Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/13374/2017**

THE IMMIGRATION ACTS

Heard at George House, Edinburgh
on 3 November 2021

Decisions & Reasons Promulgated
On 22 November 2021

Before

UT JUDGE MACLEMAN &
DEPUTY UT JUDGE DOYLE

Between

CARLOS LUIS MORLET MENDOZA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: *Mr A Caskie, advocate, instructed by Immigration Advice Service, Glasgow*
For the Respondent: *Mr M Diwnycz, Senior Home Office Presenting Officer*

DETERMINATION AND REASONS

1. The appellant is a citizen of Venezuela, born on 3 April 1984. At a protest on 11 April 2017, he witnessed the shooting of his friend Gruceni Canelon, known as Tony, by the *Guardia Nacional Bolivariana de Venezuela* (GNB). When he visited Tony in hospital, two GNB officers who had been at the demonstration manhandled him, and confiscated his mobile phone and his watch. Tony died on 12 April. His wife received calls from 24 to 26 April, culminating in an implied threat to kidnap their son. A national security service contact identified the source of the calls as someone involved with the government.

2. The appellant arrived in the UK as a family visitor on 9 June 2017 (accompanied by his wife and son, who are his dependants in these proceedings). He sought asylum on 3 July 2017.

3. On 1 December 2017 the respondent rejected the claim as incredible.

4. FtT Judge J C Grant-Hutchison ("The Judge") dismissed the appellant's appeal by a decision promulgated on 24 January 2019. For reasons explained up to [22], she found that the appellant and his wife were credible. However, for reasons explained at [23 a - i] she held at [24] that there was no risk "that the appellant will be targeted by the GNB or any other part of the government on return to Venezuela".

5. The FtT and the UT refused permission to appeal. The appellant petitioned the Court of Session for reduction of the UT's refusal of permission. The Outer House refused the petition: P623/19, [2019] CSOH 107. The appellant, as petitioner, reclaimed to the Inner House: [2021] CSIH 15.

6. The opinion of the Court, delivered by Lord Woolman, finds it necessary to deal with only two matters among the grounds of appeal to the UT:

> [19] The proposed grounds of appeal to the UT raised several matters, but it is only necessary to mention two of them. First, the F-tT had failed accurately to assess the danger to the petitioner were he to be returned. The perception of the killers was that the petitioner could speak to the commission of the crime and could identify them as the perpetrators. That placed him in danger whether or not he complained to the authorities. Second, ("the *HJ (Iran)* ground") was a new argument. The F-tT ought to have held that a requirement for the petitioner to `keep quiet' about the murder infringed his human rights. The petitioner's position was analogous to that of the applicants in *HJ (Iran) and HT (Cameroon)* v *Secretary of State for the Home Department* [2011] 1 AC 596. He could only avoid persecution in his home country if he `lived a lie' by not reporting the matter to the Venezuelan authorities.

7. The Court's opinion ends as follows:

> [25] Mr McKinlay *[for the SSHD]* submitted that the Lord Ordinary's analysis was correct. The petitioner did not have a well-founded fear of persecution on Convention grounds – the contrary view was not arguable. Any modification of his behaviour on being returned to Venezuela would stem from the petitioner's interest in personal safety, not on his political opinion. It was not arguable that *HJ (Iran)* applied. In the course of his clear and well- presented submissions, however, Mr McKinlay accepted two points. In our view, the concessions were rightly and properly made.
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> [26] First, if it is arguable that the principle in *HJ (Iran)* applies, then this court should allow the appeal and remit to the UT. Second, Mr McKinlay recognised that the F-tT, the UT and the Lord Ordinary all proceeded on the basis that the petitioner could not identify the individuals who shot T. If on a proper analysis of the facts that was not correct, their reasoning would be undermined. Mr McKinlay also acknowledged that even if the petitioner was unable to identify the perpetrators, he might nevertheless have important information to impart to the authorities, *viz* -when, how and by whom (*ie* GNB officers) T was shot. Matters may go further in any investigation. Witnesses are typically asked to view photographs, to create photo-fit images or drawings, and to attend identification parades. Sometimes this can jog an individual's memory. We are satisfied that the first ground does disclose an arguable error of law on the part of the F-tT, and that the UT and the Lord Ordinary erred in law in not recognising that. It is arguable that it was unreasonable in the circumstances for the F-tT to conclude that the petitioner is in no danger because he has not made a complaint. He is a witness to a murder by state actors. The murderers know that he witnessed the

> commission of the crime and they believe that he can identify them as the perpetrators. It may reasonably be inferred from the circumstance of the murder and from their subsequent threats to the petitioner that the perpetrators are ruthless men with scant regard for human life. They run the risk that at some point the petitioner might speak up, with potentially grave consequences for them. In those circumstance it may be reasonable to conclude that they represent a danger to the petitioner. Since it is the killers' perception of the evidence which the petitioner may be able to give which is critical to his safety, whether that perception is accurate, appears to us to be of secondary importance. However, in our opinion it is arguable that the F-tT (and in their turn the UT and the Lord Ordinary) misunderstood the petitioner's evidence. He stated that he might well be able to recognise the perpetrators - he recollected their faces. We think that there is, at the very least, a substantial argument that it may reasonably be inferred that the petitioner understood the judge's follow-up question to be asking something different, *viz*. apart from recollecting what they looked like, had he any other way of being able to establish who they were? We think it arguable that, on a reasonable reading of the entirety of the relevant passage, the petitioner indicated that he thought he would be able to recognise the killers.
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> [27] We would add that in the circumstances summarised at paragraphs 5-10 above, it is unclear, at least to this court, how and why the petitioner's reluctance to make a report should have the significance attached to it by the F-tT.
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> [28] Since we are satisfied that the UT erred in law in failing to recognise that the first ground was arguably a material error of law on the part of the F-tT, it follows that the UT's decision cannot stand.
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> [29] It is not necessary for present purposes to decide whether the UT erred in law in relation to the *HJ (Iran)* ground. Since that ground raises a somewhat novel point, and there is going to have to be an appeal to the UT in any case, there may be advantages in the *HJ (Iran)* ground being fully canvassed before the UT during the course of that appeal (if, on advice, the petitioner wishes to pursue it).
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> [30] We conclude that the proper course is to allow the reclaiming motion … and reduce the decision of the UT; and remit to the UT to proceed as accords in the light of this court's findings. We anticipate that the UT will grant permission to appeal, and will then hear the substantive appeal.

8. On 2 August 2021 the Vice President of the UT granted permission in light of that opinion.

The Hearing

9. Mr Caskie, for the appellant, moved the grounds of appeal. For the respondent, Mr Diwnycz, sensibly and correctly, adhered to the concessions made by his colleague before the Inner House of the Court of Session. Mr Diwnycz acknowledged that the respondent's reasons for refusal letter rejected the appellant's protection claim solely on the grounds of credibility, while our starting point must be that the appellant gives a truthful account. Mr Diwnycz also said that the undisputed facts disclose a Refugee Convention category, being imputed political opinion.

Analysis

10. Having found the appellant and his wife to give credible evidence, the FtT Judge embarked on consideration of risk on return to Venezuela; within which, she overlooked the impact of the appellant's ability to either identify his friend's murderers or provide

information which will identify them. She describes intimidation, which included a clearly implied threat to kidnap the appellant's child, merely as "nuisance calls".

11. The Judge's conclusions at [24] & [25] are not safe because throughout the subclauses of [23] the Judge underestimates the appellant's profile and underestimates the resources of the agent of persecution. As a result, the findings at [24] and [25] are tainted by a material error of law and cannot stand.

12. The decision of the First-tier Tribunal is set aside. There is no challenge to the facts as the Judge found them to be. We are able to substitute our own decision.

Asylum

13. The appellant is a witness to a murder by state actors. The murderers know that the appellant witnessed the commission of the crime, and they believe that he can identify them as the perpetrators. The murderers are ruthless men with scant regard for human life who have already threatened the appellant. They are members of the GNB and have the resources of the Venezuelan government behind them.

14. The appellant was at a political rally when he witnessed his friend's murder. He visited his friend in hospital before his friend died and was accosted by GNB officers during that hospital visit. Immediately afterwards, he and his wife received threatening phone calls from the GNB.

15. Those facts draw us to the conclusion that the appellant has a well-founded fear of persecution because of his imputed political opinion.

Humanitarian protection

16. As we have found the appellant is a refugee, we cannot consider whether he qualifies for humanitarian protection. Therefore, we find the appellant is not eligible for humanitarian protection.

Human rights

17. As we have found the appellant has established a well-founded fear of persecution, by analogy we find that his claim engages article 3 of the Human Rights Convention because he would face a real risk of torture, inhuman or degrading treatment if he were returned to his country of origin.

18. There is no evidence before us to indicate that the appellant meets the requirements of appendix FM of the immigration rules. We have found that he cannot return to Venezuela because he establishes a well-founded fear of persecution for a Convention reason. We have found that removal from the UK and return to Venezuela will breach his rights on article 3 ECHR grounds. For the same reasons, we find that there are very significant obstacles to his reintegration into Venezuela. He therefore meets the requirements of paragraph 276 ADE(1)(vi) of the rules.

19. TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109 tells us that where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1). As the appellant meets the requirements of paragraph 276ADE(1)(vi) of the rules, the respondent's decision must be a breach of his right to respect for private life. The appellant does not claim that any other articles of the 1950 Convention are engaged.

20. This appeal succeeds on article 3 & 8 (private life) ECHR grounds.

Decision

21. The decision of the First-tier Tribunal promulgated on 24 January 2019 materially errs in law, and is set aside. The decision substituted is as follows.

22. The appeal is allowed on Asylum grounds.

23. The appeal is dismissed on humanitarian protection grounds.

24. The appeal is allowed on article 3 & 8 (Private life) Human Rights grounds.

25. No anonymity direction has been requested or made.

P Doyle

5 November 2021
DUT Judge Doyle

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.