Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/52320/2021, PA/52323/2021

(UI-2022-001807, UI-2022-001809)
LP/00006/2022; IA/06921/2021

THE IMMIGRATION ACTS

Heard at the Immigration and Asylum Chamber	**Decision & Reasons Promulgated**
On 30 September 2022	**On 8 February 2023**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

AND

CEL AND KPO
(ANONYMITY DIRECTIONS MADE)

Respondents

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

DECISION AND REASONS

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

respondents. Failure to comply with this direction could lead to contempt of court proceedings.

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal Judge Drake (hereinafter referred to as the "FtTJ") who allowed their protection and human rights appeals in a decision promulgated on the 11 March 2022.

2. Permission to appeal was granted by FtTJ Austin on 20 April 2022.

3. Whilst this is the appeal brought on behalf of the Secretary of State, for sake of convenience I intend to refer to the parties as they were before the First-tier Tribunal.

4. The FtT did make an anonymity order and no grounds have been raised by the parties that the anonymity direction should be discharged. The order shall be continued in the terms as set out above.

5. The hearing took place on 30 September 2022 whereby both advocates presented their respective oral submissions.

6. I am grateful to Ms Young and Mr Greer for their oral submissions.

Background:

7. The history of the claim is set out in the decision of the FtTJ, the decision letter and the evidence contained in the bundle. The appellants, who are father and daughter are nationals of El Salvador. The basis of the 1st appellant's claim was that he had been threatened by gang members in El Salvador on 3 separate occasions. In July 2019 it was claimed that 2 people approached the appellant asking for money. The appellant refused to provide money stating that his company had already paid another gang and therefore were not in a position to pay the gang members. A 2nd threat was made in August 2019 whereupon leaving a client's shop by minibus several gang members stopped and searched the vehicle and stole documents including a mobile phone suspecting that he was an undercover policeman. It was said that the lady who owned the shop told the gang members that he was her nephew and returned his belongings but threatened that he would be killed if he returned.

8. The 3rd incident occurred in December 2019 after the appellant visited a client who had payments in arrears. It was stated that the gang members appeared after he had spoken to his client and followed him. The gang members threatened him by showing him their weapons. The appellant claimed that he was followed and chased by gang members after he talked to the client.

9. As a result of the problems that he had encountered gang members he stopped his work and the appellant claimed that people were standing opposite his house in January 2020. The men had been watching the house on the opposite street 3 to 4 times until the end of February 2020. The appellant considered that he was in danger from the gang members and took steps to leave El Salvador along with his daughter.

10. The appellant left El Salvador on 11 March 2020 and arrived in the United Kingdom on 12 March 2020 where they claimed asylum on the same day.

11. The respondent considered their respective claims and refused them in decisions taken on 30 April 2021. The respondent considered the factual elements of their claim. Whilst the respondent accepted that the appellants were nationals of El Salvador, for the reasons set out in the decision letters, the respondent concluded that the appellants had not given a consistent and credible factual claim to be at risk of persecution or serious harm and refused their applications for protection.

12. The appellants appealed the decision to the FtTJ. In a decision promulgated on the 11 March 2022 the FtTJ allowed the appeals. In the decision, the FtTJ set out his findings of fact and assessment of the evidence between paragraphs 29 – 48 and concluded on the evidence as a whole that the appellants had given a consistent and credible account of being targeted by criminal gangs in El Salvador and that there was no sufficiency protection or the prospect of internal relocation.

13. The FtTJ allowed the 1st appellant's appeal on humanitarian protection grounds. In respect of the 2nd appellant's claim, the FtTJ set out the position of the respondent that if the 1st appellant had established a basis for humanitarian protection then the appellant's daughter fell within a Convention reason defined as a particular social group being that of vulnerable women entitled to Convention protection in their own right (see paragraph 9 of the decision).

14. The Secretary of State appealed on four grounds and permission to appeal was granted by FtTJ Austin on 20 April 2022.

15. The appeal was listed for a hearing before the Upper Tribunal. Ms Young, Senior Presenting Officer appeared on behalf of the respondent and Mr Greer, who had appeared before the FtT, appeared on behalf of both appellants.

16. There were two preliminary issues to determine.

17. The first issue related to the respondent's grounds of challenge. Mr Greer in his Rule 24 response submitted that the grant of permission was in respect of ground 1 only and that it was a restricted grant. He submitted that at paragraph 3 of the order granting permission the FtTJ stated:

> "ground a) discloses an arguable error of law in that there was material placed before the tribunal which may not have been considered in reaching the decision. The other grounds do not disclose arguable errors of law but amount to a disagreement with the tribunal's detailed findings, which were open to the tribunal to make on the evidence."

18. Mr Greer therefore submitted that it was apparent from the decision that the FtTJ granting permission sought to restrict the grounds of appeal upon which permission to appeal was granted to ground a) only and therefore limited the grounds which may be argued before the Upper Tribunal.

19. Having considered the submission, I have reached the conclusion that the FtTJ did not, in granting permission, expressly do so only on "limited grounds" even though he considered the other grounds were not arguable. The grant of permission clearly set out in the head of the decision "permission to appeal is granted" and therefore Safi and others (permission to appeal decisions) [2018] UKUT 288 applies. Thus although the grant of permission appeared to restrict the grant to ground a) it was not accompanied by an express decision to refuse permission in relation to the other grounds as required by Safi (as cited). Therefore it has the effect that the Secretary of State has permission to appeal on the other grounds.

20. The Rule 24 sets out the submissions made on behalf of the appellants in response to the other grounds and therefore Mr Greer has been able to articulate any points he wishes to make in respect of all the grounds.

21. A second issue is identified in the rule 24 response as a "cross-appeal". It seems to me it does not matter whether this is considered at the outset or after considering the respondent's grounds provided it is dealt with in this decision.

The grounds advanced on behalf of the Secretary of State:

22. There are four grounds of challenge advanced on behalf of the respondent set out in paragraphs 1-4. Ms Young on behalf of the respondent stated that the focus of her submissions would be on ground 1 (or as set out in the grant of permission ground a)). She indicated that she relied upon grounds 2 to 4 as drafted in the written grounds but did not seek to expand upon them in her oral submissions.

23. I also observe that the decision letter that formed the basis of the respondent's submissions was that which related to the 1st appellant.

24. Dealing with ground 1, Ms Young submitted that the FtTJ erred in his consideration of the respondent's CPIN: El Salvador: Fear of Gangs dated January 2021. It is submitted that it was material to the outcome because at paragraph 42 the FtTJ stated that he preferred the

appellant's background material to that of the respondent. It is submitted that at paragraph 29 the FtTJ erroneously found that he had not been referred to any CPIN for El Salvador and was unable to find one. However paragraph 7 of the decision letter stated that the CPIN was considered.

25. Ms Young referred the tribunal to the decision letter and the references in the decision letter and the footnotes to the CPIN. Ms Young submitted that the FtTJ erred in law at paragraph 29. She conceded that the full copy of the document was not before the FtTJ, and it was not in the respondent's bundle, but it was a document in the public domain, and it was referenced in the decision letter. She further submitted that it could not be seen as conducting independent research as set out in rule 24 response but as accessing the sources cited in the decision letter.

26. Therefore she submitted the FtTJ did not engage with the contents of the CPIN and the points in the decision letter. As the decision relied upon background evidence this would be a material error of law.

27. Having considered the submissions of the advocates on the matters set out in relation to ground 1 and the rule 24 response, I am not satisfied that it has been established that any factual error made by the FtTJ is material to the outcome. The reasons are as follows.

28. At paragraph 7 of the decision letter it states that "the following information was considered; HO records, Country Policy and Information Note El Salvador: Fear of Gangs, dated January 2021.

29. The decision letter cited the CPIN at paragraph 23 in general terms stating "the CPIN El Salvador: Fear of Gangs dated January 2021 shows that "whether it is likely that a person in fear of a gang in general is a member of a PSG". Other references are made in the footnotes in the decision letter at paragraphs 31, 35 and 54.

30. Unlike other decision letters issued by the respondent, it is not the position that there are large parts of country materials or the CPIN set out in the body of the 1st appellant's decision letter. Nonetheless the CPIN is referred to in the decision letter. Insofar as the FtTJ made reference to not having been referred to the CPIN, this would appear to be factually incorrect as reference is made to it in the decision letter at paragraph 7 and as set out in the footnotes.

31. In terms of evidence the FTT practice direction sets out how evidence should be prepared. The relevant parts are set out in Rule 24 response prepared by Mr Greer at paragraph 13. In particular at 8.2, the best practice for the preparation of bundles is as follows;

(f) where reliance is placed in a particular case or text, photocopies of the case or text must be provided in full for the tribunal and the other party: and..

At 8.4 “Much evidence in immigration and asylum appeals is in documentary form. Representatives preparing bundles need to be aware of the position of the Tribunal, which may be coming to the case for the first time. The better a bundle has been prepared, the greater it will assist the Tribunal. Bundles should contain all the documents that the Tribunal will require to enable it to reach a decision without the need to refer to any other file or document. The Tribunal will not be assisted by repetitious, outdated or irrelevant material.”

8.6 “the parties cannot rely on the Tribunal having any prior familiarity with any country informational background report in relation to the case in question. If either party wishes to rely on such country or background information, copies of the relevant documentation must be provided.”

32. This was an appeal that was heard on the CCD system and case management directions were given prior to the hearing.

33. It is common ground between the parties that the CPIN was not provided either in the respondent’s bundle in accordance with the practice direction or downloaded to the CCD. Furthermore it is conceded on behalf of the respondent that the hyperlinks in the decision letter do not work on the CCD platform.

34. It would have been open to the FtTJ to read or access the footnotes in the decision letter himself without contravening the general principles of fairness (see decision in AM(fair hearing) Sudan [2015] UKUT 656. However I do not accept the submission made by Ms Young that it was incumbent on the FtTJ to compare and contrast the appellant’s account by setting out parts of the CPIN where those parts were not cited in support of the respondent’s case. As AM (Sudan) sets out, judicial research is inappropriate. When looking at the decision letter the parts of the CPIN that were relied upon were only those set out in the footnotes.

35. Having considered the footnotes and their relevance, it has not been established that the failure to reference that information from the footnotes was material to the outcome or undermined the FtTJ’s assessment of the evidence.

36. The 1st footnote is at paragraph 23 and refers to whether a Convention ground existed. It does not cite any particular country evidence and simply states the respondent’s position on “particular social group.” As can be seen by his decision the FtTJ accepted the respondent’s position on the issue of whether the 1st appellant’s appeal fell within a PSG (see paragraph [37] of the FtTJ’s decision).

37. In terms of the credibility of the appellant’s account, paragraph 31 states “you demonstrated considerable knowledge of the 2 main gangs : Mara Salvatrucha (MS-13) and Barrio 18 (B- 18) are prevalent nationwide (AIR 125, 26, 27) which is broadly consistent with the CPIN”. A footnote is given at “2” referring to the CPIN.

38. Footnotes 3 and 4 which cite the CPIN are referred to in the decision letter at paragraph 35. The context of those footnotes are set out as follows; “you provided account of an extortion arrangement between your company and B-18. Your description of the gang members look, and their extortion is broadly consistent with the background information, but this is readily available in the public domain.”

39. The last footnote which references the CPIN is at paragraph 54, which is a general reference that is made stating “therefore it is not considered that you fall within the scope of targets of gang violence according to external information”. The footnote refers to paragraph 10 of the CPIN.

40. Having set out the footnote references, it is plain that they were very limited. The footnotes at paragraphs 31 and 35 which refer to the CPIN were not points adverse to the appellants but in fact were points supportive of the appellants’ account and thus their general credibility. The last footnote referred to was at paragraph 54 and made reference to paragraph 10 of the CPIN, but that paragraph covered pages 54 – 68 and no specific parts of paragraph 10 were identified.

41. Having taken into account the footnotes and the context in which they were referred to, even if the FtTJ was factually wrong about being referred to the CPIN it has not been established that the failure to consider the points which were made in favour of the appellants could possibly undermine his factual assessment of their claims.

42. It is not entirely clear as to whether the FtTJ was in fact in error at paragraph [29]. The FtTJ stated “I note that I have not been referred to any Home Office CPIN for El Salvador …” The FtTJ may have been referring to the hearing itself rather than the references in the decision letter. It is common ground that the CPIN was not put before the FtTJ and that the footnotes do not work on the CCD system. Ms Young has not referred the tribunal to any points made on behalf of the respondent at the hearing which directly relied on country information in the CPIN. Nor has it been advanced on behalf of the respondent that the FtTJ failed to consider specific submissions made by reference to the CPIN at the hearing. As set out above, the footnotes to the CPIN in the decision letter were few and in the main was cited in support of the appellants credibility.

43. Drawing the matters together, whilst the decision letter cited some footnotes to the CPIN it has not been established by the respondent in the submissions made and by reference to the hearing before the FtTJ that the judge was directed to any specific parts of the CPIN. It is not for the FtTJ to go through the CPIN after hearing when he has not been directed to any particular parts of that document in the support of a particular parties case. To do so could be procedurally unfair as neither party will be given the opportunity to comment or consider those parts identified by the judge.

44. Consequently, it has not been demonstrated that even if the FtTJ was in error at paragraph 29 any error was material to the outcome.

45. The written grounds also refer to paragraph 39 and the reference made that passages were “selective”. Ms Young did not expand upon that particular ground. It is not clear what passages the FtTJ was referring to and neither advocate has referred to this. However I note that the decision letter did reference source material as ecoi.net (see paragraphs 37 and 41). The documents do not appear to be part of the respondent’s bundle and like the CPIN was not accessible by a hyperlink. The grounds do not provide any further information about the source document and the emphasis is on the CPIN. It is not demonstrated that paragraph 1 of the grounds is made out.

46. Turning to ground 2 it is submitted in the written grounds that at paragraph 26 the judge erred in his consideration of the SSHD’s position as per the respondent’s review dated 22/11/2021. It is submitted that the FtTJ has missed the respondent’s nuanced position on the expert report, that it does little to corroborate the appellant’s account and does not address inconsistencies and proceeds on the basis that the appellants’ account is credible.

47. The written grounds submit that the respondent’s submission was not that the expert’s opinion is nothing more than speculation as stated by the judge at paragraph 26. It is further submitted that it is material as the judge stated to prefer the expert report to the respondent’s evidence.

48. This ground was not explained further by Ms Young in her oral submissions either by reference to the evidence or by reference to the decision of the FtTJ.

49. The decision of the FtTJ should be read in its entirety. Whilst the ground cite paragraph 26 as being the relevant paragraph where it is asserted that the judge fell into error, those submissions fail to consider the other paragraphs of the decision. The FtTJ set out the respondent’s case between paragraph 7 or 9 and the respondent submissions at paragraph 12 – 19 which dealt with matters of credibility. Paragraph 18 concerned the expert report where the FtTJ stated, “ the respondent contests the experts report as being given over to comments on credibility and not merely plausibility: and cannot therefore be referred as a definitive experts report”. Paragraph 26 therefore should be read in conjunction with paragraph 18 when it is so read, it demonstrates that it is a brief summary of the points raised in the review concerning the expert report. The respondent’s review refers to the expert report providing little to corroborate the appellant’s account and that the conclusions are based on speculation. Therefore the FtTJ was not in error in his summary of the respondent’s position as regards the experts report.

50. As Mr Greer submitted, the written grounds at paragraph 2 amount to no more than a generalised statement. Paragraph 2 was not expanded upon in any oral submissions and the tribunal was not referred to the evidence or the FtTJ's decision when considering paragraph 2 of the written grounds.

51. The FtTJ considered the expert report and gave weight to it alongside other evidence including the oral testimony of the 2 witnesses (see paragraph 6 and 29). The grounds failed to refer to any of the factual findings made by the judge set out between paragraphs 29 and 48 which also refer to the expert report at paragraphs 32, 33, 34 and 38. Paragraph 2 of the written grounds has not been made out.

52. Turning to paragraph 3, the written grounds submit that in assessing credibility the FtTJ failed to consider the points made at paragraph 50 of the decision letter. Again this paragraph was not expanded upon in oral submissions.

53. Paragraph 50 of the decision letter refers to the control of gangs and those in control of the home area and that the account of his lack of familiarity of gangs was internally inconsistent. The grounds make no reference to the assessment of the credibility of the appellant and his daughter by reference to the other factual findings made. The FtTJ summarised both parties cases within the decision itself including the submissions and set out his factual assessment of credibility between paragraphs 29 – 48. In assessing credibility the FtTJ considered the core of the appellant's account to have become a target of gang members in El Salvador and having been subjected to threats for which there was no sufficient protection available nor any internal relocation.

54. At paragraph 29 the judge set out that he had compared the "core aspects of the claim" with the background material and concluded that their accounts were consistent with and supported by that material. The FtTJ then went on to consider core aspects of their account by reference to the issues raised by the respondent. At paragraph 31, the FtTJ considered the oral evidence in the context of the cross examination by the presenting officer at the hearing and found that both appellant "adhered to the testimony… and did not deviate." I take that to mean that the appellants' evidence during cross-examination was consistent with their accounts.

55. At paragraph 31 the FtTJ considered the respondent's submission that he was unable to escape from 3 separate confrontations but was not immediately injured. The judge gave his reasons in accepting the 1st appellant's evidence at paragraph 31 and paragraph 32 by reference to the UNHCR report that a person who would not being killed would be reasonably likely to be more at risk and liable to retribution having escaped. The judge considered the 1st appellant's account to be "plausible and credible" (paragraph 32). A paragraph 33 the judge considered the appellant's account of moving to a different area that

found on the evidence the 2 main gangs controlled the whole of El Salvador referring to the evidence of Dr Redder as to the dangers of moving between areas. At paragraph 34, the judge found that the 1st appellant had been threatened by gang members who had made no secret of their associations with the 2 main gangs and accepted that he had been threatened by gang members. The judge found that the appellant's account being threatened with personal violence was "plausible and credible." Paragraph 34 the judge found that the 1st appellant's explanation for not relocating was justified by the evidence of the expert report which considered the lack of sufficiency of protection. The judge paragraph 35 found that the claim was "objectively well-founded" and that having contrasted and compare the appellant's accounts threaten El Salvador at the hands of MS 13 he found the appellants to be "cogent witnesses".

56. At paragraph 38 the judge considered what was described as the respondent's principal argument, which was that the 1st appellant had managed to escape actual injury therefore it meant he was not at risk. The judge gave reasons for rejecting this central submission at paragraph 38.

57. The judge therefore concluded at paragraph 44 that the evidence taken as a whole supported the core elements of the appellant's account. A point made in the decision letter that information given by the 1st appellant was in the "public domain" was also rejected for the reasons given at paragraph 45.

58. The evidence as to control of the gangs was set out in the appellant's evidence at paragraph 11 of his witness statement stating that lots of areas were disputed areas. This is referred to in the report of Dr Redden at Page 31 where reference is made to territories being disputed and that in some cases borders were clearly defined but in other cases that were contested boundaries were not so clearly defined.

59. Drawing those matters together, paragraph 3 of the grounds does no more than refer to part of the evidence without considering the evidence as a whole and that the FtTJ dealt with the core aspects of the claim. There is no error of law established in relation to paragraph 3 of the grounds.

60. During the last point raised in the written grounds, it is submitted that the FtTJ at paragraph 46 stated that he placed particular significance in his credibility assessment on the fact that the appellants had relocated to the UK. The ground states that it is unclear how the appellant's choice of country had any bearing on whether the appellants had given a credible account of facing crime in El Salvador.

61. The grounds do not set out what error of law the FtTJ made in his decision. Ms Young did not seek to expand on this ground in her oral submissions. Paragraph 46 states "of particular significance in my

assessment of reliability of the appellant's accounts was the undisputed fact that the appellant fled as far as he could from El Salvador and to a non-Hispanic country such as the UK." As far as it appears, the contents of paragraph 46 is factually correct. It may be that paragraph 35 sheds some light on this paragraph. At paragraph 35 the FtTJ considered that the "severity of the fear was borne out by the fact that they sought to escape El Salvador and not to seek asylum or protection in any other Hispanic country but rather to come as far away from El Salvador as the UK this illustrated the degree of fear which they harbour." Based on that paragraph, the inference raised is that the judge considered that for the appellants to leave their home country and travel a significant distance illustrated the degree of fear that they were in. It may also have had a bearing on the acceptance of their evidence that they could not internally relocate (see paragraph 34).

62. In his submissions Mr Greer set out the oral evidence at paragraph 28 of the rule 24 response where the appellant stated he did not feel safe in Latin America and that he thought the UK was safer than Spain. That may shed further light on paragraph 46.

63. In conclusion, it has not been explained on behalf of the respondent what error of law the FtTJ made at paragraph 46. It is for the respondent to clearly explain what error of law has been made by a FtTJ and to do so by reference to the evidence and the materiality of any error. That has not been established in relation to paragraph 4 of the grounds. Furthermore, as Mr Greer submitted, the particular weight attached to the evidence was a matter for the FtTJ.

64. For those reasons, the respondent's grounds of challenge are not made out and the decision made by the FtTJ to allow the first and second appellant's appeals stands.

Permission to appeal application:

65. Now turning to the point raised in the Rule 24 response by Mr Greer. He submits that on behalf of the 1st appellant, he seeks permission to bring a cross-appeal on the question of whether the 1st appellant's case engages a Convention reason. It is said that the 1st appellant has not applied to the FtT for permission to appeal and in the circumstances asks the Upper Tribunal to satisfy the condition contained in Rule 21 (2) (b) of the 2008 Rules to be set aside under Rule 7 (2) (a).

66. The written response refers to the decision in Smith (appealable decisions: PTA requirements: anonymity: Belgium) [2019]UKUT 216. In reliance on that decision it is submitted that there is a good reason why permission should be granted in the case as at the time the FtTJ promulgated its decision it was the respondent's policy to grant those entitled to humanitarian protection 5 years leave to remain. Thus whilst the 1st appellant disagreed with the FtTJ's assessment of his entitlement under the Refugee Convention, he took the pragmatic view that

prolonging proceedings would entitle him to no material benefit. However following the respondent's change of policy announced on 11 May 2022, the position changed. Thus a finding that the 1st appellant would be entitled to succeed under the Convention would entitle him to a material advantage.

67. It is further submitted that should permission to appeal be granted, the 1st appellant would seek to argue the ground of appeal and that at the hearing before the FtTJ detailed submissions were made before the FtTJ that the 1st appellant was entitled to protection under the Refugee Convention and that in particular he formed part of a particular social group or in the alternative his persecutors had a political motive in persecuting him and therefore he faced persecution on account of his imputed political opinion. Beyond stating the conclusion at paragraph 56 at the 1st appellant's claim did not engage the refugee Convention, he failed to conduct any reasoned analysis of the 1st appellant's claim in this regard. Thus the judge failed to resolve a dispute between the parties or provided inadequate reasons to entitle the 1st appellant to understand why he did not succeed on this ground.

68. At the hearing, Mr Greer submitted that he was out of time for permission to apply but that permission should be granted because there was a good reason for the delay, the delay was not of any significance and there was no prejudice to the respondent in granting permission. He submitted that when looking at the interests of justice that was of relevance, the respondent had notice of this appeal in the rule 24 response and that the strongest point in favour of permission to appeal was that the Upper Tribunal had heard a country guidance decision in June on this particular point as to whether individuals targeted in El Salvador would be for a Convention reason. In assessing the 3rd stage in Mitchell and Denton, and the interests of justice, the decision made in the country guidance case would be conclusive of the appeal. He therefore submitted that if permission was granted it should be stayed until the country guidance decision had been promulgated.

69. Ms Young stated whether permission to appeal should be granted was a matter for the tribunal to decide and that she would make no submissions on this procedural issue. However, she submitted that if permission were granted the error of law hearing should be stayed behind the country guidance decision because the key would be whether the error was material. It was accepted that the CG decision would be conclusive of the appeal as Mr Greer had stated.

70. Mr Greer was asked to identify the policy referred to in the rule 24 response. It became clear after the advocates considered the policy that it did not affect appeals issued or heard before 28 June 2022. Thus Mr Greer accepted that the policy change did not affect 1st appellant but nonetheless he submitted that permission to appeal should be granted in the light of the lack of prejudice to the respondent, the relevance of the

grounds and that there had been little delay on the part of the 1st appellant to raise this issue.

71. Before considering the application, it is necessary to make some reference to the FtTJ's decision. The FtTJ set out the position of the respondent at paragraph 16 of his decision noting that the claim to have a well-founded fear of persecution was not based on a Convention reason as it did not engage the Convention as the 1st appellant was not a member of a relevant particular social group ("PSG) and thus protected by the Convention. The FtTJ set out the respondent's concession that if the father was entitled to protection of any kind (humanitarian protection) and the 2nd appellant as a woman within a PSG was entitled to Convention protection in her own right (see paragraphs 9 and 16).

72. At paragraph 37 the FtTJ also set out that counsel on behalf of the 1st appellant provided submissions that his claim fell within a Convention reason but went on to state "this is a matter the subject of a forthcoming case I make no finding on this point, but I note that I need not do so if I find that a right to HP exist in any event and that if it does, the respondent has accepted that the daughter will have a Convention protectable right in her own right."

73. The FtTJ went on to find that the 1st appellant's claim was credible and that he had shown to the lower standard that he was entitled to humanitarian protection (paragraph 48) and having done so was satisfied on the basis of the respondent's concession that the 2nd appellant was entitled to a grant of asylum as it was for a Convention reason.

74. I have set out the written and oral submissions of Mr Greer and I have also set out the position adopted on behalf of the respondent by Ms Young which was that this was a matter for the Tribunal and no submissions were offered in response.

75. However, both parties agreed that this was a permission to appeal application. Both parties agreed that I could deal with it this way. Given that that was the way that both advocates addressed this issue I have therefore decided this as a permission to appeal decision on the basis that the parties invited me to treat it as such. However I would observe that the rule 24 response appears to misread the decision of Smith (as cited) and that if the decision in Smith was applied the cross-appeal could be considered in a rule 24 response rather than via a permission to appeal decision (see paragraph 56 of Smith). Neither the appellant in Smith nor the appellant in this appeal obtained a material benefit; neither could be removed but it was argued that both sought a different basis upon which they could stay in the UK.

76. However that was not the way the parties sought to argue this, and it was agreed that it was a permission to appeal application.

77. The first issue is that the application for permission is out of time. I have applied the 3-stage approach identified in the cases of Denton, Mitchell and Hysaj as follows. The first stage is to identify and assess the seriousness or significance of the failure to comply with the rules. The focus should be on whether the breach has been serious or significant. If a judge concludes that a breach is not serious or significant, then relief will usually be granted and it will usually be unnecessary to spend much time on the second or third stages; but if the judge decides that the breach is serious or significant, then the second and third stages assume greater importance. The second stage is to consider why the failure occurred, that is to say whether there is a good reason for it. It was stated in Mitchell (at para. [41]) that if there is a good reason for the default, the court will be likely to decide that relief should be granted. The important point made in Denton was that if there is a serious or significant breach and no good reason for the breach, this does not mean that the application for relief will automatically fail. It is necessary in every case to move to the third stage. The third stage is to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application.

78. The decision of the FtTJ was promulgated on 11 March 2022. According to the Tribunal Procedure Rules the 1st appellant had 14 days to seek permission to appeal. No application was made for permission to appeal on behalf of the 1st appellant. However permission to appeal was applied for on behalf of the respondent on 23rd of March 2022. Permission was granted on 20 April 2022.

79. The 1st appellant sought permission in the written response sent to the Tribunal on 25 May 2022. There has been significant delay in seeking permission to appeal. As to why there was a delay, Mr Greer submits that a pragmatic approach was taken but that in light of the policy change a different stance was adopted. It is now accepted that the policy change did not affect the 1st appellant. However as set out above, even if there has been a significant delay, it is necessary to move on to the 3rd stage and to evaluate all the circumstances of the case to enable the court to deal justly with the application. It is when considering the 3rd stage that I am satisfied that permission was sought as soon as it was thought the 1st appellant's position was not clear and was sought some weeks after the grant of permission to the respondent. Also, the basis upon which the 1st appellant sought permission was set out in the written response and served on the respondent a number of months and well before the hearing before the Upper Tribunal listed on 30 September 2022. There has been no prejudice to the respondent in the lateness of this application. I also take into account that on the face of the decision, the reason given for not taking into account the submissions made on whether a convention ground existed, solely related to this issue being considered by the UT in due course. It is a arguable error of law not to decide a ground of appeal on such a basis.

80. For those reasons and based on the submissions made by Mr Greer, and applying the decision in Smith, I grant permission to appeal out of time and directly to the 1st appellant as the relevant party who has not complied with the rules applying Rule 7 (2) (a) of the 2008 Procedure Rules to waive any requirement to comply with the Rules.

81. The reasons for granting permission out of time are set out above. The reasons for granting permission on the merits can be stated a follows.

"In light of the written grounds of challenge submitted on behalf of the first appellant, it is arguable that the FtTJ erred in law at paragraph [56] by failing to conduct a reasoned analysis of the 1st appellant's claim that his appeal engaged the Refugee Convention thereby failing to resolve a dispute between the parties and failing to arguably decide a ground of appeal available to the 1st appellant as set out in section 84 (1) of the 2002 Act."

82. Both parties agreed that in the event that permission to appeal out of time was granted to the first appellant, that no decision should be made on the error of law until the decision of the Upper Tribunal in the CG decision had been promulgated as the issue of materiality of any error would be made clear by that decision.

Notice of Decision

83. In relation to the 1st appellant, the respondent's grounds of challenge are dismissed and there is no error of law in the decision of the FtTJ on the grounds advanced on behalf of the respondent. The decision to allow the appeal of the 1st appellant on grounds of humanitarian protection and human rights grounds (articles 2 and 3) shall stand.

84. In relation to the 2nd appellant, the respondent's grounds of challenge are dismissed and there is no error of law in the decision of the FtTJ in relation to her appeal. The decision of the FtTJ to allow the 2nd appellant's appeal on Refugee Convention grounds an human rights grounds (Articles 2 and 3) shall stand.

85. In relation to the 1st appellant's application for permission to appeal out of time, permission to appeal is granted, and shall be stayed behind the CG decision and will be determined on a date to be fixed. For the continuity of the appeal, both advocates shall provide their availability dates to the listing team.

86. For the avoidance of doubt, the only issue that remains outstanding is the 1st appellant's appeal against the FtTJ's decision which relates solely to the issue of Convention Ground.

Signed Upper Tribunal Judge Reeds

Dated 27 October 2022