



Upper Tribunal
(Immigration and Asylum Chamber)

PA/08887/2019 (V)

THE IMMIGRATION ACTS

Heard by *Skype for Business*
on 27 January 2021

Decision & Reasons Promulgated
on 17 February 2021

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MARTA GLORIA CUELLAR VALENCIA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr Olabamiji, of DMO Olabamiji, Solicitors
For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. By a decision promulgated on 10 January 2020, FtT Judge Doyle dismissed the appellant's appeal on asylum (Refugee Convention) grounds but allowed it on grounds of humanitarian protection and of articles 3 and 8 of the ECHR.
2. By a decision promulgated on 2 June 2020, UT Judge Finch set aside the decision of Judge Doyle in so far as it dismissed the appeal on asylum grounds and retained the case in the UT "to be remade *de novo* without prejudice to the decision on the appellant's entitlement to humanitarian protection, in the alternative."

3. A transfer order was made to enable another UT judge to complete the decision. The technology enabled an effective remote hearing.
4. As Mrs Pettersen pointed out an earlier hearing, section 104 of the 2002 Act applies to the effect of statutory abandonment. The appellant has not given notice under that section to preserve her “upgrade” appeal and is out of time to do so.
5. Mr Olabamiji explained he is the only fully qualified practitioner in his office; matters was not attended to initially because he was off work (with covid); and the file, unfortunately, was then overlooked. Mrs Pettersen, very reasonably, did not object to the appellant being permitted to give notice orally at the hearing, and did not oppose extension of time.
6. I considered that it was preferable for the case to be resolved on its merits; excused the appellant’s procedural lapses; extended time; and allowed the appeal to proceed.
7. Representatives agreed that the one issue for the UT was whether the facts, as found by the FtT, disclose a Refugee Convention category. I am obliged to them both for submissions which were succinct and to the point; having heard which, I reserved my decision.
8. The facts are that gangs tried to recruit the appellant’s son (who is still a minor); when he resisted, they beat him, assaulted the appellant, threatened her with rape, and threatened the lives of her and her children; and the appellant and her family then fled, in fear of being attacked or even killed by gangs if they returned.
9. The appellant cited *R v Immigration Appeal Tribunal, ex p De Melo and De Arujo* [1997] Imm AR 43 and *Shah & Islam* [1999] UKHL 20.
10. It is convenient to take this digest of the case law from *Macdonald’s Immigration Law and Practice, 9th ed + supplements*, at [12.85]:

The family is the social group *par excellence*, and family membership may form the basis of a ‘particular social group’.¹ The question which has emerged from the case law but which has now been resolved by *Fornah v Secretary of State for the Home Department*² is whether it is enough to be persecuted because of membership of a family regardless of the reason for that family's original persecution, or whether another Convention reason must be behind the initial persecution. In *Ex p De Melo and De Arujo*³ Laws J adopted the reasoning of the Tribunal in *Hernandez*⁴ to the effect that although the murder of the head of the family by drug gangs might not be for a Convention reason, persecution of family members because of their family relationship to the dead man could be. He rejected the Secretary of State's argument that the non-Convention reason advanced against the principal continued to operate against the family, and concluded that membership of a social group was a distinct Convention reason and not a sub-group that had to be qualified by another Convention reason such as political opinion. The Court of Appeal in *Quijano*,⁵ however, narrowed the application of the definition to exclude circumstances where ill-treatment of family members by a drug cartel was a fortuitous by-product of criminal activities, as likely to have been directed at employees as family members, and persecution was not therefore for reasons of membership of the family. The House of Lords in *Fornah v Secretary of State for the Home Department* held that *De Melo* had been right and *Quijano* was wrong. Much depends on the reason for the targeting. Thus in *Jaramillo-Aponte*⁶ (another case involving Colombian asylum seekers) a tribunal found Convention

persecution because the claimants were at risk 'as members of the Escobar family'.⁷ Although membership of a family is the basis of 'blood feuds', which specifically target adult male members of the target family, a blood feud was held in *Skenderaj* not to give rise to a refugee claim based on membership of a particular social group, because the family in question was not regarded as a distinct group by the claimant's society, while reliance on the attitude of the other party to the feud would be artificial.⁸ It is questionable, in the light of *Fornah* whether this decision is correct; as Lord Hope emphasised, it was not necessary for society to recognise a particular social group as being set apart from the rest of society - 'it is sufficient that the asylum seeker can be seen objectively to have been singled out by the persecutor or persecutors for reasons of his membership of a particular social group whose defining characteristics existed independently of the words or actions of the persecutor'.

11. It is unnecessary to include any further case citations.
12. The appellant also relies on *UNHCR Eligibility Guidelines, March 2016*, to support the propositions that the refusal of a youth to join a gang may show a need for refugee protection based on particular social group, on imputed political opinion, or other Convention grounds; and that the same need may extend to family members.
13. Mrs Pettersen's argument was that the appellant "muddies the waters" between imputed political opinion, in the case of the child, and particular social group, in the case of the mother; the refusal of the child to join the gang did not involve imputation of a political opinion, but was only for purposes of violent crime; no Refugee Convention was disclosed; as the FtT had found, the appellant and her children were "innocent victims of a violent society", entitled to humanitarian protection but not to asylum.
14. I am not persuaded that targeting of the appellant's son falls within the Refugee Convention. UNHCR is a guide, but not an authority on the law, and its statements on this subject are vague and unreasoned.
15. Absence of a Convention reason for the initial persecution is beside the point. The subsequent targeting of the appellant (and other relatives) is due to family relationship, and nothing else. At that stage, the family constitutes a particular social group within the meaning of the Convention.
16. The decision of the First-tier Tribunal has been set aside, to the extent set out above. The decision substituted is that the appeal is allowed also on asylum (Refugee Convention) grounds.
17. No anonymity direction has been requested or made.

Hugh Macleman

28 January 2021

UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A **"working day"** means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email.