Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/51144/2021
(UI-2021-000794); IA/03361/2021

THE IMMIGRATION ACTS

Heard at Bradford IAC	**Decision & Reasons Promulgated**
On 26 August 2022	**On 14 November 2022**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

S O
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Greer, Counsel instructed on behalf of the appellant
For the Respondent: Ms Young, Senior Home Office Presenting Officer

Anonymity:
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008:
Anonymity is granted because the facts of the appeal involve a protection claim. and Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal (Judge Kelly) (hereinafter referred to as the "FtTJ") who dismissed the appellant's appeal against the decision of the respondent made on 22 January 2021 refusing his protection and human rights appeal.

2. Permission was granted on 7 January 2022 by Upper Tribunal Judge Grubb.

Background:

3. The appellant is a national of Iraq who entered the UK on 5 March 2019. He made a claim for asylum which was refused in a decision taken on 22 January 2021.

4. The factual background to his claim is set out in the decision letter and summarised in the decision of the FtTJ as follows.

5. The appellant is a Kurdish national of Iraq from the IKR. The appellant's father had been a wealthy currency trader with business premises in x in the IKR but had begun to lose money and was declared bankrupt in 2014. He now found himself owing a considerable amount of money to people who were connected to the PUK who had invested in the fund.

6. The appellant's maternal uncle blamed the death of the appellant's mother on his late father because he had been unable to continue to pay the medical bills. He therefore disowned the appellant side of the family.

7. Complaints made by his late father's creditors to the police led to his arrest and detention for several weeks in both 2016 and 2017. Furthermore, a high-ranking PUK member F, made death threats against him. On an occasion in early 2018, one of his late father's creditors fought his way into the family home and pushed him. His father died of a stroke following this altercation with one of his enemies.

8. Following the death of his father, the creditors began threatening to kill the appellant and/or to kidnap a sister and forced her to marry against his will. On one occasion a creditor called M assaulted the appellant by beating him to the head with a pistol. The appellant reported these threats to the police, who said that they would look into the matter and told them to be "patient".

9. About 8 or 9 months after M attacked him, the appellant went to Erbil for 3 months where M again threatened him by telephone. The appellant returned to his home area in or about November 2018 and was assisted to leave Iraq on 26 January 2019.

10. The respondent accepted that the appellant was a citizen of Iraq was of Kurdish ethnicity but rejected his claims for the reasons set out in the decision letter dated 22 January 2021. In essence, whilst the appellant's account of his father working as a currency trader was generally plausible, the respondent did not consider that he was internally consistent with the account given as to the appellant's father's trading. The appellant and

provided documentation to evidence is father's financial transactions already provided any threatening letters that his father may have received. Other matters of credibility were set out in the decision letter. In the alternative, if the appellant's account was credible, the respondent considered that he could internally relocate within the IKR and receive replacement identity documents upon arrival.

11. The appeal came before the FtTJ. In a written decision promulgated on 16 August 2021 the FtTJ dismissed his appeal. The FtTJ set out his findings of fact between paragraphs [26]-[31] having considered the matters raised by the respondent when rejecting his account. The FtTJ concluded at paragraph 31 that "having considered the evidence in detail, I have stood back and considered it in the round by weighing those aspects that tell both for and against the appellant's credibility as a witness of truth. I therefore concluded that there is at least a reasonable degree of likelihood that he is given a truthful account of the primary facts. I have therefore assessed the risk of return on this basis." The FtTJ had earlier in his decision set out a summary of the appellant's factual claim between paragraphs 3 – 10 of his decision.

12. The assessment of risk on return was set out at paragraphs [32]-[33]. The FtTJ rejected the respondent's submission that the police authorities in the appellant's home area would provide the appellant with sufficient protection on return and therefore found that the appellant would not have protection in his home area given the level of influence of the PUK in that city and secondly the connections that is late father's creditors had to that party.

13. However the FtTJ found that the appellant had not substantiated the claim that he would be unsafe in the city of Erbil where the KDP were based. The FtTJ found that the appellant had returned to Erbil at the end of 2018 where he remained for a period of 3 months without any problems. The judge further found that he failed to satisfactorily explain why he thereafter returned to his home area before leaving for the UK shortly afterwards. Whilst the appellant said that M had threatened him over the telephone whilst he was residing in Erbil, the appellant did not suggest that M was aware of his exact location or that there had been any face-to-face contact whilst he was living there. The judge further noted that in any event M was now deceased.

14. As regards the issue of documentation and the appellant's lack of a CSID, the FtTJ found that as a former resident of the IKR, he could take a direct flight to his home area in order to obtain a replacement. The appellant could then relocate to Erbil. The FtTJ therefore found that he would not find himself destitute or otherwise living in inhuman or degrading conditions in breach of his rights under Article 3. He further found that he would not face "significant obstacles" to his reintegration in return for the purposes of paragraph 276ADE of the immigration rules and therefore dismissed appeal on all grounds.

15. The appellant sought permission to appeal raising 2 grounds of challenge. The first ground challenged the FtTJ's assessment of safety in the place of relocation, and the 2nd ground challenged the application of the country guidance decision on the issue of documentation and return in the light of the factual findings made.

16. Permission to appeal was initially refused by FtTJ Chohan but on renewal was granted by Upper Tribunal Judge Grubb for the following reasons:

> "The FtTJ dismissed the appellant's appeal against the decision to refuses international protection, humanitarian protection and human rights claims. The judge accepted the appellant's fear is well-founded in his home area in the IKR (Iraq). But he found that the appellant could safely avoid the risk from the Talabani family led PUK by relocating to Erbil where the Barzani family led KDP were in control.
>
> The grounds are arguable. It is arguable that the judge reached an unreasonable finding that the appellant could relocate to Erbil because he could not be located there, given his history that he had previously. Also given he is at risk in his home area (where his local CSA office is located) it is arguably unreasonable to conclude he could safely obtain replacement CSID whether his direct return there or via Baghdad. The latter, of course, would require him to have a CSID in Baghdad in order to travel to the IKR. For these reasons, permission to appeal was granted".

17. At the hearing the appellant was represented by Mr Greer, of Counsel. The respondent was represented by Ms Young, Senior Presenting Officer. At the outset of the hearing, Ms Young informed the tribunal that the parties had reached agreement that the FtTJ had made a material error of law in his decision and that it should be set aside, and the appeal should be allowed on article 3 of the ECHR or in the alternative humanitarian protection. She explained that she did not rely upon the previous rule 24 response that had been filed on behalf of the respondent and that it was now conceded on behalf of the respondent that the FtTJ erred in law when reaching his decision.

18. The basis of the concession made was that the FtTJ had made findings of fact that the appellant would be at risk in his home area. When assessing the issue of return and documentation, the FtTJ found that the appellant could return to his home area and attend at the civil documentation office to obtain the relevant documents and then internally relocate. Ms Young submitted that those findings of facts were contradictory and that in order to relocate to Erbil (another area of the IKR) the appellant would be required to return to the home area where the judge found that he would be at risk.

19. Ms Young referred to the most recent CG decision of SMO & KSP (Civil status documentation; article 15) Iraq CG [2022] UKUT 001100 (IAC) (hereinafter referred to as "SMO(2)") and that the system operating in the appellant's home area now produced INID's as confirmed in Annex D of the respondent's recent CPIN and therefore in light of SMO(2) the appellant

will be required to be present in his home area to obtain the relevant documentation. The respondent accepted that he would not be able to obtain the documents from the UK.

20. Therefore she submitted that the appeal would succeed on article 3 or humanitarian protection grounds.

21. Whilst Ms Young had referred to the parties being in agreement as to the outcome and final disposal of the appeal, in the submissions made by Mr Greer it became clear that the parties were not in agreement with the disposal and that whilst it was common ground between the parties that the appellant had a well-founded fear of serious harm in his home area and that it was unreasonable and unduly harsh to expect him to relocate to Erbil, the appellant was entitled to succeed on asylum grounds because the fear arose out of a Convention reason. Mr Greer submitted that the issue had been raised in the respondent's decision letter where it was stated that there was no Convention reason however as a result of the factual findings made, FtTJ Kelly did not need to resolve that issue. He therefore submitted that in light of the decision of Secretary of State for the Home Department v K(FC), Fornah [2006] UKHL, the appellant fell within the Convention reason of a Particular Social Group (hereinafter referred to as "PSG") due to his membership of the family.

22. As this appeared to be a new issue raised, Mr Greer was directed to put his submission on disposal in writing and provide that to Ms Young so that she could consider it. The matter was stood down for that to take place. Having done so, Ms Young did not seek an adjournment but was content to proceed on the basis of submissions regarding the disposal of the appeal.

23. Mr Greer provided a short summary of his position in a document dated 26 August 2022 "submissions on disposal" alongside a copy of K v Fornah [2006] UKHL 46 relying on paragraphs 11 – 16 and paragraphs 19 – 24.

24. The summary document provided by Mr Greer sets out that in light of the FtTJ's findings on the point, it is common ground between the parties of the appellant is at risk from his father's erstwhile business associates in his home area. The appellant is wanted on account of his relationship with his late father. Therefore the appellant forms part of a particular social group, namely his father's family. This is the case whether or not the appellant's persecutors targeted the appellant's father motivated by a Convention reason.

25. In his oral submissions, Mr Greer submitted that the appellant's skeleton argument for the hearing dated 4/5/21 raised the issue of a Convention ground applying in the appellant's appeal however it was on the basis of a blood feud. It was not developed in the submissions and the appellant's case did not rely upon a blood feud for the purposes of this hearing. It is put in a different way based on the House of Lords decision in K v Fornah and that the appeal was not dealing with the "but for test" but one of the operative motivations of the persecutors on the facts of this appeal was a

Convention ground. He referred to paragraph 17 of that decision were it was stated and that "A person is entitled to claim recognition as a refugee only where the persecutory treatment of which the claimant has a well-founded fear is causally linked to the Convention ground on which the claimant relies. The ground on which the claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that the ground relied on is an effective reason. The persecutory treatment need not be motivated by enmity, malignity or animus on the part of the prosecutor, whose professed or apparent motives may or may not be the real reason for the persecution. What matters is the real reason. In deciding whether the causal link is established, a simple "but for" test of causation is inappropriate: the convention calls for a more sophisticated approach, appropriate to the context and taking account of all the facts and circumstances relevant to the particular case."

26. He submitted that when applied to the particular facts the appellant fears the people to whom his father owed money and caused his death and feared that they would come after him. In reality the persecutors are pursuing him because he is his father's son. This was accepted by the FtTJ in his decision at paragraph 26 – 31. At paragraph 28 the FtTJ accepted that the appellant had been threatened and beaten by his father's creditors. On the facts as accepted, the associates of F and M in the PUK were seeking to recover the money lost and the only reason that they were coming after the appellant was solely because he was his father's son that was the motivation for the pursuit. That was recognised at paragraph 20 – 21 of the decision in K v Fornah. The motivation of the persecution was because the appellant was the member of the father's family and fell within the principle of a PSG.

27. Mr Greer confirmed that he did not rely upon the factual circumstances as demonstrating a blood feud as there was no tribal links but that the PSG was that of the family.

28. Ms Young was asked to clarify the position of the respondent. She relied upon the earlier submissions made that the FtTJ made a material error of law in his decision. Having reached a finding that the appellant would be at risk is home area but could relocate to Erbil, the FtTJ was in error as it was not reasonable to expect the appellant to travel to his home area to obtain the documentation which would then allow him to relocate to Erbil. Therefore the concession was made in line with SMO (2) and that he could not obtain the relevant documentation to relocate.

29. She submitted that it was not conceded that the appellant would be at risk of harm in Erbil but that it was based on the issue of documentation. In this respect ground one was not made out, as the reason why he cannot relocate is the lack of documents and therefore the appeal should be allowed under article 3 or an alternative humanitarian protection set out in SMO & KSP (Civil status documentation; article 15) Iraq CG [2022] UKUT 001100 (IAC) (hereinafter referred to as "SMO(2)").

30. In terms of the Convention reason, she submitted that in light of the refusal letter between paragraphs 22 and 27 the appellant's claim did not fall within a Convention reason. The appellant's account is that he was threatened by civilians and high-ranking members of the PUK due to his father owing him money. The decision letter highlights that it is for the appellant to show that he falls within a PSG within Iraq and that he has not shown on the facts of the case that he would be at risk based on his membership of a PSG and there has been no reference made on the background evidence to a PSG of this type existing in Iraq.

31. By way of reply, Mr Greer submitted that the appellant had demonstrated a risk persecution/serious harm in his home area and that it would not be reasonable for the appellant to relocate to another area. He submitted that it was common ground between the parties that the appellant could not relocate and as a matter of fact he could not return to the place where he had a well-founded fear of persecution/serious harm.

32. He submitted the point made by Ms Young is that internal relocation is not viable because of the issue of documents and therefore he should only succeed on Article 3 /humanitarian protection grounds, but this is a distinction which does not exist in law. By reference to SMO (1) and the lack of documentation, and appellant would be successful on humanitarian protection/Article 3 grounds. The position on the availability of documents is a factual concession made by the respondent during the course of this appeal and that respondent submits that this should lead to a grant of humanitarian protection. If that is correct, the appellant seeks to demonstrate that the reason for being at risk in his home area is a result of a Convention reason, namely being a member of a PSG.

33. The FtTJ accepted that the appellant had given a truthful account, and that factual account was summarised between paragraphs 3 and 10 of the FtTJ's decision. Therefore relying on the decision in K v Fornah, and the casual nexus, the appellant fears the creditors who are a class of people. The appellant does not need to show that they are a cohesive group but there is a risk of them harming the appellant. The FtTJ did not make a finding who from the class of people would harm the appellant, but it was sufficient to show that he would be at risk from one or more of them namely his father's creditors and F and his associates which included M although now deceased. He submitted that the trigger which made him a victim of serious harm was the link to his father and that is the operative factual matter.

34. In respect ground one, he submitted that that was still made out and that the appellant had moved to Erbil and was discovered there. He submitted that it was perverse for the judge to say that he could not be found in 3 months when reaching a finding that he had been threatened.

35. Paragraph 8 of the grounds referred to the durable solution and must look to this when deciding internal relocation. The appellant had been living in Erbil but not in a formal sense but was in hiding and this was not a durable

situation. The appellant would not be able to live a "relatively normal life" and they had been able to find out his new mobile telephone number. If he worked and lived in Erbil, he would have to undergo through security screening and the local authority apparatus. Checks would take place with the Mukhtar as his previous registration and would tie him to the PUK and this would tip them off in a bill through that process.

36. As to evidence in support of this submission, he refers to paragraph 9 of the witness statement filed by the appellant that F was a high ranking and dangerous man. Also at paragraph 15 he was described as a high-ranking officer in the army and that paragraph 18 referred to his enemies as being able to locate him.

37. Mr Greer submitted that in any event the issue of internal relocation is the reasonableness of relocation therefore ground one is immaterial to that issue as it is agreed that he cannot relocate because he does not have the documentation necessary to do so. Ground one does not need to be determined and it is immaterial to the agreed outcome.

Discussion:

38. It is common ground between the parties that the FtTJ materially erred in law in his decision based on ground 2 is set out in the grounds for permission to appeal. As set out, the FtTJ accepted the appellant's factual claim concerning the events that had occurred in the home area and as summarised between paragraphs 3 – 10 of his decision. That is plain from the FtTJ's summary at paragraph 31. The FtTJ therefore found that the appellant would be at risk in his home area. He further found that there would be an insufficiency of protection (set out at paragraph 32). However the FtTJ concluded that he could relocate to another area in the IKR, namely Erbil (see paragraph 32).

39. As to the issue of documentation, it appears to have been accepted by the FtTJ that the appellant did not have his documentation and in particular his CSID (see paragraph 33).

40. The FtTJ set out at paragraph 33 that the appellant, as a former resident of the IKR could return to his home area to obtain the necessary replacement documentation. The FtTJ concluded that he did not think that the appellant's father's creditors would have access to the passenger manifest to enable them to be aware of his presence nor would they be aware of his presence in the short term when obtaining replacement documents before then relocating to Erbil. The judge found that he would not find himself destitute or otherwise living in conditions in breach of Article 3 of the ECHR.

41. Ms Young on behalf of the respondent concedes that the FtTJ's assessment that the appellant could return to his home area, an area where he was at risk of harm and there was an insufficiency of protection against that harm, to obtain documentation and then to relocate was materially flawed

in law. Ms Young also relied on the CG decision of SMO(2) and the respondent's recent CPIN which demonstrates that that the appellant's home area has moved to the INID system and therefore he would be required to attend in person to obtain any replacement documentation including his CSID. In summary, Ms Young accepts that this is an unreasonable finding and that the tribunal should set aside the decision and substitute a decision to allow the appeal on humanitarian protection grounds/article 3 grounds.

42. Thus there is no dispute between the parties on this issue that the decision of the FtTJ to dismiss the appeal on the basis that it would be unduly harsh the appellant to relocate should be set aside and to substitute a decision allowing the appeal.

43. The parties are correct in their agreed position that the FtTJ materially erred in law. In the light of the factual assessment made by the FtTJ and the acceptance of the core part of the appellant's claim and the assessment made that he would be at risk of serious harm in his home area, a risk from which he found the appellant could not be protected, that it would be unreasonable or unduly harsh to expect the appellant to return to his home area to obtain the necessary documentation, including his CSID. As the decision letter set out by reference to the country materials, when driving from the appellant's home area to Erbil, the 1st checkpoint would be manned by the PUK and then there would be a further checkpoint manned by the KDP (see paragraph 79 of the decision letter). Therefore in order to internally relocate, the appellant would have to re-enter the home area having gone through the checkpoint which is controlled by members of the party allied to those he fears. He would then be required to obtain documentation by attending at his local office in person, and by then leaving the place of persecution or serious harm to relocate.

44. The decision in SMO (2) further supports the error of law as a material one. In terms of documentation, it is common ground that the appellant does not have any documentation with him in the United Kingdom.

45. As reflected at paragraph 317 of SMO (1) and also in SMO(2) headnote C 11 (the amended section C), the respondent's position is that person returning to Iraq without either family connections able to assist him, or the means to obtain a CSID may be at risk of enduring conditions contrary to Article 3 of the ECHR.

46. The issue surrounding the documents required to return to Iraq and to survive in that country have played a prominent part in the country guidance cases thus far decided. Those documents are referred to as the Civil Status Identity Card ("CSID"), the Iraqi Nationality Certificate (INC) and the public distribution system ("PDS") card/ food ration card and the new digital identification document known as Iraqi National Identity Document ("INID)." Reference is also made to the 1957 Registration Document (see paragraphs 115 -137 of SMO(2)).

47. The importance of the CSID was set out in the previous CG decisions as it is required to access financial assistance, employment, education and housing etc. it was described as an “essential document for life in Iraq” (at [39] AA (Iraq) [2017]).

48. It is therefore necessary to consider the CG of SMO (2). At paragraph 60 the Upper Tribunal considered that CSID’s continued to be available at the Iraqi embassy but only for individuals who are registered at a CSA office which has not been transferred to the digital INID system. However if the individual is registered at a place where the INID has been rolled out, they would not be able to apply for a CSID in Iraq or in the UK. If the INID has not been rolled out in the place of registration, an appellant could apply for a CSID in Iraq, in person or by proxy, or from the UK using the intermediary facility provided by the embassy (see paragraph 61).

49. Ms Young relies on the recent CPIN refers to the IKR as having rolled out the INID and therefore the appellant will be required to re-enter the place where he be at risk of serious harm, to be documented in order for him to relocate. It is therefore demonstrated that it would be unduly harsh or unreasonable for the appellant in those circumstances to internally relocate.

50. The parties however disagree on 2 issues. Firstly, Ms Young does not accept the ground one is made out which relates to risk of harm in Erbil. Secondly, it is not agreed what decision the tribunal should substitute for the FtTJ’s decision, that is, whether the appellant is entitled to refugee status on the basis that he is at risk of serious harm/persecution for a Convention reason, namely membership of a PSG, or whether applying SMO (2) the appellant should be granted humanitarian protection or leave on article 3 grounds.

51. Applications for asylum and humanitarian protection are addressed in part 11 of the Immigration Rules. Rule 339O, which is included in part 11, deals with the possibility of "Internal relocation". It states:

> "(i) The Secretary of State will not make:
>
> (a) a grant of refugee status if in part of the country of origin a person would not have a well-founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country; or
>
> (b) a grant of humanitarian protection if in part of the country of return a person would not face a real risk of suffering serious harm, and the person can reasonably be expected to stay in that part of the country.
>
> (ii) In examining whether a part of the country of origin or country of return meets the requirements in (i) the Secretary of State, when making a decision on whether to grant asylum or humanitarian

> protection, will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person.
>
> (iii) (i) applies notwithstanding technical obstacles to return to the country of origin or country of return."

52. The House of Lords gave guidance as to the test to be applied in *Januzi v Home Secretary* [2006] UKHL 5, [2006] 2 AC 426. Lord Bingham, with whom the other members of the House agreed, said at paragraph 21:

> "The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so."

53. The House of Lords returned to the subject of internal relocation in *AH (Sudan) v Home Secretary* [2007] UKHL 49, [2008] 1 AC 678. It stressed that the test quoted in the previous paragraph provided the correct approach to the problem of internal relocation, and Lord Bingham observed in paragraph 5:

> "The humanitarian object of the Refugee Convention is to secure a reasonable measure of protection for those with a well-founded fear of persecution in their home country or some part of it; it is not to procure a general levelling-up of living standards around the world, desirable though of course that is."

For her part, Baroness Hale explained at paragraph 21:

> "By definition, if the claimant had a well-founded fear of persecution, not only in the place from which he has fled, but also in the place to which he might be returned, there can be no question of internal relocation. The question presupposes that there is some place within his country of origin to which he could be returned without fear of persecution. It asks whether, in all the circumstances, it would be unduly harsh to expect him/her to go there. If it is reasonable to expect him to go there, then he can no longer claim to be outside his country of origin because of his/her well-founded fear of persecution."

54. When it is submitted under paragraph 339O of the Immigration Rules that there is a part of the country of origin in which there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the appellant can reasonably be expected to stay in that part of the country, the Senior President of Tribunals stated at paragraph 33 of SC (Jamaica) [2017] EWCA Civ 2112 that the issue of reasonableness of internal relocation involves 3 separate questions. Firstly, what is the location to which it is proposed a person could move? Secondly, are there real risk of serious harm or persecution in this place? Thirdly, if not, is it reasonable or not unduly harsh to expect the person to relocate to this place? At

paragraph 36 of SC (Jamaica), it was stated that the evaluative exercise is intended to be holistic and that no burden or standard of proof arises in relation to the overall issue of whether it is reasonable to internally relocate.

55. Dealing with the first issue, where internal relocation is raised in the Iraqi context, it is necessary to consider not only the safety and reasonableness of relocation but also the feasibility of this course.

56. Applying the test to the factual circumstances of the appellant, even if the appellant would be safe in the prospective place of relocation, it would be unreasonable and would be unduly harsh to expect him to relocate to the area without a CSID. To obtain his CSID, he would have to do re-enter his home area where he is at risk of harm. It would be unreasonable and unduly harsh for the appellant to relocate in the circumstances where he does not have the documents which would enable him to live and resettle by having access to a livelihood within the place of relocation given the importance of the CSID (as set out above).

57. As reflected at paragraph 317 of SMO (1) and also in SMO(2) headnote C 11 (the amended section C), the respondent's position is that person returning to Iraq without either family connections able to assist him, or the means to obtain a CSID may be at risk of enduring conditions contrary to Article 3 of the ECHR.

58. I therefore accept the submission made by Mr Greer that whether ground one is made out or not is immaterial to the overall assessment and outcome as agreed between the parties that it would be unduly harsh or unreasonable to expect him to relocate.

59. The 2nd issue is whether the appellant's claim falls within a Convention reason namely membership of a PSG.

60. Membership of a particular social group" is one of the five grounds enumerated in Article 1A(2) of the 1951 Convention. The UNHCR 'Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention' note that the 'PSG' ground is the ground with the least clarity and is not defined by the 1951 Convention itself.

61. In SSHD v K and Fornah v SSHD 2006 UKHL 46, it was common ground that the applicants had a well-founded fear of persecution if returned to their home country (Iran and Sudan). The issue was whether the well-founded fear of being persecuted was for reasons of membership of a particular group. In paragraph [12] of his judgment, Lord Bingham referred to the leading domestic authority: the decision of the House of Lords in R v Immigration Appeal Tribunal, ex p Shah; Islam v SSHD [1999] 2 AC 629. There, the House of Lords held that women in Pakistan constitute a particular social group. At paragraphs [13] and [14] Lord Bingham said:

"13. Certain important points of principle relevant to these appeals are to be derived from the opinions of the House. First, the Convention is concerned not with all cases of persecution but with persecution which is based on discrimination, the making of distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being: pp 651, 656. Secondly, to identify a social group one must first identify the society of which it forms part; a particular social group may be recognisable as such in one country but not in another: pp 652, 657. Thirdly, a social group need not be cohesive to be recognised as such: pp 643, 651, 657. Fourthly, applying *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 263, there can only be a particular social group if it exists independently of the persecution to which it is subject: pp 639-640, 656-657, 658.

14. In *Shah and Islam*, the House cited and relied strongly on *In re Acosta* (1985) 19 I&N 211, a relatively early American decision given by the Board of Immigration Appeals. Construing "membership of a particular social group" ejusdem generis with the other grounds of persecution recognised by the Convention, the Board held the expression to refer to a group of persons all of whom share a common characteristic, which may be one the members cannot change or may be one that they should not be required to change because it is fundamental to their individual identities or consciences. The Supreme Court of Canada relied on and elaborated this approach in *Attorney-General of Canada v Ward* [1993] 2 SCR 689, 738-739, and La Forest J reverted to it in his dissent in *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593, 642-644. The trend of authority in New Zealand has been generally in accord with *Acosta* and *Ward*: T A Aleinikoff, "Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group'" *UNHCR's Global Consultations on International Protection,* ed Feller, TÃ¼rk and Nicholson, (2003), pp 263, 280. The leading Canadian authorities were considered by the High Court of Australia in *Applicant A*, above, where the court was divided as to the outcome, but the judgments yield valuable insights. Brennan CJ, at p 234, observed:

> "By the ordinary meaning of the words used, a 'particular group' is a group identifiable by any characteristic common to the members of the group and a 'social group' is a group the members of which possess some characteristic which distinguishes them from society at large. The characteristic may consist in any attribute, including attributes of non-criminal conduct or family life, which distinguish the member of the group from society at large. The persons possessing any such characteristic form a particular social group".

Dawson J (p 241) saw no reason to confine a particular social group to small groups or to large ones; a family or a group of many millions might each be a particular social group. Gummow J (p 285) did not regard numerous individuals with similar characteristics or aspirations as comprising a particular social group of which they were members: there must be a common unifying element binding the members together before there would be a social group of this kind."

Lord Bingham also noted the UNHCR's view that, whilst a social group could not be defined by the persecution, persecutory action towards a

group might be a relevant factor in determining the visibility of the group in a particular society.

62. The decision letter addresses the issue of Convention ground between paragraphs 22 – 28. The basis of the respondent's case is that the appellant was threatened by civilians and that the appellant had not shown that he belonged to a group which had an innate or immutable characteristic.

63. The difficulty with that argument is that the appellant has provided evidence that he shares an immutable characteristic which is that he is a member of his father's family. Membership of a particular family is capable of falling within a PSG. On the facts of the appeal, the agents of persecution or nonstate agents however they are not "civilians" in the way the respondent submits, but they are allied or have connections to the state. In other words the FtTJ found that the appellant would be reasonably likely to be caused serious harm or persecution by those who had links to the state based on the profile of F who was a high commander in the PUK and against whom there would be an insufficiency of protection.

64. Therefore on the facts of the appeal, the threat of serious harm/persecution arises as a result of the appellant's membership of his family and as a direct result of the relationship to his father who was the source of the difficulties faced by the appellant and other members of the family. Here, the target of serious harm was the family group, and those family members were persecuted/suffered or at risk of serious harm were subjected to treatment on account of their membership of the family. As Mr Greer submits, the essential element is the identification of the target of the persecution or serious harm. In the case of the appellant the family are the target, and the relevant acts were against the appellant's father, the appellant and also his sister. Thus the fear of persecution or serious harm was because of the membership of the family group.

65. For those reasons, the appellant has demonstrated that he would be at risk of persecution or serious harm on account of the Convention ground namely his membership of a PSG. The parties agree that on the facts of this appeal it would be unreasonable and unduly harsh for the appellant to relocate. It therefore follows that the appellant's appeal should be allowed.

66. The decision of the FtTJ to dismiss the appeal is set aside and a decision is substituted allowing the appeal on asylum grounds. If I were in error in finding that he fell within the definition of a PSG, his appeal would still succeed on humanitarian protection grounds and Article 3 of the ECHR for the reasons agreed by the parties.

Decision

67. The decision of the First-tier Tribunal involved the making of an error on a point of law; the decision is set aside. The appeal is remade as follows: the appeal is allowed on asylum grounds and article 3 of the ECHR.

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Upper Tribunal Judge Reeds
Dated : 3/10/ 2022