Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/03262/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th January 2021	**On 09th March 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON
UPPER TRIBUNAL JUDGE RINTOUL

Between

MR HGV
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Fripp, Counsel instructed by Turpin & Miller LLP
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of 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 or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of

court proceedings. This direction applies because of the sensitive nature of the claim.

1. The appellant is a citizen of Cuba born on 27th June 1965 and he appeals against the decision of the Secretary of State dated 14th March 2019 refusing his asylum, humanitarian protection and human rights claim under the European Convention on Human Rights ("ECHR"). He entered the United Kingdom on 5th May 2007 and claimed asylum which was refused, and his appeal was dismissed on 25th September 2007. On 10th October 2017, HGV submitted further representations asserting that he no longer had the right to enter Cuba and as a result was stateless and a refugee. The respondent considered the further submissions but refused his claims with an in country right of appeal. The appellant appealed under Section 82(1)(a) and (b) of the Nationality, Immigration and Asylum Act 2002.

2. His appeal came before First-tier Tribunal Judge N M K Lawrence who dismissed his appeal on 1st July 2019 (without making an anonymity direction). The decision of the First-tier Tribunal was set aside by Deputy Upper Tribunal Judge O'Ryan on 6th January 2020 on the basis that the judge had materially erred in law by proceeding under a mistake of fact as to the appellant's oral evidence, specifically whether his relatives in Cuba would afford him any support on return to Cuba, and which was relevant to the issue of what avenues may or may not be available to the appellant to seek repatriation to Cuba by obtaining sponsorship. Deputy Upper Tribunal Judge O'Ryan also found that the respondent had taken no issue at any stage as to the reliability of any of the documentation that were provided by the appellant and said to emanate from the Cuban Embassy and, therefore, the judge proceeded unfairly by treating a number of those documents with significant caution, and thereby placing limited weight on them for reasons which were not raised with the appellant in the hearing and which were only raised by the judge in his written decision. The decision was set aside in its entirety and no findings of fact were preserved.

3. The appeal came before us at a resumed 'face to face hearing'. The appellant appeared in person to adopt his written statement but was not called to give live evidence. The appellant's representative confirmed that he did not require an interpreter.

4. The appellant has twice previously had his international protection and ECHR claim considered, first by Immigration Judge Chohan on 24th September 2007 who dismissed the claim on all grounds, and secondly by First-tier Tribunal Judge Telford on 14th October 2013 who also dismissed the claims.

5. Before First-tier Tribunal Judge Chohan the appellant explained that he was a professional engineer and had a degree in gas engineering and that his problems began in Cuba when he spoke out against the authorities at his place of work; as a result, he was perceived as being anti-government. He stated,

however, that he was never detained nor ill-treated whilst in Cuba but would meet with private groups to speak out against the regime in Cuba. He did not wish to be a member of the Communist Party but was forced to attend meetings, otherwise he would face punishment. He claimed that his name was on a list as an opponent of the regime and that he was denied an opportunity to advance his career. He also wove a complicated web of travel suggesting that he had travelled to Russia, then Europe and on to Mexico, only being returned to the United Kingdom where he had transited. In evidence he stated that in fact he had never been detained in Cuba but that if he were returned to Cuba, he would be considered a deserter as he had rejected the Communist regime and would face imprisonment for a period of four to five years including torture. He gave evidence that all along he had been intending to go to America and the only way he could get a visa was to go to Russia. Judge Chohan made the following findings [with our underlining]:

> *"It is quite clear from the reasons for refusal letter that the Appellant's credibility as a whole is not challenged. However, it is the Respondent's position that the Appellant faces no real risk of persecution upon return to Cuba. It is the Appellant's claim that he has a degree in gas engineering and was employed by a company in Cuba. The Appellant claims that he spoke out against the Communist regime in Cuba and was involved in holding private meetings with groups of four to five people. It is further the Appellant's claim that he did not wish to attend Communist Party meetings but he was placed under pressure from the authorities and in particular a committee called the CDR to attend meetings. <u>As a result, the Appellant claims that he was considered to be anti-government.</u> <u>I have no reason to disbelieve the Appellant's account but there is nothing to suggest that he has ever been persecuted or ill-treated or will be if returned to Cuba.</u> There is no doubt that the Appellant is disillusioned with the political system in Cuba and it is apparent from his account that he does feel that he is not valued as a professional individual. The Appellant has never been arrested or detained by the authorities. I do find that if the Cuban authorities had any <u>serious</u> adverse interest in the Appellant then no doubt he would have been arrested and detained at some point. Indeed, the Appellant was able to obtain a visa to travel to Russia although it is the Appellant's argument that he was allowed to do so because Russia is a Communist country. Nevertheless, the Appellant travelled on his own passport without any difficulties from the Cuban authorities. I do find that if they had any adverse interest in him then they would not have allowed him to leave the country".*

6. The judge noted that in practice the Cuban government's human rights record remained poor and the government did not allow criticism of the 'Revolution' or its leaders. The judge recorded that the country report on Cuba at that time stated that "disseminating 'enemy propaganda', which included expressing opinions at odds with those of the government, was punishable by up to fourteen years' imprisonment". That said, the judge found again at paragraph 17 of his determination:

> *"There is nothing in the Appellant's account to suggest that he was ever persecuted or ill-treated. Indeed, by his own account he was never arrested or detained by the authorities. The Appellant may well have faced some pressure from the authorities to attend Communist Party meetings but other than that he experienced no difficulties".*

7. In essence, the judge at paragraph 18 found:

> *"In short, the Appellant travelled through several countries and remained in one for over a year but did not claim asylum. Those are not the actions of a genuine asylum seeker. There is no doubt in my mind that the Appellant is simply seeking a better way of life. ... [it] does not amount to persecution or ill treatment".*

8. The judge found he may be questioned regarding his departure but there was no evidence that he would be persecuted or ill-treated by the authorities.

9. On 14th October 2013 First-tier Tribunal Judge Telford again rejected the appellant's asylum, humanitarian protection and human rights appeal and found no risk to the appellant owing to his actual or imputed political activity in or outside Cuba. Judge Telford noted that the country guidance case law **OM (Cuba returning dissident) Cuba [2004] UKAIT 00120**, had been amended since Judge Chohan's decision (**OM** had not in fact been mentioned)**,** but that the relevant country guidance was, by 2013, to be found in **Fernandez (Dissidents and defectors) Cuba CG [2011] UKUT 00343 (IAC)**. The judge recorded at paragraph 5 that:

> *"Counsel for the appellant helpfully stated that it was the appellant's case that the factual findings were accepted as per the determination and it was submitted by both parties that essentially there was no dispute over the facts as found in that determination".*

10. Nonetheless, the judge detailed that although the previous determination was a starting point "*it was not set in stone that it would be the same end point or that if it were, the same route would be travelled in getting there*". In particular, the judge detailed that the appellant's claim was that now he had been absent from Cuba for six years and this period was in excess of the two years permitted under the Cuban regime for their citizens. The appellant asserted he had heard from his relatives who had been visited by the police or security in Cuba and his brother was now jailed. The appellant had letters from the Cuban Embassy in the UK to confirm loss of his status in Cuba, [7].

11. The judge noted the documentary and other evidence and in particular that an "expert country report by ARC" had been provided, a study dated 19th February 2013 by the Immigration and Refugee Board of Canada, Cuba: Treatment by authorities of failed asylum seekers who have returned to Cuba, including the treatment of family members that remained in Cuba.

12. The judge's finding included the following at paragraph 19:

> *"I found the appellant's core account of being a person who was unable to return to Cuba permanently and as a citizen with such rights of residence credible simply as he has no documentation and had left Cuba for more than the 24 months permitted. However that does not mean he could not apply to return".*

A letter produced from the Cuban Embassy showed that the appellant had been considered by the "Cuban authorities now to be a permanent resident of the UK". He had left Cuba on 26th April 2007 with a permit from the Cuban government to travel to the UK but to return before 26th April 2008. *"He was therefore only entitled to travel to Cuba as a temporary visitor for up to 90 days (provided he had a valid Cuban passport with an entry permit (habitation) and a visa for two years or more from the UK where he resides)".*

13. The judge proceeded as follows:

> *"However, I do not find him credible in his core account of leaving his country for Russia as an asylum seeker in fear of persecution due to anti-regime political activity and having travelled around other European countries before arriving in the UK illegally. This is because that is completely at odds with what the letter from the embassy clearly states that when he left Cuba on 26th April 2007, he did so to travel direct to the UK for personal reasons on a Cuban visa or permit".*

It was observed that evidence was inconsistent with the evidence before Judge Chohan and the judge found that the appellant would not have had a permit to travel abroad to anywhere at that time without being a person whom the Cuban authorities at that time could trust and thus was not in fear in persecution.

14. Further, the judge found that there was no evidence, other than the appellant's word, that his brother was in prison or his family had been visited and he would not have expected the appellant to have contacted the family by telephone either directly at their home in Cuba or direct to the Cuban Embassy here in London. The judge proceeded to find as follows at paragraph 22:

> *"This case to me turns on the way he puts his case in regard to what is stated in **Fernandez** at paragraph 57. The appellant would of course return to a land where basic civil and political rights as we in the UK legally deem them are denied their citizens and where human rights are generally not respected by the state when it comes to dissidents. Those who may be deemed dissidents are anyone who are regarded by the state of Cuba as engaging in activities contrary to its political agenda and engage in unauthorised opposition to the state political agenda. However, we already know and Mr Chohan has found, that the appellant is not to be regarded as a dissident – either in terms of the guidance under **OM** or **Fernandez** today as I find. He is not a person whom the state in Cuba has found unable to trust from his life in Cuba as they would not have issued him with a direct visa to the UK on 26th April 2007".*

15. At paragraph 24 the judge found:

> *"I am not satisfied even on the low standard that a person who simply does not return is to be regarded necessarily or in this case as openly disloyal. It was submitted quite skilfully with the limited material available that his conduct has put in the category or persons who would be or could be seen as disloyal. That conduct is one of a person skilled and highly educated as not registered. I do not find that the regime necessarily knows he wished to ultimately arrive in the USA. There is no evidence they know of this at all. I do not find that a person who is educated has necessarily a higher chance of being considered a dissident simply because they are higher educated".*

16. With respect to the ARC Report the judge found it lacked any finalised conclusion on the questions asked, and the judge had no way of knowing if all the possible evidence with regard to the questions asked was considered or addressed or simply provided information as "pointers" and thus the ARC Report was viewed as not entirely a reasoned argument on all the evidence.

17. Although the report was said to be of somewhat limited use, the judge stated at paragraph 29:

> *"Question 5 appeared to be answered in an inconclusive manner. Whilst it dealt with persons who had been abroad only up to 24 months, that was not the case for the appellant. What that did point out and which the appellant relied on pari passu was that if a person has not only applied for asylum and been refused it but that they are known by the authorities to have done so they may sometimes be unable to access full services and may be 'blacklisted' and face difficulties for employment ... Certainly there was no evidence before me that he was known by the authorities in Cuba as a failed asylum seeker. I find that he is not likely to inform them as such".*

18. The judge went on to find that the appellant had expressed consistent and credible worry but that his concerns were misplaced and that he had not been "entirely credible in terms of when he left, what permission he had and what destination he had". The judge found he had "overcooked" his case in terms of being only able to leave for Russia, and the embassy evidence now undermined that account, such that he was not found to be seen by the authorities from his behaviour, over the years many years in Cuba, as a dissident or troublemaker or as a person who disagreed with the authorities and "*even his criminal record would have been known by the authorities and yet they gave him a visa to leave for one month in 2007 direct to the UK. They would not have done this if his account of being a political opponent were true*".

Documentation before the Upper Tribunal

19. For the resumed hearing before the Upper Tribunal, the appellant produced a bundle of evidence, A1 to A4, B1 to B4 and C1 to C98. A supplementary bundle was produced, pages 1 to 186. We considered all the material submitted.

20. The respondent produced a two page skeleton argument dated 11th February 2020 and Mr Fripp produced an amended skeleton argument dated December 2020, for reconsideration.

21. At the hearing the appellant adopted his statement of 8th March 2020 and was content as was his representative Mr Fripp that his evidence was sufficient to understand the proceedings without an interpreter.

Submissions

22. Mr Fripp told us that the appellant in 2014 filed an application for leave to remain as a stateless person, the core of his application being that the treatment he received was indicative of him, in reality, being stateless in the sense required by the Immigration Rules, HC 395 but that application was refused on 14th December 2015 because the respondent viewed the appellant as remaining a Cuban citizen, albeit he faced obstacles to return. The respondent argued that the appellant could seek a "special permit" if there was any chance, he might regain residency in Cuba and he was a Cuban national and therefore not stateless. At the hearing before us Mr Fripp confirmed that it was not being argued that the appellant was stateless but that the treatment by the Cuban authorities in relation to the obstacles to his return amounted to serious harm because of the deprivation of his rights. The claimant would be seen as disloyal. This in turn founded the protection claim. In support of his claim expert evidence was put forward as well as evidence from the Cuban Embassy which had repeatedly confirmed that the appellant was a citizen of Cuba but there were obstacles to his return. 'Emigrado' status had been inflicted upon him entailing a loss of residency, loss of property and loss of right to enter or to remain.

23. One of the primary tenets of international law was that the state must admit its nationals when they are excluded or expelled by another state. Article 13(2) of the Universal Declaration of Human Rights provided that 'Everyone has the right to leave any country, including his own, and to return' and the International Covenant on Civil and Political Rights 1966 ("ICCPR"), as approved by UNHCR, prohibits arbitrary exclusion, although Cuba is not a party to the ICCPR. Mr Fripp in his skeleton argument also referred to the Inter-American Commission on Human Rights which concluded that the position on Cuba towards restrictions on the rights of its nationals' residence and movement represented a 'permanent situation of violation' of those rights. The Inter-American Commission on Human Rights ("IACHR") report of 2018 again confirmed that the restrictions on residence and movement were an impediment to and improper interference with its citizen's rights and the IACHR report of 2020 confirmed that the impossibility of returning to one's own country prevented Cubans from enjoying effective nationality tantamount to persecution. We were also referred to a decision of the Refugee Appeal Division of the immigration and Refugee Board of Canada which declared that Cuban's policy founded an entitlement to refugee status. We did point out to

Mr Fripp that this was a first instance Canadian decision from a court with no jurisdiction in English law.

24. We were referred to relevant sections of the Refugee Convention and the Qualification Directive. Mr Fripp also referred to **Gashi and Nikshiqi v SSHD** [1997] INLR 96 where the court (the Immigration Appeal Tribunal) largely accepted the definition of Professor J Hathaway that 'persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community'. He advanced that the House of Lords had endorsed this approach in **Horvath v SSHD** [2000] UKHL 37, **Sepet v SSHD** [2003] UKHL 15 and **R (Ullah) v Special Adjudicator** [2004] UKHL 26.

25. We were also referred to **EB (Ethiopia) v SSHD** [2007] EWCA Civ 809 which decisively confirmed that arbitrary deprivation of key elements of nationality would, in appropriate circumstances, amount to persecution.

26. **MA (Ethiopia)** [2009] EWCA 289 at paragraph 43 was relevant, as although the appeal here related to deprivation of residency and associated rights, the deprivation of nationality was analogous. The Court of Appeal, in **MA (Ethiopia)**, broadly reiterated **EB (Ethiopia)** and was concerned with the means of gaining entry to the country. In a case where the ability to access the index country was a central part of the factual matrix it should be addressed. The Court of Appeal in **MA (Ethiopia)** identified that the Tribunal, however, erred by eliding consideration of risk on the basis of contemplated presence in Ethiopia with consideration of whether there arose a bar to return precisely because of persecutory deprivation of rights relating to nationality. Where the right to return was part of the persecution itself the Tribunal should engage with that question. Further merely because the appellant wished to remain in the United Kingdom did not render the refusal of access/rights by Cuba devoid of persecutory treatment. Nor did the fact that Cuba acted in conformity with its own state laws prevent its actions from being persecutory. Mr Fripp relied on **Danian v SSHD** [1999] EWCA Civ 3000 and **YB (Eritrea) v SSHD** [2008] EWCA Civ 360 such that 'good faith' in sur place activities was irrelevant to the question of entitlement to protection.

27. The appellant here was prevented from accessing Cuba through means which were persecutory. We were referred to the official Cuban documentation within the bundle and the references to Cuban law. The Communist Party of Cuba was the sole political party permitted to operate in Cuba and the dominant political power. Since the early years of rule, Cuba had required its citizens to apply for and maintain permission to leave or remain outside the country otherwise criminalising presence outside its territory. In addition, Cubans who remained outside Cuba without permission beyond a period of permitted absence, were termed "emigrados" and forfeited authorisation to return. Since the initial documentation from the Cuban Embassy on 27th May 2011 the law had changed. There was a liberalisation in the law in 2013 such

that it was possible to repatriate but because the property of an "emgirado" would have been confiscated by the State, a deed of support is required for residence.

28. The correspondence between the appellant and the Cuban Embassy confirmed that the appellant needed to apply though the Embassy with an affidavit of support. That was a prerequisite. His family had confirmed that they did not wish to do so as demonstrated at C47 and C 48 of the bundle. Correspondence from the Cuban Embassy in relation to the appellant was submitted and the final statement of the Cuban Embassy dated 4th April 2019 from Lidice Vegueria Lopez, the councillor at the embassy in charge of consular affairs, dated 27th May 2011 (could be located at C87 of the bundle which) again repeated that to make an application the appellant must have an affidavit of support and evidence that he had leave to remain in the UK.

29. We were also referred to the Austrian Red Cross Accord Report dated August 2017 "Accord" report at H33.

30. The Cuban authorities now knew that the appellant was a failed asylum seeker in the UK because this information had been passed to the Cuban Embassy when the appellant was seeking information on the formalities of his return. He had been outside Cuba for 13 years and he had a history that would have been recorded. He had not been true to the expectations of the party by 'repaying' his advanced education in working for the state.

31. The appellant was denied the ability to return and exercise his rights as a citizen by reason of the application of unusual laws which were politically motivated to punish dissenting behaviour, that is not co-operating with the Communist party of Cuba. The appellant had no proof of legal residence in the UK and no proof of support and could not get a decision from the authorities in Havana and because of the operation of the legal scheme for re-entry and residence. That was persecutory for a convention reason and Contrary to Article 9(1)(a) and (b) of the Qualification Directive.

32. The experts, Mr Alpizar and Ms Diversent, who provided written reports on behalf of HGV, were both qualified lawyers and the report reiterated the legal provisions of Cuba.

33. Albeit the appellant's appeals had been previously dismissed, the tribunal decisions, showed substantial acceptance of the appellant's history prior to departure from Cuba and both tribunals were entirely concerned with how the appellant might be treated on return and assumed an ability to return. Neither tribunal had detailed specific evidence as to how refusal to participate in Communist Party of Cuba ("CPC") organs or unauthorised remaining outside the country would be seen, as now provided in the reports from Mr Alpizar and Ms Diversent. Those reports supplemented already strong findings in **Fernandez**, which confirmed that the Cuban authorities are intolerant of any

form of unauthorised opposition to its political agenda and the law is used to criminalise dissent and that engaging in activities regarded by the authorities as contrary to its political agenda even without membership in any organised group can give rise to characterisation as a dissident.

34. The effect of withdrawal of the right to return in relation to international law was not raised in 2007 nor 2013 and no previous appeal hearing had been addressed on this or shown the relevant material in relation to deprivation of ability to return and asylum. In this respect, past decisions did not come with the principle of **Devaseelan v SSHD** [2002] UKIAT 00702. The decisions of the respondent, however, retained some relevance on this point.

35. The respondent's decision of 14th December 2015 accepted that the appellant was

> "*potentially not admissible to Cuba however you do still hold Cuban citizenship" and that the appellant "would have to apply for a special permit to return to Cuba be it for temporary visit purpose or to resume residence"*

and that he

> *"would not be allowed to return to Cuba without an endorsement ... by the Cuban diplomatic mission abroad, which in most cases requires approval from the authorities in Cuba*".

The decision of 14th March 2019 presently under appeal erroneously stated that the appellant was previously found to be able to repatriate himself and that being stateless was not a Convention reason and that he would not be at significant harm on return to Cuba.

36. Ultimately the case raised a single issue which is the effect of the appellant's current position vis a vis the Cuban authorities and in particular whether he was today left unable or unwilling to return to Cuba by reason of a well-founded fear of persecution.

37. Applying **EB (Ethiopia)** and **MA (Ethiopia)** it could be shown, first, that the appellant is prevented from return by well-documented Cuban laws which punish those who had overstayed their permission to leave and remain outside Cuba. Secondly, those legal provisions are of longstanding application and remained in effect.

38. Thirdly, there was a consistent history of the Cuban authorities applying those rules to deny right of return and this is attested by the documents from the Cuban authorities themselves.

39. Fourthly, the 'emigrado' provisions breach the strong international legal norms of protection for the right of individuals to re-enter a country.

40. Fifthly, the expert and objective evidence confirmed Cuba's application of these politicised measures to the appellant was in material part by reason of his actual or attributed anti-Communist political opinion and/or social group (emigrado/exile). The Tribunal's own country guidance in **Fernandez (Dissidents and defectors) Cuba CG** confirmed that

> "*the authorities are intolerant of any form of unauthorised opposition to its political agenda and the law is used to criminalise dissent*" (CG headnote (ii)).

On a balanced assessment it is clear that the appellant had held an anti-Communist or anti-CPC beliefs at the relevant times and displayed this in Cuba by refusal to participate in CPC dominated structures and again by seeking to depart Cuba permanently and claiming asylum.

41. Sixthly, even without his actual manifestation of his views the 'emigrado' provisions effectively deemed those overstaying permission to be outside Cuba as dissidents from CPC rule. The 'emigrado' measures themselves were political and served to mark and punish disloyalty. The previous Tribunals in each case concluded there would be no persecution on return. The phrase 'economic migrant' applied to the appellant failed to appreciate that in the context of which Cuba's poverty was closely linked to the political rule by the CPC, and the desire to leave, highlighted that poverty and was in effect political.

42. Seventh, the position of the Cuban authorities on the critical issue of exclusion was clear and that was evidenced by the first statement of the Cuban Embassy.

43. Eighth, the Upper Tribunal had, contrary to the previous decision makers, abundant objective evidence concerning the 'emigrado' provisions and further, the expert evidence from Mr Alpizar and Ms Diversent both of whom clearly identified the politicised nature of Cuban laws restricting the freedom of movement and, the arbitrariness with which applications for permission to return are addressed both in general and with regard to the instant case.

44. Ninth, an application had in any event been made to the relevant Cuban authorities and Mr Lopez had in April 2019 made clear that to return the appellant would have to prove UK residence valid for two years or more. It was clear that the appellant could not comply with this requirement. That was in essence a cover for arbitrary exclusion, and nothing had changed on the facts since that assessment. The mere provision for an application to be made for a short period of temporary return, withholding the substance of Article 12(4) did not remove the glaring breach of international standards represented by the Cuban 'emigrado' law or the satisfaction of the refugee definition.

The Secretary of State's submissions

45. The respondent's written submissions were set out in a skeleton argument submitted on 11th February 2020 and in turn relied on the Secretary of State's refusal of the appellant's claim on 14th March 2019. Reliance was also placed on the two previous tribunal decisions with reference to **Devaseelan**. The respondent relied on the Country Policy and Information Response of September 2017 which appeared to be the most recent document in the respondent's library of Country and Policy Information documents relating to Cuba. The officer drafting the grounds could not locate by electronic means the evidence adduced by the appellant at the hearing of November 2019 and noted the

> "*officer drafting this skeleton is reliant on the information stored in R's computer systems which are not producing much by way of assistance to him or the Tribunal*".

46. At the outset of the hearing, we confirmed with Ms Cunha the facts in dispute and she focussed on the ability and the effect on the appellant to be able to return. As set out in her oral submissions it was the Secretary of State's case that the appellant could make an application for return, albeit temporary.

47. Ms Cunha submitted that the Accord Report demonstrated that the appellant could return to Cuba under Cuban law, but this would initially be on a visit visa basis and thereafter the appellant could apply for permanent residency. In the meantime, she accepted he would not be able to access employment, accommodation, pension rights and healthcare. She could not help us on the length of time that she thought the appellant might have to endure the inability to access social and economic assistance and she acknowledged that the family had denied that it could offer support. That was not challenged.

48. She submitted there was a nexus between not being able to access rights on the basis of being an emigrado and government procedures, but submitted that, neither on its own nor cumulatively, was sufficient to amount to imputed political opinion and could not afford protection to this appellant under the Refugee Convention. There was no pattern of mistreatment. She accepted that the Cuban government adopted a position which had a discriminatory effect, and which could cumulatively amount to serious harm but that the approach was not consistently applied to a class of persons and thus the appellant could not fall within such a class. This was not a case where the government actively pursued someone seen as a political dissident such as a draft evader. There was a distinction between a government actively implementing a policy which would lead to persecution over, for example, past activity and a government on the other hand just applying rules to all those who departed and within those rules having a discretion to re-admit those who had left. There was a difference between prosecuting someone and deciding that they would on return would not be able to avail themselves of protection.

49. In response, Mr Fripp made clear that his case was not based on statelessness but on the deprivation of the essential rights attached to the appellant's Cuban citizenship and the consequences of that deprivation which amounted, according to Mr Fripp, to such a violation that it constituted serious harm. He added the deprivation was politically motivated.

Analysis

50. Article 1A(2) of the Refugee Convention relating to the Status of Refugees 1951 provides the definition of refugee as:

> '2(c) '*refugee' means a third country national who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country'*.

51. In **Lazarevic v SSHD** [1997] EWCA Civ 1007 Hutchison LJ held, that refusal to permit return (depending on a convention reason), might constitute persecution and held as follows:

> *'If a State arbitrarily excludes one of its citizens, thereby cutting him off from enjoyment of all those benefits and rights enjoyed by citizens and duties owed by a State to its citizens, there is in my view no difficulty in accepting that such conduct can amount to persecution. Such a person may properly say both that he is being persecuted and that he fears [continued] persecution in the future. I see no reason, given the scope and objects of the Convention, not to accept Professor Hathaway's formulation; and I am encouraged to do so by the fact that Simon Brown L.J. cited it in terms which at least implied approval in Ravichandran [1996] Imm AR 97 at 107. However, even accepting that refusal to permit return can constitute persecution for a Convention reason, I would not myself accept that that would be so in the case of those who, like these appellants, are anxious at all costs not to return: how can they be said to be harmed by such a refusal? I shall return to this in the context of the second of the questions raised by Mr. Lewis's submissions, to which I now turn'.*

52. Under Regulation 5 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, as far as relevant, acts of persecution are defined as follows:

> *5 (1) In deciding whether a person is a refugee an act of persecution must be:*
>
> *(a) sufficiently serious by its nature or repetition as to constitute a severe violation of a basic human right, in particular a right from which derogation cannot be made under Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms; or*
>
> *(b) an accumulation of various measures, including a violation of a human right which is sufficiently severe as to affect an individual in a similar manner as specified in (a).*

(2) 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;

(b) a legal, administrative, police, or judicial measure which in itself is discriminatory or which is implemented in a discriminatory manner;

(c) prosecution or punishment, which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

…

(3) An act of persecution must be committed for at least one of the reasons in Article 1(A) of the Geneva Convention

53. The headnote to the Cuban country guidance case of **Fernandez (Dissidents and defectors) Cuba CG [2011] UKUT 00343 (IAC)** reads, with our underling for emphasis, as follows:

"(i) The human rights situation in Cuba is dismal and the government continues to deny its citizens basic civil and political rights.

(ii) The authorities are intolerant of any form of unauthorised opposition to its political agenda and the law is used to criminalise dissent.

(iii) The term 'dissident' in the context of Cuba does not refer to a homogenous group of people but can refer to anyone engaging in activities regarded by the authorities as contrary to its political agenda.

(iv) The 'dangerousness' law is used as a political tool against those seen as dissidents or otherwise opposing the regime's political agenda

(v) Those regarded by the Cuban authorities as opponents, dissidents or defectors can be at risk of treatment of sufficient severity to amount to persecution. Whether a particular individual will be at such risk depends upon his background and profile but in general terms an active political opponent who has come to the attention of the authorities or someone who has been openly disloyal to the regime is likely to be at such risk.

(vi) This guidance replaces that given in OM (Cuba returning dissident) Cuba [2004] UKAIT 00120 which is no longer to be regarded as providing country guidance".

54. The cases **EB (Ethiopia)** and **MA (Ethiopia)** relate to the deprivation of nationality but both cases identify that the deprivation of nationality which has the effect of removing and excluding someone from their country of nationality is potentially a ground for refugee protection. The Cuban provisions are indeed globally rare and can, as seen from the expert reports below, operate permanently to remove from a Cuban national their access to the country.

55. The consequences of remaining outside Cuba for an extended time can be particularly severe. The stipulations regarding return can be draconian, and, despite the relaxation for some Cuban nationals, the conditions have plainly been long standing, sustained and systemic. The effective exclusion of a national in such an institutionalised manner, we accept can be identified as incompatible with refugee and international human rights law. Secondly, Ms

Cunha accepted that even if the appellant could access Cuba, he would be denied access to social and economic rights which would include employment, housing, healthcare and pension rights. She could not tell us how long this state of denial would continue. Owing to first the exclusion and secondly, the character and possible indefinite nature of deprivation of significant rights, we conclude both forms of treatment would constitute administrative and punitive measures for the purposes of an act of persecution under Regulation 5(1) (cited above).

56. Cuban laws are inherently discriminatory when those laws exclude nationals from returning, particularly those who have been out with Cuba for more than 24 months. Those laws implement a politically motivated process for repatriation resulting in, for those unable to comply, being condemned to exclusion.

57. Mr Alpinsar, a lawyer whose expertise was not challenged, submitted a written report and described Cuban law as politically motivated as follows:

> *"The status as émigré is crystal clearly (sic) defined by the Cuban law: a national who continuously have stayed for more than 24 months without authorisation or have settled abroad without the relevant permit. Any émigré in the appellant's position will be blacklisted in the highly politicised Cuban society"*

58. The operation of the legal scheme appears both persecutory and motivated for a Convention reason. From the evidence before us we accept that the bar from re-entry and adoption of civil rights within Cuba are for reasons which are political, that is, the application of a law directed towards punishing dissenting behaviour that is not in conformity with the Communist Party of Cuba.

59. We accept that a Cuban citizen designated as an emigrado and denied a right to have a repatriation application considered without proof of legal residence in the UK and proof of support from those in the UK can render 'emigrados' to fall into a "class of persons" that is separate and discrete. Such 'emigrados' can be defined as a particular class by their exclusion and the deemed nature of their political dissidence.

60. It is no answer that the decision to bar the appellant merely conforms with the wishes of the appellant as can be seen from paragraph 58 of **MA (Ethiopia)** or that that the bar conforms with the domestic laws of Cuba as can be seen from the ruling of Lady Justice Arden in **R (Tientchu) v IAT [2000] EWCA Civ 385.** The fact that someone can be punished in the 'same way as all other citizens' does not respond adequately to a complaint of persecution.

61. With regards the appellant our starting point is the findings made by the First-tier Tribunal Judges Chohan and Telford, and we agree that the key issue of ability to return was not under the spotlight in those decisions rather the risk to the appellant once he had returned and was in Cuba. The previous decisions are set out in detail above.

62. It is important to note that the appellant's credibility as a whole was not challenged in terms of his activities in Cuba. Indeed, it is accepted that he left Cuba in 2007 and travelled to the United Kingdom and although Judge Chohan found that there was no adverse interest in the appellant or active ill-treatment, otherwise the Cuban authorities would not have allowed him to leave the country, it did appear to have been accepted that, as the appellant claimed, he was considered to be generally anti-government. Judge Chohan states quite clearly that he had no reason to disbelieve the appellant's account, albeit there was nothing to suggest he had ever been persecuted or ill-treated or would be if he were returned to Cuba for his activities in Cuba.

63. The second point to note is that, as Mr Fripp confirmed, and contrary to the finding of First-tier Tribunal Judge Telford, whilst the appellant has been attempting to establish communication with the Cuban authorities and obtain information on his return, information transpired and was confirmed to those authorities, that the appellant is now a failed asylum seeker. Additionally, there was no anonymity direction given by the First-tier Tribunal Judge Lawrence's decision albeit that it has now been set aside. In terms of the definition of dissident, as **Fernandez** held this can include anyone engaging in activities regarded by the authorities as contrary to its political agenda. We are persuaded that the appellant's act of remaining outside Cuba, and his failed asylum claim, within the context of his previous accepted disaffection with the Cuban regime, could be construed and perceived by the Cubans as contrary to its own political agenda. It is within this context that the appellant would now have to make a detailed application to the Cuban Embassy. This is not an appellant who would be returning and merely showing his passport to immigration officials on re-entry for re-admission to his country of origin.

64. Ms Cunha took us carefully through the Austrian Red Cross Accord Report dated August 2017 and which post-dated both the First-tier Tribunal decisions of 2007 and 2013. In particular, she referred to section 1.3.2 entitled "Regaining residency rights" which referred to Decree No 305 and the relevant Article 47 to Article 50 of the Cuban constitution. This confirms that emigrated Cuban nationals are allowed temporary visits to Cuba of up to 90 days and those who are residents abroad are allowed visits to Cuba of up to 180 days. Article 48 stipulates that "emigrated Cuban nationals who wish to take up residence in the national territory have to submit an application at a diplomatic or consular representation abroad or at the relevant department of the Ministry of Interior during their visit to Cuba".

65. Both parties relied on the Accord report and it makes clear that there is an established procedure for processing applications and that the Cuban representations and offices abroad forward the applications to the Cuban Immigration and Foreign Affairs Department of the Ministry of the Interior in Cuba. That department in turn imposes a timeframe of not exceeding 90 days to respond to applications referred to in Article 48, that is for those who wish to take up residence in the national territory. It would appear that application

timeframe relates to an application from within Cuba. The Accord Report also refers to a procedure for a Cuban emigrant to reapply for residence in Cuba from Cuban consulates abroad and that they must submit a request and a valid passport (Article 44). The report underlines that "they have to indicate a reference person in Cuba who is committed to guarantee accommodation and upkeep, if applicable, until the applicant disposes of his own housing and income". This application is approved by the Cuban immigration authorities and allows the entry into the national territory for a Cuban emigrant wanting to once again permanently take up residence in Cuba. Again, the applications must be submitted to the consular offices by the interested parties.

66. The Accord report identifies the activist Laritza Diversent as explaining in her article that the new migration law made it possible for Cuban emigrants to regain their residency in Cuba and which signified a substantial change compared with previous legislation but according to Ms Diversent the decision about regaining residence lay with the state organ equipped with discretionary powers and the Ministry of Interior has made transparent that it was going to choose which emigrants could return and claim their rights and which could not.

67. The Accord report refers to the May 2017 report by Landinfo on Cuban entry and exit procedures relating to those who have stayed abroad for more than 24 months and recorded that those who had done so must apply for repatriation and such an application is processed by the Cuban diplomatic representations abroad and the authorities in Cuba make a decision as to whether the person is allowed to repatriate. This identifies that:

> *"The Cuban authorities must have all the information about why the Cuban wants to repatriate. The name of the family or guardians in Cuba must be stated and a financial guarantee from family or friends in Cuba must be submitted. Property belonging to persons who have received the status of emigrado has been expropriated by the Cuban state. Cubans who repatriate, therefore basically have nothing to return to. According to information given by a source for consular affairs in May 2017, an economic guarantee is therefore necessary for repatriation".*

68. At internal page 35 the Accord report identified that the process could take several years but now went much faster and there was less documentation that had to be presented but identified that persons that are qualified as "terrorists or political enemies" are excluded from repatriation and such persons were not even allowed to return to Cuba for a visit. Nonetheless the procedures continued for repatriation to take place at diplomatic representations abroad. The report also states

> *"only those people facing legal problems with the Cuban state or the state they reside in cannot apply. All other Cuban citizens residing outside the island can without objection apply for it" ...*

> *"The person [applicant] needs to travel to Cuba and together with the relative who owns the property of the place where the returnee is to reside go to a notary who will officially register the applicant as living in that same household".*

69. Although the Accord report under section 1.3.3 states that repatriated Cubans are granted the same rights that the Constitution grants any other Cuban citizen (political rights, the right to vote, social rights, healthcare, food distribution as well as the right to education if applicable and labour rights), this presupposes that the applicant would be able to enter and repatriate and gain residence.

70. There are a number of difficulties for this appellant. First, there has been a finding that he was said to be anti-government, albeit that he was not detained or persecuted whilst in Cuba. Secondly, the fact that he has made an application for asylum has now been registered with the Cuban authorities and it is likely that that will be construed as anti-Communist. It is in this context that he would be making an application to return.

71. Thirdly, there has been a raft of correspondence with the Cuban authorities in the United Kingdom in an attempt to establish the possibility of re-entering Cuba from May 2011 to 10th January 2018, outlining the difficulties the appellant faces in applying for return. There was no challenge to this Cuban documentation and we have no reason to classify it as unreliable, indeed some of it emanates from the Home Office. The Cuban documentation reflects and emphasises the information cited in the reports above.

72. A letter from the Home Office UK Visas and Immigration dated 10th January 2018 recorded that the UK Visa Country Liaison and Documentation Unit confirmed they had a meeting in June 2017 with Cuban Embassy officials regarding returns to Cuba and identified that the appellant's relatives had sent a letter to the consulate stating they did not give him support to return to Cuba.

73. Further, a copy of the letter from the Embassy of Cuba in the United Kingdom from Mr Lidice Lopez confirmed that this particular appellant had lost his permanent residence in Cuba and was considered a permanent resident of the United Kingdom and may travel on a visit visa to Cuba but must have a valid Cuban passport with an entry permit (habitation) with a visa for two years or more from the country where he resides. The letter quoted from the Migration Procedure Manual for the Foreign Service of the Republic of Cuba and confirmed that Cuban nationals are permitted to travel abroad for a period of 24 months counting from the day of departure but were required to obtain extensions, and those who stayed without authorisation were considered as refusing "to return to the country and are deemed as emigrants". Such émigrés who would like to resettle needed to apply for official process through the Cuban consular and there were specific requirements such that the applicant needed to make an official request, and further provide a "notarial deed in

which the person of reference in Cuba committed to guarantee accommodation and relevant allowance until the interested party is able to afford his own accommodation and self-sustenance".

74. All the requirements mentioned were compulsory and there was no other official procedure for a Cuban émigré citizen to resettle in Cuba. The conditions made clear in this letter included that the appellant must have a visa for two or more years from the country where the appellant resides.

75. Quite apart from the accommodation and self-sustenance conditions, the appellant has never had status in the United Kingdom and cannot comply with this requirement; it is also apparent that this appellant has 'legal problems' with the state in which he currently resides, the United Kingdom. He faces removal and thus he would not be entitled to even make a temporary visit to Cuba for up to 90 days.

76. The expert report of Mr Santiago Alpizar, which was not challenged by the respondent either by way of his qualifications to give such an opinion or its contents, confirmed that for entering and seeking permanent residence any émigré must request repatriation at the corresponding Cuban Consulate abroad and the decision on the request is entirely at the discretion of the Directorate of Identification. Mr Alpizar confirmed there was no right to repatriate but simply a right to *request* repatriation. It is possible for a non-repatriable émigré to return as a visitor for up to 90 days, but the authorities might grant an extension upon request. In view of the Cuban Embassy correspondence, we consider this unlikely.

77. As Mr Alpizar observed, in response to a question of the attitude of the Cuban authorities to failed Cuban national asylum seekers classed as émigrés wishing to return to Cuba, was given as follows:

> *"The inveterate attitude of the Cuban authorities towards asylum seekers is to flatten their Cuban citizenship down to the level of traitor. Rather than émigrés, they could be considered de facto stateless individuals, since the Cuban government won't authorise them to return as repatriates. Only if an inscrutable policy works in a mysterious way, a Cuban émigré could return as a repatriate after failing to get asylum".*

78. The expert reflected the information given by the Cuban Embassy, that repatriation would only be granted if an émigré had a housing sponsor and granted an affidavit in advance. In that way he would obtain mandatory ID and ration cards; housing availability was a sine qua non condition for requesting repatriation.

79. Mr Alpizar wrote:

> *"The appellant's current application for repatriation has no chance of success under the present circumstances"*

and:

> *"A Cuban engineer who declined to join the Cuban Communist Party is automatically wrapped up in a cloud of suspicion. 'Worm' is the usual term for branding people reluctant to join the party. Abstaining from open dissent and behaving a normal citizen prevent being victimise by the law and order apparatus but the repression turned into what Cubans dubbed 'administrative execution': being excluded from opportunities of professional development".*

and:

> *"For the Cuban authorities HGV [the appellant] is just a traitor, despite his motivation for leaving his home country, and he is not eligible for repatriation. It is the typical Catch 22 of the Cuban immigration policy. If you leave the country with no political reason but without permission, you won't be able to be accepted as repatriate, since you will be deemed as a political opponent and the repressive action is simply to degrade you at the level of stateless person".*

80. On this basis we consider that the appellant will be considered at the outset generally antipathetic to the regime, not least because of the acceptance by First-tier Tribunal Judge Chohan of his low-level antipathy towards communism whilst in Cuba but also because of the considerable length of time, that is thirteen years, outside the Cuban state and thirdly, the fact he has claimed asylum. Mr Fripp argued that the appellant's departure was owing to the politically driven poverty in Cuba. Previous tribunals found that the appellant was not actively mistreated in Cuba owing to convention reasons, but time has moved on.

81. We conclude that although there is legal process by which an individual outside Cuba and rendered an 'emigrado', is able to reapply for repatriation and a resumption of rights, the treatment can still constitute persecution under The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, regulation 5(2)(b) and (c), where the conditions applied effectively discriminate such that the citizen is effectively denied the ability to return and exercise his rights as a citizen. We consider, on the facts, this appellant cannot fulfil the conditions of re-entry owing to his absence and the imputed (or indeed actual) political beliefs and is reasonably likely to experience an effective denial of his right to re-enter, which is a severe violation of his human rights through a legal or administrative measure implemented in a sufficiently discriminatory manner. It is also effectively a punishment for having been absent from the country for so long which is also defined under the Regulations as constituting persecution.

82. We considered the Home Office response to country of origin information (COI) request dated 12th January 2017 as this recorded that Cuban authorities no longer stigmatize Cuban nationals who breach and overstay their exit visas, provided 'they're not coming back as anti-government activists'. The COI request response included that the requirements for entry were set out on the

website of the Cuban consulate in Canada. As we have seen, however, the picture is rather more nuanced than that described in the request response.

83. HGV's deprivation of re-entry is a denial of his right as a citizen of Cuba and although he has not been stripped of nationality and therefore cannot be classified as stateless de jure or de facto, and indeed that was not claimed, the rights attendant on that citizenship have been deprived because of his deemed political opposition to the government. Ms Cunha accepted that his treatment such as denial of social and economic rights, should he be allowed to enter Cuba could be indefinite. The risk of such denial, even if the appellant could access Cuba, is likely to have severe consequences and such rights are government controlled. We consider that this treatment also falls within the definition of persecution for a convention reason.

84. For the reasons given above we conclude that the appellant on the lower standard of proof has fulfilled the criteria for refugee protection and similarly protection on Article 3 ECHR grounds.

85. We therefore allow HGV's appeal on refugee and human rights grounds (Article 3).

Signed *Helen Rimington* Date 4th March 2021
Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed *Helen Rimington* Date 4th March 2021
Upper Tribunal Judge Rimington