Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02596/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd January 2019	**On 7th February 2019**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

M A

(ANONYMITY ORDER MAINTAINED)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K. Cronin of counsel, instructed by Duncan Lewis Solicitors

For the Respondents: Mrs A. Everett, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant was born in Somalia on 24 September 1978 but moved to Kenya at the age of three to live with her aunt and uncle, after her mother died. First-tier Tribunal Judge Boylan-Kemp and the judges who subsequently considered the Appellant's claim accepted that she

was sexually abused by her uncle from the age of five to eight. It was also accepted that she went to work for a family as a house girl from the age of 16 to 18. She then returned to her aunt's home and helped her run her market stall selling items such as fish, tomatoes and beans.

2. The Appellant's aunt had a friend, called Helen Brown, who visited Kenya for business purposes from time to time and, when she did, the Appellant would assist her and Helen Brown would pay her a little money or buy her some clothes. On 5 September 2014, after an incident, in which the Appellant was told her aunt had been killed by the Kenyan authorities, Helen Brown took the Appellant to Uganda, where she had a large house in gated community. The Appellant remained in this house until 17 September 2014. Helen Brown then told the Appellant that they were going to travel to Dubai and provided her with a ticket and a document that appeared to be a passport. However, she was brought to the United Kingdom, arriving here on 17 September 2014.

3. It is now accepted that, in fact, Helen Brown trafficked the Appellant to the United Kingdom for the purpose of sexual exploitation. They were met at the airport by a woman called Sophia and Helen Brown left the Appellant with Sophia in a large detached house, where she realised that she had been brought there to be prostituted either at the house or at "sex parties" which took place at other large houses.

4. One day, as the Appellant and two other women were being taken to one of these parties, the vehicle in which they were travelling broke down and the Appellant and the other women were able to escape. A stranger then assisted the Appellant and drove her to Croydon and informed her that she should got to the Home Office and ask for assistance.

5. An asylum screening interview was conducted the next day, which was 16 July 2015. UKVI referred the Applicant into the National Referral Mechanism on 22 July 2015, as a woman who may have been trafficked into the United Kingdom. On 28 July 2015 the competent authority found that there were reasonable grounds to believe that the Appellant had been trafficked and she was granted temporary admission until 10 September 2015. Subsequently, on 28 February 2017, the Respondent made a conclusive grounds decision that she had been trafficked to the United Kingdom but decided that she did not qualify for leave to remain as a person who had been trafficked to the United Kingdom.

6. On 28 September 2017, the Respondent refused to grant the Appellant asylum. He accepted that the Appellant was a former victim of modern slavery, who had been trafficked from Kenya to the United Kingdom but found that there would be a sufficiency of protection for her in Kenya and that she would be able to relocate in safety to another part of Kenya.

7. She appealed against the decision and First-tier Tribunal Judge Boylan-Kemp MBE allowed her appeal. However, the Respondent appealed against this decision and First-tier Tribunal Judge Pedro granted him permission to appeal on 24 November 2017 and in a decision promulgated on 14 March 2018 Upper Tribunal Judge Chalkley found that First-tier Tribunal Judge Boylan-Kemp MBE had made errors of law in her decision. However, in paragraph 7 of his decision, he noted that "it was agreed with the representatives that all findings up to and including those at paragraph 23 of the determination [of First-tier Tribunal Judge Boylan-Kemp MBE)" should stand. He then remitted the appeal to the First-tier Tribunal.

8. The Appellant's appeal was listed before First-tier Tribunal Judge Watson, who dismissed her appeal in a decision promulgated on 20 July 2018. It was noted in paragraph 3 of the decision that the findings made by First-tier Tribunal Judge Boylan-Kemp MBE in paragraphs 1- 23 of her decision were preserved. The Appellant appealed against this decision and First-tier Tribunal Judge Scott Baker granted her permission to appeal on 6 September 2018. When doing so, she said that it was arguable that First-tier Tribunal Judge Watson had not provided adequate reasons for finding that a lone woman with health issues, having been trafficked, could return to Kenya without any family support or that there would be an adequacy of protection for her there. She also found that the findings on relocation were arguably inadequate.

ERROR OF LAW HEARING

9. Counsel for the Appellant and the Home Office Presenting Officer made oral submissions and I have taken these into account when reaching my decisions below.

ERROR OF LAW DECISION

10. When granting permission to appeal, First-tier Tribunal Judge Scott Baker found that First-tier Tribunal Judge Watson had made inadequate reasons for finding that a woman with the characteristics of the Appellant would be able to access a sufficiency of protection in Kenya.

11. In paragraph 37 of her decision, First-tier Tribunal Judge Watson found that the Appellant had no financial resources and had not contacted anyone in Kenya since she left there in 2014. In paragraph 28 of her decision First-tier Tribunal Judge Watson also found that the Appellant's aunt had not been killed as claimed. However, she did not address the fact that in paragraph 21of his decision, First-tier Tribunal Judge Boylan-Kemp found that "as neither the appellant, her aunt or her uncle had any previous issues with the Kenyan authorities and, as the appellant is not even certain that her uncle was involved with Al-Shahbab, and as the appellant was told about events by an unidentified man whilst she was with a women involved in trafficking her, then I find the most plausible explanation is that the account of her aunt being killed and needing to leave was most likely arouse to ensure that she left Kenya and went to the property in Uganda from where she was then trafficked to the United Kingdom".

12. This may suggest that the Appellant's aunt was still alive, but it could equally suggest that her aunt had colluded with Helen Brown to facilitate her plan to traffic and exploit the Appellant and this needed to be addressed. If she did not have any family to return to and if her aunt had colluded with Helen Brown, the assistance that the Appellant may be able to access in Kenya assumed greater significance.

13. Therefore, it was very relevant that, in paragraph 30 of his decision, when considering whether there would be a sufficiency of protection for the Appellant in Kenya, First-tier Tribunal Judge Watson referred to paragraph 41 of the refusal letter, which quoted from the US Department of State's Trafficking in Persons report for 2016, and noted that the Nigerian government had "reported prosecution of 762 suspected traffickers and 456 convictions during the reporting period, in comparison to 65 prosecutions and 33 convictions in the previous reporting period. However, she did not take into account the up to date US Department of State Trafficking in Persons Report for 2017, which was at page B80 of the Appellant's Bundle. It noted that Kenya continued to be classed as a Tier 2 state, as it had not fully met the minimum standards for the elimination of trafficking. Significantly, it stated that "the availability of protective services for adult victims remains negligible". The number of prosecutions was also much lower than those relied upon by the First-tier Tribunal Judge and it was said that "the government reported initiating 281 prosecutions during the reporting year, compared with 762 in 2015 and 65 in 2014". It was also said that "the government reported convicting 105 traffickers, compared to 456 in 2015…"

14. The reference to the availability of protection services for adult victims also rendered the finding in paragraph 30 of First-tier Tribunal Judge Watson's decision irrational as there was no basis on which she could find in paragraph 30 of her decision that Kenya was able and willing to offer protection to victims who approached the authorities.

15. In paragraph 34 of the decision First-tier Tribunal Judge Watson also referred to COIS February 2018 and stated that "this indicates that in general where the threat is from non-state agents, internal relocation in Kenya is likely to be reasonable". However, paragraph 2.3.3 of the Country Policy and Information Note *Kenya; Background information, including actors of protection and internal relocation*, February 2018, read in its entirety stated "In general, where the threat is from non-state agents, internal relocation to another area of Kenya is likely to be reasonable, depending on the nature and origin of the threat, and the individual circumstances of the person".

16 It also stated in paragraph 2.3.4 "women and girls face discrimination and restrictions in their social and economic rights and may find relocation more difficult than men".

17. Nevertheless, First-tier Tribunal Judge Watson found in paragraph 39 of the decision that "the COIS indicates that relocation in general is not unduly harsh and I find that the appellant is not especially vulnerable and if she chooses not to return to her home village she can relocate in Kenya which is a large and populous country".

18. As a consequence, there were errors of law in First-tier Tribunal Judge Watson's decision.

Decision

(1) The appeal is allowed.

(2) The decision of First-tier Tribunal Judge Watson is set aside but the findings of fact made by First-tier Tribunal Judge Boylan-Kemp, MBE, in paragraphs 1 to 23 of her decision are maintained.

(3) The parties did not believe that a further hearing was needed and that the Upper Tribunal could remake the decision on the basis of the preserved findings and the objective evidence. Therefore, I retained the appeal in the Upper Tribunal and

reserved it to myself in order to remake it on the material already before the Upper Tribunal.

SUBSTANTIVE DECISION

THE ADMISSION OF FURTHER EVIDENCE

1. The Applicant's solicitors had made an application to admit further evidence under Rule 15 2A of the Tribunal Procedure (Upper Tribunal) Rules 2008 on 13 September 2018. They had attached a bundle of documents to the letter which contained that new evidence the Appellant wished to rely upon if the Upper Tribunal went on to remake the decision on her appeal. These documents related to the Appellant's physical and mental health. All but two of these documents post-dated the hearing before First-tier Tribunal Judge Watson. Of these two, one of these was a letter by Dr. Feinberg, was dated 19 June 2018, but had only been sent to the Appellant's solicitors by her support worker on 12 December 2018. The other was a copy of the US Department of State: Trafficking in Persons Report 2018, dated 27 June 2018, which was relevant to the findings made by First-tier Tribunal Judge Watson who had only taken into account an earlier 2016 US State Department Report.

2. Therefore, I find that there was no unreasonable delay in submitting this new evidence, I also find that this evidence is of direct relevance to the issues to be re-considered by the Upper Tribunal and should be admitted.

FINDINGS OF FACT

3. In keeping with paragraph 7 of Upper Tribunal Judge Chalkley's decision and paragraph 3 of First-tier Tribunal Judge Watson's decision, paragraphs 1 to 23 of First-tier Tribunal Judge Boylan-Kemp MBE findings of fact have been preserved. This was also agreed by the parties at the error of law hearing before me.

NATIONALITY AND IMMIGRATION STATUS IN KENYA

4. In paragraph 15 of First-tier Tribunal Judge Boylan-Kemp's decision she accepted that the Appellant had been born in Somalia but had been living in Kenya from a very young age. She also found that the Appellant spoke the languages of Kenya but not Somalia but found that

this was not a determinative factor when assessing her nationality. In paragraph 16 of her decision, she then found that "taking all the evidence in the round, I am satisfied that it is more likely than not that the appellant is Kenyan, or alternatively, that she could be granted Kenyan citizenship because she had lived there lawfully for over seven years".

5. Therefore, First-tier Tribunal Judge Boylan-Kemp did not find that the Appellant was in possession of a Kenyan passport or a Kenya identity card or that she had previously been recognised as a Kenyan national, even though she had lived there from the age of three. There is also no other evidence to suggest that the Appellant has been in possession of a Kenyan passport or identity card in the past. In reply to question 48 of her asylum interview, she said that she had never had any status in Kenya and was just seen as a Somali living in Kenya. Her evidence has continued to be consistent in relation to this assertion.

6. In addition, I note that what section 13 of the Kenya Citizenship and Immigration Act 2011 states about obtaining Kenyan citizenship by lawful residence is that:

> (1) A person who has attained the age of majority and capacity who has been lawfully resident in Kenya for a continuous period of at least seven years may on application be registered as a citizen if that person—
>
> (a) has been ordinarily resident in Kenya for a period of seven years, immediately preceding the date of application;
>
> …
>
> (c) has resided in Kenya throughout the period of twelve months immediately preceding the date of the application;
>
> …
>
> (e) is able to understand and speak Kiswahili or a local dialect;
>
> (f) understands the nature of the application under subsection (1);
>
> (g) has not been convicted of an offence and sentenced to imprisonment for a term of three years or longer;
>
> …
>
> (i) has been determined, through an objective criteria, and the justification made, in writing, that he or she has made or is capable of making a

substantive contribution to the progress or advancement in any area of national development within Kenya; and

(j) is not an adjudged bankrupt".

7. Therefore, I find that, if the Appellant were to be returned to Kenya, she would have to establish her entitlement to Kenyan citizenship and most significantly would have to show that she had been ordinarily resident there for the seven years immediately preceding her application. As a consequence, I find that she would be returning as someone without extant Kenyan citizenship.

CONVENTION REASON

8. In *SB (PSG – Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002 the Upper Tribunal found that former victims of trafficking can form a particular social group within regulation 6(1)(d) of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006.

9. In paragraph 23 of her decision, First-tier Tribunal Judge Boylan-Kemp MBE found that "former victims of trafficking do have a distinct identity in Kenyan society and therefore a former VOT in Kenya can be considered to be a member of a particular social group under the Convention". Therefore, I find that the Appellant is a member of a particular social group for the purposes of the Refugee Convention.

PERSECUTION

10. Regulation 5(2) of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 also states that:

"An act of persecution may, for example, take the form of:

(a) an act of physical or mental violence, including an act of sexual violence".

11. If the Appellant were to be re-trafficked, she is likely to be raped and sexually assaulted and, therefore, be persecuted for the purposes of regulation 5(2).

ACTORS OF PERSECUTION OR SERIOUS HARM

12. Regulation 3 states that "persecution or serious harm can be committed by:

(c) any non-State actor if it can be demonstrated that [the State] …is unable or unwilling to provide protection against persecution or serious harm".

RISK OF PERSECUTION

13. It has been found that the Appellant will not be at risk of persecution by the Kenyan authorities but it is her case that she continues to be at risk Helen Brown and the international criminal gang she was part of or other potential human traffickers. When assessing the risk that may arise in the future, I find that a number of features about the account which was given by the Appellant about being trafficked and exploited and which was accepted by both the competent authority within the National Referral Mechanism and the Judges who have considered her case, are potentially significant.

14. It was accepted that Helen Brown was a woman who travelled across international borders with ease and had large houses in a number of different countries. She also had a driver working for her and was able to obtain a passport in order to traffic the Appellant to the United Kingdom within a matter of days. She was then met at a British airport by another woman with whom she was familiar, who immediately put the Appellant to work as a prostitute. Both the house in Uganda and the one in the United Kingdom were said to be large and detached, which suggests that they were expensive. The Appellant was accommodated in her own room in the house in the United Kingdom and provided with sufficient food, clothes and make up. Significantly, she was not required to have sex with many men each week. She has also required to attend "sex parties" in big houses where there were men in smart suits and she and other girls were taken to these "parties" in a car which has a glass panel between the front seats and the seats at the rear, which suggests that it was some sort of limousine. All of this tends to indicate that the gang was supplying women for the higher end of the sexual exploitation market and that the gang were making a good living from this trade.

15. In addition, as noted above, First-tier Tribunal Judge Moylan-Kemp found that the Appellant had been told that her aunt was dead, as part of plan to traffic and exploit her. As I found above when making my error of law decision, this means that there must be a serious possibility that her aunt colluded with her traffickers. Therefore, there is also a serious possibility that the Appellant will be returning to Kenya as a single woman with no family members to turn to for assistance and as a woman who had escaped from an international

trafficking gang which operated in Kenya, Uganda and the United Kingdom and possibly elsewhere.

16. I have not given any significant weight to the fact that the Appellant is no forty years old. She was initially trafficked when she was in her later 30s and there is no evidence to suggest that only girls and young women are trafficked from Kenya. Neither do I find that her knowledge of being trafficked in the past will offer her much protection. In contrast, her own individual characteristics will render her vulnerable to re-trafficking.

17. In considering what methodology to adopt to consider whether a woman who has been trafficked from Kenya would be safe on return, I have adopted the approach taken by the Upper Tribunal in *HD (Trafficked women) Nigeria CG* [2016] UKUT 00454 (IAC) and *TD and AD (Trafficked women) CG* [2016] UKUT 00092 (IAC). I accept that the country guidance applies to these two specific countries but in my view the methodology has a wider application. This is because Nigeria and Albania are also source, transit and destination country for human trafficking and Kenya and Albania are both on Tier 2 and Nigeria is on the Tier 2 watch list for the purposes of the US Department of State's 2018 Trafficking in Persons Report.

18. For example, in *HD (Trafficked women) Nigeria CG* [2016] UKUT 00454 (IAC) the Upper Tribunal noted that:

> "4. Whether a woman returning to Nigeria having previously been trafficked to the United Kingdom faces on return a real risk of being trafficked afresh will require a detailed assessment of her particular and individual characteristics. Factors that will indicate an enhanced risk of being trafficked include, but are not limited to:
>
> a. The absence of a supportive family willing to take her back into the family unit;
>
> b. Visible or discernible characteristics of vulnerability, such as having no social support network to assist her, no or little education or vocational skills, mental health conditions, which may well have been caused by experiences of abuse when originally trafficked, material and financial deprivation such as to mean that she will be living in poverty or in conditions of destitution;

c. The fact that a woman was previously trafficked is likely to mean that she was then identified by the traffickers as someone disclosing characteristics of vulnerability such as to give rise to a real risk of being trafficked. On returning to Nigeria, it is probable that those characteristics of vulnerability will be enhanced further in the absence of factors that suggest otherwise.

19. In current case, it is accepted that the Appellant was trafficked from Nigeria and that she had been sexually exploited in the United Kingdom for nine months. It is also accepted that she has had no contact with anyone in Kenya since 2014. In addition, for the reasons given above, there is a serious possibility that her aunt with whom she used to live colluded with her trafficker. Her history also indicates that her family history, including historic sexual abuse as a child, left her vulnerable and isolated to being trafficked in the past. She did not complete her secondary education and her only formal employment was as a domestic servant or assisting her aunt on a market stall. Although it is true that she started a course in computing in the United Kingdom, a deterioration in her mental health from October 2017 has meant that she was unable to complete it.

20. There is also a significant amount of evidence to indicate that the Applicant continues to suffer from anxiety, which is rooted in her childhood sexual abuse and her experience of being trafficked and sexually exploited over a nine-month period. The letter from Stockland Green Primary Care Centre, dated 30 November 2018, confirmed that she was referred to the Mental Health Trust in 2016 as she was suffering from anxiety. It also noted that the reference was not successful "as they asked her to fill in a diary for assessment and she felt as though it was making her more anxious, possibly reinforcing previous experiences she had gone through with the Home Office". The letter also confirmed that she is monitored by the Mental Health Trust on a regular basis and noted that she continues to suffer from stress, fleeting suicide thoughts and had problems trusting people. I have also noted that the letter, dated 28 September 2018, from Dr. Onuba, states that she was being prescribed with a new anti-depressant and that this was at more than the lowest dosage.

21. It is also clear from some of the evidence, that her distress has prevented her from taking full advantage of the counselling and support services offered to her. For example, the letter from Restore, dated 12 December 2018 indicated that her ability to feel able to communicate and meet with other people has deteriorated from 2015/2016 when she was attending a number of social activities and also volunteering. The letter also explained that she had struggled to leave

her home since October 2017. The letter from The Adavu Project, dated 11 December 2018, noted that the Appellant "continued to struggle with memories of the sexual exploitation and is unable to speak about it in detail as it retraumatises her. I have discussed returning to counselling with [the Appellant] consistently and during our initial sessions and she stated that she had found the sessions difficult with Women's Aid during 2015-2016, the recall made her distressed [and] caused her to feel "worse"". The letter from BIRCH (Birmingham Community Hosting Network), dated 3 December 2018, confirmed that, although the Appellant was initially a valued and regular weekly volunteer for its "meet and greet" session at St Martins Youth Centre, she had not been able to help since October 2017 because of serious health problems. The letter does not describe the nature of these problems but the earlier two letters indicate that it was her mental ill health which was the main obstacle to her communicating with others and which was leading to her isolation.

22. As a consequence, I find that the evidence indicates that even with the engagement of her GP, the Mental Health Trust and various voluntary groups the Appellant has not yet been able to address the anxiety caused by her previous trauma. Removing the Appellant from the United Kingdom will deprive of her current support and is likely to lead to a further deterioration of her mental health.

23. The medical evidence also confirmed that the Appellant needs surgery to remove large uterine fibroids but that the operation had to be cancelled as she is also suffering from supraventricular tachycardia. This has now been addressed but she is still waiting for her surgery to be rescheduled.

24. I also find that there is an additional factor in the Appellant's case, which is that for the reasons given in paragraphs 5 – 7 above, the Appellant would be returning to Kenya without the necessary immigration status or documents to prove her nationality. This would impede her ability to access employment and services and render her additionally vulnerable to being re-trafficked and exploited, if not by Helen Brown and the international criminal gang to which she belonged, then by another similar gang.

THE KENYAN GOVERNMENT AS AN AGENT OF PROTECTION

25. The US Department of State Trafficking in Persons Report for 2018 confirms that the Kenyan government continues to fail to meet the minimum standards in several key areas and was a source, transit and destination country for human trafficking. It also stated that "the

government maintained law enforcement efforts, but incomplete data from the government made it difficult to fully assess those efforts". In addition, it was noted that "at the close of the reported period, the government did not report any trafficking convictions, and the nine prosecutions remained on-going, compared with 105 convictions in 2016.

26. It also confirmed that "services for adult victims in-country remained negligible". It was also clear that the few shelters and drop in centres which were financially supported by the Government catered for child, as opposed to adult, victims of trafficking". It was also significant that the Report also noted that "NGOs reported that internally displaced persons, particular those who live close to a major highway or local trading centre, are more vulnerable to trafficking than persons in settled communities". I find that this is a relevant factor as Appellant's the particular characteristics, including her lack of family support, her mental ill-health and her lack of immigration status suggest that she will not be able to assimilate into a settled community.

27. The fact that it is internationally and nationally recognised that former and potential victims of human trafficking require special protection mean that the Respondent cannot merely rely upon the decision in *Horvath v Secretary of State for the Home Department* [2000] UKHL 37 and the protection generally provided to those in Kenya. As a consequence, I find that, due to her particular characteristics, the Appellant would not be able to access sufficient protection in Kenya from the government there.

INTERNAL FLIGHT

28. For the reasons given above, I find that the Appellant would be at risk wherever she moved in Kenya. Relocating to Nairobi or another city would not resolve her lack of immigration status or her mental ill-health and on-going vulnerability to exploitation. In addition, in *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579, Lord Justice Buxton was considering whether it would be unduly harsh to return a woman to Uganda. However, the general principles have greater applicability. In particular, he found that:

> "22. Even if the foregoing is wrong, and it was open to the AIT to hold that it would not be unduly harsh to return young women generally to Kampala, it is still necessary to consider whether AA has characteristics that would render remission unduly harsh in her particular case. That is made plain in the authoritative statements of the law cited in §7 above. Lord Bingham said that the enquiry must be directed to the situation of the

> particular applicant; and Lord Brown of Eaton-under-Heywood that the claimant must be as well able as most to bear the hardship suffered by a significant minority in the country of relocation. It was this aspect of the case that occupied most of the submissions both before the AIT and before us.
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> 23. The two particular characteristics of AA that were relied on as making her particularly vulnerable were, first, that AA has no formal qualifications; and second that she was traumatised and suffering from anxiety and depression."

29. In the current case expecting the Appellant to both to another part of Kenya would also be unduly harsh because she will not be able to establish her right to Kenyan nationality and will have no family or education and employment history to assist her.

Decision

The appeal is allowed.

Nadine Finch

Signed **Date 31 January2019**

Upper Tribunal Judge Finch