

***MS (PAKISTAN) (APPELLANT) V SECRETARY OF STATE FOR THE HOME DEPARTMENT  
(RESPONDENT) [2020] UKSC 9***

**Issues Considered**

MS was a case about a Pakistani national, MS, who was trafficked to the UK and subjected to forced labour. The UK had established the National Referral Mechanism (NRM) to give effect to the identification of victims of human trafficking under article 10 of the 2005 Council of Europe Convention on Action against Trafficking in Human Beings (ECAT). The main issue in this case was whether immigration appeals tribunals in the UK are bound to accept the decisions of the NRM as to whether a person is a victim of trafficking.

MS also raises further issues regarding a person's rights under the European Convention of Human Rights (ECHR). Section 6 of the Human Rights Act 1998 (HRA) makes it unlawful for a public authority to act in a way which is incompatible with a person's rights under the ECHR. Article 4 of the ECHR prohibits slavery and forced labour. This raises questions as to: (a) when a decision to remove a person from the UK will be contrary to section 6 of the HRA, and (b) the relationship between ECHR rights and the UK's obligations under ECAT.

**Court Decision**

In a unanimous decision, the UK Supreme Court (UKSC) held that immigration appeals tribunals are not bound by decisions of the NRM because: (a) the tribunals have no jurisdiction to judicially review NRM decisions [12];<sup>1</sup> (b) appeals in such tribunals are intended to involve the hearing of evidence and fact-finding [13];<sup>2</sup> and (c) the House of Lords in *Huang v Secretary of State for the Home Department* made it clear that the role of such tribunals is to "decide for itself whether the impugned decision is lawful" [14].<sup>3</sup> It was also noted that if immigration tribunals were bound by NRM decisions, this could negatively affect "the willingness of victims to engage with the NRM mechanism for fear that it would prejudice their prospects of a successful immigration appeal" [11]. Therefore, the UKSC in this case held that the tribunal was entitled to find that MS was a victim of trafficking, because it was not bound by the decision of the NRM that he was not.

With regard to the relationship between ECAT and the ECHR, the UKSC held that the UK's positive obligations under ECAT should inform the content of their obligations under article 4 of the ECHR [27].<sup>4</sup> However, they made it clear that it was not necessary for the purposes of this appeal to decide whether *all* the obligations in ECAT are incorporated into article 4 of the ECHR [27]. The relevant obligations listed were the prevention of trafficking, protection of victims and potential victims of trafficking, investigation of potential cases of trafficking, and punishment of traffickers.<sup>5</sup> Applying this to the present case, the UKSC held that there was no breach of the UK's protective obligation because the appellant was effectively removed from risk once he had come to the attention of the police, and he would not be at further risk if returned to Pakistan [34]. However, the UK was in breach of its

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<sup>1</sup> They only have jurisdiction to hear appeals against the immigration decisions of officials, under s.82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act")

<sup>2</sup> Section 85(4) of the 2002 Act, rules 14 and 15 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, and rules 15 and 16 of the Tribunal Procedure (Upper Tribunal) Rules 2008

<sup>3</sup> [2007] UKHL 11; [2007] 2 AC 167 (para 11), emphasis added

<sup>4</sup> The UKSC relied on the leading case of *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, where the European Court of Human Rights held that trafficking within the meaning of article 4(a) of ECAT fell within the scope of article 4 of the ECHR (para 282)

<sup>5</sup> *ibid* (paras 285, 288), *Chowdury v Greece* (Application No 2184/15) Judgment of 30 March 2017 (paras 86-89), and *J v Austria* (Application No 58216/12) Judgment of 17 January 2017 (para 106)

investigative obligation because the police took no further action after passing the appellant on to the social services department, and an effective investigation cannot take place if the appellant is removed to Pakistan [35].

Because the Court held that the UK was in breach of its investigative obligation under article 4 of the ECHR, it did not need to consider whether the decision to remove MS from the UK was contrary to section 6 of the HRA. However, it noted that “appellants will still be able to appeal on this ground if the decision breaches the requirements of article 4 [of the ECHR]” [37].

### **Significance**

The decision to make immigration appeals tribunals free to make their own findings is significant because, as recognised by the Court, this would make victims of trafficking more willing to engage with the NRM without worrying that it could negatively affect their immigration appeal. Furthermore, by incorporating ECAT obligations into article 4 ECHR obligations, the UKSC set a higher level of protection for the right to freedom from slavery and forced labour. As this case shows, it is not enough to simply protect victims of trafficking; states must also ensure that they efficiently investigate potential cases of trafficking, punish traffickers, and prevent future cases of trafficking from occurring. These efforts should contribute significantly to the fight against human trafficking globally.

**By Rukevwe Otive-Igbuzor**