EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 20658/11
F.A.
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 10 September 2013 as a Chamber composed of

Ineta Ziemele, *President,*
David Thór Björgvinsson,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Paul Mahoney, *judges,*

and Françoise Elens-Passos, *Section Registrar,*

Having regard to the above application lodged on 31 March 2011,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, F.A., is a Ghanian national who was born in 1973 and lives in London. She is represented before the Court by Ms Duszynska, a lawyer practising in London with the Hammersmith & Fulham Community Law Centre.

2. The United Kingdom Government ("the Government") were represented by their Agent, Ms L. Dauban of the Foreign and Commonwealth Office.

3. On 1 April 2011 the Acting President of the Chamber to which the case was allocated decided to apply Rule 39 of the Rules of Court,

indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court that the applicant should not be expelled to Ghana pending the Court's decision.

4. On 26 August 2011 the application was communicated to the Government together with the application of Y.K. (application no. 21413/11). It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1) and to grant the applicants anonymity (Rule 47 § 3 of the Rules of Court).

5. The Registry was subsequently informed that the complaints made by Y.K were the subject of ongoing domestic proceedings. The Court therefore decided to disjoin the applications and adjourn the examination of Y.K.'s complaints until the domestic proceedings had concluded.

A. The circumstances of the case

6. The facts of the case, as submitted by the parties, may be summarised as follows.

7. The applicant entered the United Kingdom in 2003 using a valid Ghanaian passport issued in her own name. She was also in possession of a visit visa, which was valid for six months. She did not come to the attention of the immigration authorities again until August 2008, when she applied for a European Economic Area ("EEA") residence card as the spouse of a French national. The documents submitted in support of the application indicated that the marriage had taken place in Ghana on 5 June 2008. A statutory declaration purportedly made by the applicant's father on 25 July 2008 appeared to confirm this. The application was refused by the Secretary of State for the Home Department on 9 January 2009.

8. The applicant was arrested on 28 October 2009 after presenting a false French passport. On 13 November 2009, at Croydon Crown Court, she pleaded guilty to the possession of a false passport and was sentenced to eight months' imprisonment. When her prison sentence expired on 27 February 2010 she was taken into immigration detention and directions were set for her removal to Ghana on 13 March 2010. However, the removal directions were cancelled when she claimed asylum on 12 March 2010.

9. The basis of her asylum claim was that after a difficult childhood in Ghana her father had arranged for agents to help her travel to the United Kingdom to work. She had met the agents at Accra airport in November 2003 and was handed some travel documents. On arrival at Heathrow airport in London, she was met by a man and woman who took her to a house in a secluded area and drugged her. When she woke up she realised that she had been raped. She was then informed that she was in debt to the agents and would have to work as a prostitute to pay off her debt. She was imprisoned in the house for approximately three years and during this time

she was forced to have sexual intercourse with many men. She heard two other women shouting and screaming in the house but never saw them. In the first week of January 2007 she managed to escape from the house when the couple forgot to lock the door to her room. She travelled to London and stayed with different members of the public. In March 2007 she discovered that she was pregnant and HIV positive. On 30 September 2007 her son was born two weeks early by caesarean section. Although he initially lived with her, in December 2008 she sent him to Ghana because she found it too difficult to cope with him in the United Kingdom.

10. The applicant claimed that, if she returned to Ghana, she would be killed or re-trafficked by the agent and his cohorts. She alleged that her parents had been threatened in Ghana by the agents and as a direct consequence of these threats her father had died of a heart attack in early 2008. She also claimed that she would face discrimination in Ghana as an HIV-positive single mother who had worked as a prostitute.

11. On 19 April 2010 the applicant was referred to the National Referral Mechanism ("NRM"), the United Kingdom's system for identifying victims of human trafficking (see paragraph 29 below).

12. On 4 May 2010 the United Kingdom Border Agency, acting in their capacity as a "competent authority" under the NRM (see paragraph 30 below), found that there were "reasonable grounds" to believe that the applicant was a victim of human trafficking. She was therefore granted a period of forty-five days' temporary admission into the United Kingdom to help her recover from her trafficking experience and to allow her time to consider her next steps. Furthermore, she was entitled to appropriate and secure accommodation during that period. She was informed that at the end of the reflection period the competent authority would make a conclusive decision as to whether or not she was a victim of trafficking and that she would be eligible for a residence permit if her stay in the United Kingdom was necessary either owing to her personal situation or for the purpose of her co-operation with a criminal investigation.

13. She was released from detention into the care of the Poppy Project, a charitable organisation that provides support to women victims of human trafficking into the United Kingdom for sexual and labour exploitation. Thereafter she started to receive counselling with the Mulberry Project, an agency that provides specialist counselling to asylum-seekers and refugees who have experienced trauma either in their country of origin or due to exploitation in the United Kingdom.

14. On 28 August 2010 the Secretary of State for the Home Department refused her asylum claim, finding that her credibility had been damaged by, *inter alia*, her failure to claim asylum until the day before her removal; her conviction for the use of false documents; her submission of a fraudulent application for a residence card in the past; and the inconsistencies in her account (she had provided different dates for her father's death and her

accounts of both her own living arrangements in the United Kingdom and her son's return to Ghana had been inconsistent). The Secretary of State found her claims to have been trafficked and to fear her traffickers to be unsubstantiated. Therefore, in light of her generally poor credibility, she did not believe her account. In any event, in respect of her fear of the agents, the Secretary of State considered that she could obtain protection from the Ghanaian authorities or internally relocate within Ghana if necessary. Given that she would be returning to a different area of Ghana where support would be available from her friends and from the authorities, the Secretary of State did not accept that she would be at risk of re-trafficking on return. Finally, with regard to her HIV status, she did not accept that her circumstances reached the high threshold set out in *N. v. the United Kingdom* [GC], no. 26565/05, ECHR 2008 because treatment and support would be available to her in Ghana.

15. The applicant appealed against the refusal of asylum to the First-Tier Tribunal (Immigration and Asylum Chamber) ("the Tribunal"). In the course of those proceedings her representative indicated that the marriage in Ghana, upon which her application for an EEA Residence Card had been based, had not taken place.

16. The appeal was dismissed by the Tribunal on 17 December 2010. At the hearing the Secretary of State had conceded that the applicant had been a victim of trafficking. The Immigration Judge subsequently accepted that she had been trafficked into the United Kingdom in 2003; that she had been forced into prostitution until 2007; that she had experienced trauma as a result of her imprisonment and enforced prostitution between 2003 and 2007; and that she had a son who was three years old and living in Ghana.

17. However, the Immigration Judge did not accept that the applicant still feared her traffickers because, *inter alia*, she had failed to seek assistance from the United Kingdom authorities – and in particular the police – until the day before her scheduled removal in March 2010, despite having had many opportunities to do so. The Immigration Judge also considered that the fact she had sent her son back to live in her home area in Ghana where she claimed the principal threat to her and her family's safety existed was inconsistent with her claim to still fear her traffickers.

18. The Immigration Judge was also not satisfied that the applicant had lived in the United Kingdom continuously since her escape in 2007 because the documents submitted in support of her application for an EEA residence card indicated that she had married in Ghana in 2008. Moreover, he did not accept that her father was dead or that the whereabouts of her mother was unknown. When she applied for the EEA residence card she had submitted a statutory declaration purportedly made by her father some months after she claimed that he had died. In addition, in 2009 she had stated that her son returned to Ghana with her mother, although she later claimed he had returned with a friend.

19. As a result, the Immigration Judge accepted that the applicant had been a victim of trafficking and sexual exploitation between 2003 and 2007 and that she had a son, but rejected the remainder of her claim as an entire fabrication. He did not believe that the applicant would be unable to look to her parents for accommodation and moral support in Ghana and found that the agents responsible for trafficking her seven years earlier did not remain interested in her. He also found that there was no risk that she would again be tricked into prostitution or re-trafficked. He acknowledged that she might be subject to some stigma in Ghana because of her HIV positive status but did not accept that it would amount to ill-treatment under Article 3 or that she would be destitute, given that she would have the support of her parents and her siblings in Ghana. He also found that treatment for HIV would be available there and that, having examined the medical report submitted, any differences in healthcare between the United Kingdom and Ghana were no more than a relative disadvantage in quality and availability and were not such to be incompatible with her rights under Articles 3 or 8 of the Convention.

20. The applicant did not apply for permission to appeal to the Upper Tribunal.

21. On 10 January 2011 the United Kingdom Border Agency, acting again as the "competent authority" under the NRM, made a "conclusive decision" (see paragraph 33 below) that the applicant was no longer a victim of trafficking for the purposes of the Council of Europe Convention on Action against Trafficking in Human Beings ("the Convention on Trafficking" – see paragraph 35 below). It acknowledged that there were reasonable grounds for considering that she had historically been a victim of human trafficking but considered that she was no longer a victim for the purposes of the Convention. In particular, it noted that since 2007 she had not been under the control of any trafficker nor had she had any contact with her traffickers. She had had sufficient time to recover from the influence of her traffickers and attain a level of psychological stability as intended by the Convention on Trafficking. She had been offered support and counselling from both the Poppy Project and medical professionals and she had been prescribed medication. She was studying and attending church, which indicated that she had reintegrated back into society and had moved on from the trafficking experience. Moreover, the Tribunal had given consideration to all of the relevant reports and had found that there would be a support network and medical care available to her in Ghana to assist in her continued reintegration into society. Therefore, the competent authority did not consider that she required any additional time to recover in the United Kingdom.

22. On 25 January 2011 Ashiana, an organisation which provided support to trafficked women in partnership with The Poppy Project, wrote to the United Kingdom Border Agency on the applicant's behalf to request a

reconsideration of the decision of 10 January 2011. In particular, they sought to contest the conclusion that the applicant had "moved on from the trafficking experience".

23. The United Kingdom Border Agency confirmed its decision on 18 February 2011, noting that the applicant had not submitted any new factual or other information in support of her claims and all of the relevant evidence had already been carefully assessed by the First-Tier Tribunal.

24. On 29 March 2011 the applicant sought permission to apply for judicial review of the competent authority's decision that she was no longer a victim of trafficking for the purposes of the Trafficking Convention. In particular, she argued that the competent authority should not have based itself on the Tribunal's decision and instead should have considered the effects of the applicant's psychiatric state upon her evidence and the risks of re-trafficking if returned to Ghana. The applicant also sought an injunction preventing her removal from the United Kingdom.

25. On 1 April 2011 the application for permission was refused by the High Court, which observed that the Tribunal had expressly considered the applicant's mental state in light of the medical evidence before it; the evidence that she had been in Ghana since her last arrival in the United Kingdom which contrasted with her expression of fear of return; and her account of the period after January 2007. The Tribunal had also explicitly rejected her complaint that she would be at risk of re-trafficking on return. The competent authority's decision was therefore considered to be lawful, reasoned and careful.

26. The applicant renewed her application for judicial review, repeating the same grounds. The Secretary of State defended the claim, arguing that the applicant's contentions had been given very full consideration both by the Tribunal, which had the benefit of hearing the applicant give evidence and which had examined all of the documents, and by the competent authority in its decisions of 10 January and 18 February 2011.

27. On 10 June 2011, the High Court refused the renewed application for judicial review.

B. Relevant domestic law and practice

1. Asylum and human rights claims

28. Sections 82(1) and 84 of the Nationality, Immigration and Asylum Act 2002 provide for a right of appeal against an immigration decision made by the Secretary of State for the Home Department, *inter alia,* on the grounds that the decision is incompatible with the Convention.

29. Appeals in asylum, immigration and nationality matters are heard by the First-Tier Tribunal (Immigration and Asylum Chamber). Section 11 of the Tribunals, Courts and Enforcement Act 2007 provides a right of appeal

to the Upper Tribunal, with the permission of the First-Tier Tribunal or the Upper Tribunal, on any point of law arising from a decision made by the First-Tier Tribunal other than an excluded decision.

30. Section 2 of the Human Rights Act 1998 provides that, in determining any question that arises in connection with a Convention right, courts and tribunals must take into account any case-law from this Court in so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. Section 6(1) of the same act provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

2. The United Kingdom identification process of potential victims of trafficking – the United Kingdom Border Agency's Guidance for "Competent Authorities" ("the Guidance") – undated

31. The above Guidance explains that the framework for identifying victims of trafficking in the United Kingdom is known as the National Referral Mechanism ("NRM"). The NRM was introduced in 2009 following the ratification and entry into force of the Council of Europe Convention on Action against Trafficking in Human Beings (see below). It is a victim identification and support process designed to make it easier for all the different agencies that could be involved in a trafficking case – the police, the United Kingdom Border Agency, local authorities and non-governmental organisations – to co-operate, to share information about potential victims and to facilitate their access to advice, accommodation and support.

32. Under the NRM, where there are reasons to believe that a person may be a trafficking victim, organisations formally identified as "first responders", which include, *inter alia,* local authorities, the police, the United Kingdom Border Agency, the Poppy Project and the Serious Organised Crime Agency, can refer the person to the designated "competent authorities". The United Kingdom Border Agency and the United Kingdom Human Trafficking Centre are the two competent authorities for identifying victims of trafficking. The United Kingdom Border Agency is the competent authority linked to immigration and asylum cases.

33. Once the referral has been made, a two-stage identification process takes place. First, the competent authority decides whether or not there are reasonable grounds to believe that the person is a potential victim of trafficking (a "reasonable grounds" decision).

34. If the competent authority decides that the person is a potential victim of trafficking, it is expected to make a conclusive decision within a forty-five day recover-and-reflection period granted to the potential victim (a "conclusive decision"). When assessing the case, the competent authority is expected to gather relevant information and to cooperate with other

agencies, such as the police and support organisations. In that regard, the Guidance states, *inter alia,* that:

> "During the 45 day reflection period the CA [competent authority] should carry out any evidence gathering and further enquiries required. The CA must consult with any relevant agencies, such as the police, children's services, and the support provider, to reach a conclusive decision on whether the person has been trafficked.
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> ...
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> If the Competent Authority concludes that the person is not considered to be a victim of trafficking, before releasing the decision the CA must discuss the decision with interested parties such as the support provider, police, First Responder or Local Authority (in the case of children) to ensure that all information has been granted.
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> ...
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> Competent Authorities need to have all necessary information before making a negative decision. In cases where it's likely that the person will be refused, an interview will need to be conducted, unless all of the relevant questions have been asked as part of the asylum process, or we've commissioned another frontline agency or the support provider to ask the questions on our behalf."

35. There is no right of appeal against a decision that a person is not a victim of trafficking; such a decision can only be challenged by judicial review.

C. Relevant International Law

36. The Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 ("the Trafficking Convention"), was signed by the United Kingdom on 23 March 2007 and ratified on 17 December 2008. It entered into force in respect of the United Kingdom on 1 April 2009.

37. Article 10 of that Convention provides that each Party shall adopt such legislation as is necessary to ensure the identification of trafficking victims and staff its competent authorities with persons trained in the prevention and combating of trafficking and the identification and assistance of victims.

38. Article 12 provides that each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery, taking due account of the victim's safety and protection needs.

39. Article 13 provides that each Party shall provide in its internal law a recovery and reflection period of at least thirty days when there are reasonable grounds to believe that the person concerned is a victim. During this period it shall not be possible to enforce any expulsion order against the victim.

40. Article 14 provides that each Party shall issue a renewable residence permit to victims if the competent authority considers that their stay is

necessary owing to their personal situation or for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.

41. Article 15 provides that each Party shall ensure that victims have access to information on relevant judicial and administrative proceedings and shall provide in its internal law for the right to legal assistance and free legal aid for victims under the conditions provided by its internal law and for the right of victims to compensation from the perpetrators.

42. Article 16 provides that when a Party returns a victim to another State, such return shall be with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary.

43. Article 28 provides that each Party shall adopt such legislative or other measures as may be necessary to provide effective and appropriate protection for victims and other groups from potential retaliation or intimidation, in particular during and after investigation and prosecution of perpetrators.

COMPLAINTS

44. The applicant complained that her removal to Ghana would put her at risk of ill-treatment in breach of Article 3 of the Convention. In particular, she complained that she would be at risk of falling into the hands of her former traffickers or of falling into the hands of new traffickers. She further complained under Articles 3 and 4 of the Convention that as she had contracted HIV in the United Kingdom as a direct result of trafficking and sexual exploitation, the State was under a positive obligation to allow her to remain in the United Kingdom to access the necessary medical treatment.

THE LAW

45. The Government submitted that the applicant had failed to exhaust domestic remedies, as required by Article 35 § 1 of the Convention, in respect of her Convention complaints because she did not appeal against the decision of the First-Tier Tribunal dated 17 December 2010.

A. The parties' submissions

46. The applicant argued that she had decided not to appeal to the Upper Tribunal on the advice of her legal counsel, who had advised her that she would have a better chance of obtaining leave to remain as a victim of

trafficking than by pursuing the asylum claim. She contended that an application for judicial review was a potentially effective remedy for her Convention complaints because if it were successful she would have been granted a residence permit. She therefore argued that an application for judicial review to the High Court was a parallel remedy to an appeal to the Upper Tribunal and the fact that she had chosen to obtain redress through this remedy meant that she was not required to attempt to use any other.

47. The Government disagreed that judicial review was an alternative remedy to an application for permission to appeal to the Upper Tribunal for a number of reasons. First, an application for judicial review of the United Kingdom Border Agency's trafficking decisions was much narrower than an application for permission to appeal. The High Court was limited to supervision of the rationality of the decisions and could never have over-turned a number of material findings of fact made by the First-Tier Tribunal. Secondly, as the United Kingdom Border Agency's decision was based on the factual findings of the First-Tier Tribunal the applicant's failure to apply for permission to appeal necessarily limited the nature of the High Court's possible review of the NRM decision. Thirdly, by the time that she had applied for judicial review, the time limit for applying for permission to appeal had long expired and the decision had already been taken not to attempt to overturn the factual findings of the First-Tier Tribunal. The Government therefore did not accept that it was a case where one effective remedy had been attempted and the use of another remedy was not required.

48. In any case, the Government further argued that a mere statement of counsel, which was undocumented and wholly unparticularised, was inadequate and could not exempt the applicant from the obligation to exhaust domestic remedies. Doubts on the part of counsel as to the merits of an application did not absolve an applicant from pursuing a particular remedy.

B. The Court's assessment

49. The purpose of Article 35 § 1 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, *inter alia*, *Civet v. France* [GC], no. 29340/95, § 41, ECHR 1999-VI). The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time, namely, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *T. v. the United Kingdom* [GC], no. 24724/94, 16 December 1999, § 55). Article 35 must also be applied to reflect the practical realities of the applicant's position in order to ensure the effective protection of the

rights and freedoms guaranteed by the Convention (*Hilal v the United Kingdom* (dec.), no. 45276/99, 8 February 2000).

50. The general principles applicable to the exhaustion of domestic remedies in expulsion cases were summarised in *NA. v. the United Kingdom*, no. 25904/07, §§ 88-90, 17 July 2008. Those relevant to the current application are as follows:

(a) The rule of exhaustion of domestic remedies in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the Court for their acts before they have had an opportunity to put matters right through their own legal system.

(b) The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time, namely, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success.

(c) Article 35 must also be applied to reflect the practical realities of the applicant's position in order to ensure the effective protection of the rights and freedoms guaranteed by the Convention.

(d) Mere doubts as to the prospects of success of national remedies do not absolve an applicant from the obligation to exhaust those remedies. However, the Court has, on occasion, found that where an applicant is advised by counsel that an appeal offers no prospects of success, that appeal does not constitute an effective remedy. Equally, an applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case-law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail.

(e) In cases where an applicant seeks to prevent his removal from a Contracting State, a remedy will only be effective if it has suspensive effect. Conversely, where a remedy does have suspensive effect, the applicant will normally be required to exhaust that remedy. Judicial review, where it is available and where the lodging of an application for judicial review will operate as a bar to removal, must be regarded as an effective remedy which in principle applicants will be required to exhaust before lodging an application with the Court or indeed requesting interim measures under Rule 39 of the Rules of Court to delay a removal.

51. Section 11 of the Tribunals, Courts and Enforcement Act 2007 provides a right of appeal to the Upper Tribunal, with the permission of the First-Tier Tribunal or the Upper Tribunal, on any point of law arising from

a decision made by the First-Tier Tribunal other than an excluded decision. Such an appeal has suspensive effect, meaning that an appellant could not be expelled from the United Kingdom while an appeal to the Upper Tribunal was pending. Provided that leave to appeal is granted, the Upper Tribunal will decide the case on its merits. The Upper Tribunal therefore has jurisdiction to examine the lawfulness of the First-Tier Tribunal's decision, including its compatibility with the Convention. Moreover, it is empowered to quash a First-Tier Tribunal's decision if it finds the latter to be contrary to the Convention or otherwise unlawful.

52. A judicial review of the decision taken by the NRM is, by comparison, a much narrower challenge. In the present case, the NRM decision was confined to the conclusion that given the time which the applicant had been afforded in the United Kingdom, and the support she had received since claiming asylum, she no longer required additional time there to recover and in that sense was no longer a victim for the purposes of the Trafficking Convention. That decision was to a considerable degree based on the findings of fact made by the First-Tier Tribunal. According to established case-law, when one remedy has been pursued, use of another remedy which has essentially the same objective is not required (see, *inter alia*, *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 40, 19 February 2009). However, judicial review of the NRM decision was not a second remedy of equal scope to an appeal to the Upper Tribunal. As submitted by the Government, it was a significantly narrower challenge which could not overturn the material findings of fact made by the First-Tier Tribunal.

53. In the applicant's case, the findings of fact made by the First-Tier Tribunal were material to the decision of the NRM that she did not require further time in the United Kingdom to recover from her ordeal. Of particular relevance to this conclusion were the following findings: that the applicant's account following her escape from her traffickers was not credible; that she had close family in Ghana that she could turn to for support; that there was no evidence that her family there had been threatened by her former traffickers; that her former traffickers were no longer interested in her; and that adequate treatment for HIV was available in Ghana. The applicant's failure to challenge these findings not only concluded the asylum proceedings but also seriously prejudiced the prospects of success of her judicial review application.

54. Moreover, this is not a case in which counsel advised that an appeal would have no prospects of success; rather, the advice given to the applicant was that she would have greater prospects of obtaining leave to remain as a victim of trafficking than as an asylum-seeker. In any case, counsel's opinion was wholly unparticularised and undocumented and was in no way capable of demonstrating that an appeal to the Upper Tribunal would have offered no prospects of success.

55. Finally, it is not in dispute that if the applicant had sought leave to appeal to the Upper Tribunal, it could have considered any point of law arising from a decision made by the First-Tier Tribunal (see paragraphs 29 and 51 above). Indeed, in a number of recent decisions the Court has tacitly accepted that such an appeal would normally amount to an effective remedy for the purposes of Article 35 § 4 (see, for example, *H. and B. v. the United Kingdom*, nos. 70073/10 and 44539/11, 9 April 2013 and *S.H.H. v. the United Kingdom*, no. 60367/10, 29 January 2013). In the present case, the Court notes that the applicant could have raised all of her Convention complaints in an appeal to the Upper Tribunal, including her submission that the State had a positive obligation under Articles 3 and 4 of the Convention to allow her to remain for the purposes of receiving medical treatment. In fact, as with her complaints concerning risk on return, the failure to challenge the findings of the Tribunal seriously prejudiced any chance she had to successfully raise these complaints in the subsequent judicial review proceedings.

56. In light of the above, the Court considers that in the present case an appeal to the Upper Tribunal would have offered an effective remedy for the applicant's Convention complaints. The applicant's failure to seek permission to appeal – and in particular to challenge the findings of the Tribunal on appeal – limited the effectiveness of the subsequent judicial review application to the extent that it could no longer be considered an effective remedy because it did not offer reasonable prospects of success.

57. Consequently, by not applying for permission to appeal to the Upper Tribunal, the applicant failed to meet the requirements of Article 35 § 1 of the Convention and the application must be rejected in accordance with Article 35 § 4 of the Convention. Furthermore, in view of the above, it is appropriate to lift the indication made to the Government under Rule 39 of the Rules of Court.

For these reasons, the Court unanimously

Declares the application inadmissible.

Françoise Elens-Passos
Registrar

Ineta Ziemele
President