonable basis, he was in complete ignorance at the material time. I would respectfully suggest that that was never the intention of Parliament when enacting either section 92(8) or its predecessors. In addition, it would surely be regarded by a reasonable bystander as operating contrary to basic standards of fairness.
75. Fifthly, and following on directly from the above, the "manifest object and purpose" of section 92(8) is to allow for the striking out of an appeal with a "minimum of fuss" when an individual has, inconsistently with the "serious pursuit of an appeal", left the United Kingdom: [16(iv)] of SR (Algeria). Applying that mischief consideration to the present case, the contrast with the authorities is stark. The appellant pursued his appeals through the First-tier Tribunal process and there is no doubt whatsoever that he would have continued to defend his success at first instance if the respondent had sought and been granted permission to appeal prior to his departure from the United Kingdom in July 2022.
76. Sixthly, my conclusion does not involve importing a "discretion" into section 92(8) of the 2002 Act. Instead, it simply goes to whether the provision is engaged at all. Nor does my conclusion import a purely subjective test. As I have hoped to emphasise throughout, it is not simply a question of what the appellant and/or his representatives believed at the time: it is crucial that the belief which was held was entirely reasonable, albeit mistaken.

77. I do not address any argument that the appellant's departure, even if deemed to be voluntary, would not have triggered the application of section 92(8) on account of his ignorance of the true facts. The appellant's case has not been put forward on that basis and in my judgment it would not be right to reach an alternative conclusion.
78. On the conclusion which I have reached, the appellant's appeals are not to be treated as abandoned and I therefore turn to address the substantive grounds of appeal put forward by the respondent.

The respondent's substantive grounds of appeal

79. The respondent's first ground of appeal is based on an alleged failure by the judge to provide adequate reasons for his conclusion that the appellant would be at risk on return to the DRC because of detention extending beyond a day.
80. The judge was clearly entitled to rely on the CPIN ("Democratic Republic of Congo: Unsuccessful asylum seekers", version 4.0, published in January 2020), both in terms of the country information contained therein, but also because it included the respondent's own assessment of what the country information, together with any relevant country guidance decisions, demonstrated.
81. The judge noted at [66] that the respondent had conceded that a period of detention in a DRC prison exceeding approximately one day would result in a real risk of Article 3 ill-treatment. There has been no suggestion that that concession was subsequently withdrawn. In the same paragraph, the judge referred to the country guidance decision of BM and Others (returnees - criminal and non-criminal) CG [2015] UKUT 293 (IAC) and the Upper Tribunal's confirmation of earlier country guidance to the effect that a failed asylum-seeker would not by virtue of that status alone be exposed to a real risk of serious harm on return.

82. At [67] the judge referred to Counsel’s skeleton argument, which itself referred to paragraph 2.4.31 and 2.4.32 of the CPIN. It would seem very unlikely that, given this, the judge would then have overlooked what had been said in those two paragraphs when reaching his conclusions on risk in the subsequent five paragraphs.
83. Paragraph 13 of the respondent’s skeleton argument refers to paragraph 2.4.17 of the CPIN and states that the judge had failed to refer to any “subsequent sources” to counter what was said in that passage of the document. I note that this paragraph was not referred to in the grounds of appeal. In any event, the particular passage in question in no way required the judge to cite other sources. The import of paragraphs 2.4.31 and 2.4.32 was not dependent on what had been said in paragraph 2.4.17.
84. Paragraph 2.4.31 read as followed:
- “All returnees travelling to the DRC will have a passport or an ETD issued by the DRC authorities after a face-to-face interview in the UK. Returnees may be questioned on arrival by the DGM and the ANR during which time they may be detained briefly. Factors that may affect the length of questioning and detention on arrival may include, for example:
- Whether the person has family members, friends or other support in the DRC who are able to meet them on arrival and assist their return
 - Whether the person is able to fluently speak French/Lingala to facilitate progress through immigration control
 - Existing mental health conditions which may affect their behaviour on arrival
 - The ability of the person to pay a bribe if asked”
85. Paragraph 2.4.32 red as follows:

“If a person has family, NGO or other assistance on arrival these are likely to assist their progress through immigration and security control. Conversely, an inability to communicate clearly in French or Lingala, a mental health condition that affects the person’s behaviour or being able to pay a bribe may increase the likelihood that they are detained for one day or more and faces a breach of Article 3. However, no single factor is likely to be determinative as to whether a person is delayed or detained.”

86. At [68] the judge recorded that the Presenting Officer’s submissions were brief (as they seemingly had been on other issues). The judge noted the absence of any substantive challenge to aspects of the appellant’s evidence relating to some of the factors set out in the CPIN passages referred to above. At [69] the judge accepted that the appellant had no family in the DRC. At [70] the judge found that the appellant could not speak Lingala beyond “perhaps a few very basic words” and that he could not “engage in any meaningful conversation at all”. Whilst an ability to converse in French is not expressly mentioned by the judge, at [28(h)] he recorded the appellant’s evidence that he (the appellant) had only spoken English since arriving in the United Kingdom at the age of four. I note also that the appellant had told the respondent in a 2016 screening form that he only spoke English. I have not been referred to any evidence that the appellant speaks French. It is clear to me that the judge was aware of the appellant’s inability in that regard. At [71] the judge found that the appellant would be unable to pay a bribe.
87. None of these findings of fact have been challenged by the respondent.
88. The respondent’s additional reliance on paragraph 2.4.33 of the CPIN takes her case no further. The judge’s conclusion did not represent a departure from the country guidance decision in BM and Others. Rather, it was an example of a fact-specific approach, which was entirely in keeping with the position adopted by the respondent herself in the same paragraph.

89. With the above in mind, I am satisfied that the judge was entitled to conclude that, on the particular facts of this case, the appellant would be at risk of being detained for questioning in excess of a day, therefore putting him at risk of Article 3 ill-treatment, as conceded by the respondent: [72]. The reasoning in support of the judge's conclusion was adequate: it consisted of the unchallenged findings of fact, which had a direct bearing on the factors acknowledged by the respondent herself to be relevant to the question of the length of detention on return.
90. What the respondent's challenge appears to me to overlook is that neither the country guidance, the country information, nor indeed her own assessment, precluded the existence of a risk on return. There was no general risk and an individual asserting a specific profile such as would bring themselves out of the ordinary run of cases would have to establish that by evidence. On my analysis, the judge approached the issue correctly, made appropriate findings of fact, and then rationally applied those to the risk framework with which he was concerned.
91. Turning to the respondent's second ground of appeal, it is now conceded by the respondent that the judge was entitled to make findings on the trafficking issue notwithstanding that there had been no NRM assessment. It is also conceded that the judge had been entitled to place weight on the expert evidence.
92. I would observe that the judge could perhaps have set out the underlying evidence in respect of the trafficking issue in a little more detail within his decision. However, that discloses no error of law. That evidence, which was accepted, demonstrated that the appellant had been exploited at the time of the original offences, aged only 16. That evidence also demonstrated to the judge's satisfaction that the appellant had been the subject of debt bondage in respect of the 2017 offending.
93. The remaining aspect of the challenge boils down to the questions of relevancy and weight. The respondent asserts that the judge placed "undue weight" on

“immaterial matters”, namely the trafficking consideration, when assessing whether there were very compelling circumstances in the appellant’s case.

94. The fact, as found by the judge, that the appellant had been the victim of trafficking at the time of his offending was clearly relevant to the overall assessment of proportionality under section 117C(6) of the 2002 Act, which included the strength of the public interest. It is equally clear that the judge did not purport to go behind either the conviction or the sentencing remarks. He was aware that the trafficking issue had not been put forward during the criminal proceedings. Despite this, on the evidence before him, the judge made, and was entitled to make, findings favourable to the appellant.
95. Any challenge based on the weight attributed by the first instance fact-finding tribunal will face something of an uphill struggle. In the present case, I am satisfied that the judge had the relevant legal framework and associated considerations in mind when undertaking his assessment of the very compelling circumstances test. He made a number of references to the appellant’s skeleton argument and, having reviewed this document for myself, I am satisfied that he was cognisant of the very significant weight ordinarily attributable to the public interest was properly recognised.
96. The judge was, in my judgment, rationally entitled to place very significant weight on the fact that the appellant had been a victim of trafficking. That might have been a generous attribution, but it does not disclose an error of law. The grounds of appeal provide no reasoned argument as to why it should be deemed erroneous.
97. The respondent’s skeleton argument prepared for the appeal before me provides additional points, but these attempt to raise a reasons challenge for the first time, without there having been any amendment to the grounds of appeal themselves.

98. Even if I were to take the additional points into account, they do not disclose errors of law. The weight attributed by the judge to the trafficking factor did not depend on Exception 1 under section 117C(4) of the 2002 Act, nor on the existence of mental health treatment.
99. In summary, the judge's decision is, on the facts as found, sustainable and there is no proper basis on which I can interfere with it.

Anonymity

100. There is a strong public interest in open justice and the identification of parties to proceedings in the Upper Tribunal. This public interest may have added force when those proceedings involve foreign national criminals. However, the current proceedings concern protection issues and this consideration outweighs the public interest, at least for the time being.

Notice of Decision

These appeals are not to be treated as abandoned pursuant to section 92(8) of the Nationality, Immigration and Asylum Act 2002, as amended.

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and that decision shall stand.

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

H Norton-Taylor

**Judge of the Upper Tribunal
Immigration and Asylum Chamber**

Dated: 16 October 2023