IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006085
First-tier Tribunal No: PA/51317/2021

THE IMMIGRATION ACTS

Decision and Reasons Issued:

On 25th of January 2024

Before

UPPER TRIBUNAL JUDGE LESLEY SMITH

Between

PD (ZIMBABWE)
[ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr J Greer, Counsel instructed by Duncan Lewis Solicitors
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Heard at Field House on Monday 8 January 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant (PD) is granted anonymity. No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. By a decision issued on 19 September 2023, the Tribunal (myself and Deputy Upper Tribunal Judge Malik) found an error of law in the decision of First-tier Tribunal Judge Devlin promulgated on 21 November 2022, allowing PD's appeal from the Secretary of State's decision to refuse his protection and human right claims. However, we found an error only in relation to one narrow aspect of Judge Devlin's decision and accordingly set aside only one part of it with directions for re-making on one issue. The error of law decision is appended hereto for ease of reference.

2. Before turning to re-make the decision, I confirm what is not in dispute as follows:

   (1) The Appellant is not excluded from the protection of the Refugee Convention by section 72 Nationality, Immigration and Asylum Act 2002. Accordingly, if the Refugee Convention applies to his case, then he is entitled to recognition as a refugee notwithstanding his criminal convictions.
   (2) There is not a sufficiency of protection in Zimbabwe against the risk which the Appellant claims. Accordingly, whether or not the Appellant falls within the ambit of the Refugee Convention, he is entitled not to be removed by reason of Article 3 ECHR, it being accepted that there is a real risk of harm from an individual referred to in these proceedings as JM. I will come to the detail of the risk which is accepted below as it is relevant to the issue which remains. If the Appellant's case falls within the Refugee Convention, then he is entitled to recognition as a refugee on the accepted finding that there would not be effective protection for him on return to Zimbabwe against the risk he faces. Judge Devlin also found that the Appellant could not reasonably be expected to relocate within Zimbabwe to avoid the risk which he claims from JM. The Respondent did not challenge that finding.
   (3) However, the Appellant has not challenged Judge Devlin's findings that the Appellant is not at risk on return as a failed asylum seeker nor on account of any political opinion or imputed political opinion. He would not face any real risk from the Zimbabwean State.
   (4) The Appellant has not challenged Judge Devlin's findings that JM has no involvement in Zimbabwean politics or any connection with the Zimbabwean authorities.
   (5) The Appellant is entitled to humanitarian protection. The Respondent's challenge to Judge Devlin's finding in that regard was abandoned at the previous hearing.
   (6) The Appellant cannot be removed to Zimbabwe on account of a prospective and significant deterioration in his health on return (he is HIV positive). Article 3 ECHR has been found to apply in that regard. He cannot therefore be deported to Zimbabwe also for that reason.

3. The overall impact of the findings of Judge Devlin which are no longer challenged is that the Appellant cannot and will not be deported to

Zimbabwe as a result of this appeal. That is the position whatever the outcome of my consideration of the issue which remains.

4. The only issue which remains is whether the risk which the Appellant claims is on account of a Refugee Convention reason. As it is not disputed that the Appellant cannot claim to be at risk on account of any political opinion, actual or imputed, the only reason which remains is that he is a member of a particular social group ("PSG"). The only issue which I have to determine is whether that reason applies to the facts of his case.

5. Following the directions given in the error of law decision, I had before me a skeleton argument from Mr Greer dated 5 November 2023 and one from Ms Ahmed dated 1 December 2023. Although Mr Greer informed me that his instructing solicitors had sent him a bundle of authorities, that had not reached the Tribunal file. However, the authorities on which the Appellant places reliance and the material relied upon by the Respondent are clearly set out in the skeleton arguments and I have had regard to the case-law when reaching my decision.

IS THE APPELLANT A MEMBER OF A PARTICULAR SOCIAL GROUP?

Legal Context

6. In order to be recognised as a refugee, the Appellant needs to satisfy Article 1(A)(2) of the Refugee Convention which as originally approved reads as follows (so far as relevant):

> "A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who:
>
> …
>
> (2) …owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country …"

7. The Appellant claims to be a member of a PSG being male victims of traffickers or male victims of JM or as it is now put in Mr Greer's skeleton argument, former victims of modern-day slavery. None of the other Convention reasons apply in this case.

8. Article 6 of European Union Directive 2004/83/EC ("the Qualification Directive") defines a PSG as follows:

> "1. In deciding whether a person is a refugee…
>
> …
>
> (d) a group shall be considered to form a particular social group where, for example:
>
> (i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a

> characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
> (ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society."

9. The Respondent relies on the conjunction between (i) and (ii) based on what he says is the clear wording of Article 6. The Appellant says that the two limbs are disjunctive. He relies on (i) as applying to his case based on what he says is a "common background that cannot be changed".

10. The UK did not adopt the re-cast Qualification Directive (Directive 2011/95/EU) (although little turns on that since the wording is essentially the same). As such, the Qualification Directive remained incorporated in UK legislation via The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 ("the QD Regulations"). Paragraph 6(1)(d) of the QD Regulations faithfully reproduces Article 6 of the Qualification Directive as set out above which includes a conjunction between the two sub-paragraphs.

11. That the CJEU considers the requirements of a PSG to be conjunctive is confirmed by the Court in Minister voor Immigratie en Asiel v X and Y [2013] EUECJ C-199/12 ("X and Y") (see [45] of the judgment).

12. The judgment in X and Y is not mentioned in either skeleton argument. I referred Mr Greer to it at the outset of his submissions. However, the Appellant's case is based on this Tribunal's guidance in DH (Particular Social Group: Mental Health) Afghanistan [2020] UKUT 00223 (IAC) ("DH"), the headnote to which indicates that "the Geneva Convention relating to the Status of Refugees 1951 provides greater protection than the minimum standards imposed by a literal interpretation of the Qualification Directive and which therefore directs that "Article 10(d) [of the re-cast Qualification Directive] should be interpreted by replacing the word 'and' between Article 10(d)(i) and (ii) with the word 'or', creating an alternative rather than cumulative test". Mr Greer's response to the judgment in X and Y therefore is that this Tribunal should follow the interpretation of the Refugee Convention as set out in DH, irrespective of the wording of either of the Qualification Directives.

13. The guidance in DH was followed by a different constitution of the Tribunal in EMAP (Gang violence – Convention Reason) El Salvador CG [2022] UKUT 00335 (IAC) ("EMAP"). The decision in that case was based also on actual or imputed political opinion as a Convention reason but at (iv) of the guidance the Tribunal said this:

> "As the law stands at present, so taking the disjunctive approach, those fearing gang violence in El Salvador may be considered to be members of a particular social group where they can demonstrate that they share an innate characteristic, a common background that cannot

> be changed, or a characteristic that is so fundamental to their identity or conscience that they should not be forced to renounce it."

14. The reference there to the law "at present" would appear to be related to the change brought about by the Nationality and Borders Act 2022 ("NABA") which clearly directs that the conjunctive approach is to be taken to the definition of a PSG (sections 33(2) to 33(4)). It is common ground that NABA does not apply to this appeal as the operation of those sub-sections is not retrospective but the Respondent argues that they are instructive as to the approach which applies.

15. The guidance in DH and the Appellant's case relies heavily on the House of Lords' judgment in Secretary of State v K; Fornah v Secretary of State for the Home Department [2006] UKHL 46 ("K and Fornah") (see in particular the extracts set out at [52] of the decision). As the decision also makes clear, by reference to the speeches in K and Fornah, the House of Lords' judgment is based in large part on adoption of the "UNHCR Guidelines on International Protection" dated 7 May 2002 (which are also annexed to the decision in DH) ("the UNHCR Guidelines")

16. The judgment in K and Fornah is also particularly instructive in relation to the causal nexus between the Convention reason claimed and the persecution. This is dealt with in the speech of Lord Bingham (with whom Lords Hope, Rodger, Brown and Baroness Hale agreed) as follows:

> "*The meaning of 'for reasons of'*
> 17.The text of article 1A(2) of the Convention makes plain that a person is entitled to claim recognition as a refugee only where the persecutory treatment of which the claimant has a well-founded fear is causally linked with the Convention ground on which the claimant relies. The ground on which the claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that the ground relied on is an effective reason. The persecutory treatment need not be motivated by enmity, malignity or animus on the part of the persecutor, whose professed or apparent motives may or may not be the real reason for the persecution. What matters is the real reason. In deciding whether the causal link is established, a simple 'but for' test of causation is inappropriate: the Convention calls for a more sophisticated approach, appropriate to the context and taking account of all the facts and circumstances relevant to the particular case.
> 18. I do not understand these propositions to be contentious. They are in my opinion well-attested by authorities such as *Shah and Islam*, above, pp 653-655; *R(Sivakumar) v Secretary of State for the Home Department* [2003] UKHL 14, [2003] 1 WLR 840, paras 41-42; *Sepet v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856, paras 21-23; *Suarez v Secretary of State for the Home Department* [2002] EWCA Civ 722, [2002] 1 WLR 2663, para 29; *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201

> CLR 293, paras 32-33, 67-71; *Minister for Immigration and Multicultural Affairs v Sarrazola* [2001] FCA 263, para 52; and *Thomas v Gonzales* 409 F 3d 1177 (9th Cir, 2005). They are also reflected in the *Michigan Guidelines on Nexus to a Convention Ground*, published following a colloquium in March 2001. Whatever the difficulty of applying it in a particular case, I do not think that the test of causation is problematical in principle."

18. In terms of former victims of trafficking constituting a particular social group, the Appellant relies on the Tribunal's guidance in such cases as HD (Trafficked women) Nigeria CG [2016] UKUT 00454 (IAC) ("HD"), HC & RC (Trafficked women) China CG [2009] UKAIT 00027 ("HC"), TD and AD (Trafficked women) CG [2016] UKUT 00092 (IAC) ("TD and AD") and AZ (Trafficked women) Thailand CG [2010] UKUT 118 (IAC) ("AZ"). I was not taken to any of those cases by either party. The Respondent seeks to distinguish those cases on the basis that they relate to groups who also have a distinct identity within society in their countries of origin.

19. I can deal briefly with those cases as follows. In HD, membership of a particular social group made up of former victims of trafficking was conceded by the Respondent on the basis that "former victims of trafficking are seen as a distinct group within Nigerian society" ([9]). Likewise, in HC, the Respondent conceded that a person in that appellant's position "could be" a member of a PSG.

20. It is worthy of note that the Tribunal in AZ expressly rejected the proposition that the two limbs of the definition of a PSG should be considered disjunctively ([134]). However, it went on to find that young women who were former victims of sexual exploitation did constitute a PSG because, adopting the words of Baroness Hale in R v Special Adjudicator ex parte Hoxha [2005] UKHL 19, "women who have been victims of sexual violence in the past are linked by an immutable characteristic which is at once independent of and the cause of their current ill-treatment".

21. The Tribunal in TD and AD accepted that "Trafficked women from Albania may well be members of a particular social group on that account alone" ((h) of the headnote) but importantly went on to say that "whether they are at risk on account of such membership" would depend on their individual circumstances. It is worth noting however that the Tribunal's guidance in TD and AD in this regard stemmed from the Tribunal's previous guidance in AM and BM (Trafficked women) Albania CG [2010] UKUT 80 ("AM and BM"). The reasons why the Tribunal in AM and BM accepted that former female victims of trafficking in Albania constituted a PSG are to be found at [160] to [166] of the decision and are based squarely on the second limb of the definition, that is to say the societal perception of that group.

22. I did not find those cases of assistance. Either the PSG issue was conceded or was resolved based on societal perception of the group

in their country of origin. Mr Greer expressly conceded that in the Appellant's case, he could not argue on the evidence that former victims of modern-day slavery in Zimbabwe would meet the second limb of the definition. Hence, in order to succeed, he had to rely on the two limbs being disjunctive. Whilst Mr Greer recognised that the decisions in DH and EMAP were not binding, he submitted that they were highly persuasive.

Factual Context

23. The Tribunal did not set aside any of the findings of fact made by Judge Devlin. I was not taken to any of the evidence by Mr Greer or Ms Ahmed and nor did I hear oral evidence from the Appellant. I therefore adopt the unchallenged findings of Judge Devlin when considering the risk which the Appellant claims to face and the reasons he claims that risk exists.

24. Judge Devlin noted at [17] of his decision that the Appellant's case was helpfully set out at [5] to [11] of the skeleton argument before the First-tier Tribunal. I set that out as the starting point for the Judge's consideration of the case (so far as relevant to the issue I have to determine):

> "5. The Appellant is a Zimbabwean national of Shona Ethnicity, born on 15 June 1983, originating from Harare. He arrived in the United Kingdom on 4th February 2002 and applied for leave to enter the United Kingdom as a visitor on arrival. He was granted 8 days leave to enter the United Kingdom as a visitor. He has not left the United Kingdom since his arrival in the United Kingdom on 4th February 2002.
> 6. [JM] gave the Appellant's mother money to facilitate the Appellant's journey to the UK. The Appellant met JM in or around 2004 or 2005. JM approached the client and told him that he owed him a debt for funding the Appellant's trip. This resulted in the Appellant working for [JM] in debt slavery. The Appellant worked for JM by depositing cheques for JM.
> 7. The Appellant was arrested in 2007, along with JM and another man. JM left the United Kingdom and returned to Zimbabwe. On 29 May 2009, the Appellant was convicted of making false representations to make gain for self or another or cause loss to other and sentenced to 2 years imprisonment.
> 8. Following his release from prison in 2010, the Appellant met one of JM's criminal associates who told the Appellant he must continue working for JM until the debt was paid off. The Appellant found someone to cash cheques for them. On 10 March 2017 the Appellant was convicted of conspire/make false representation to make gain for self or another or cause loss to other/ expose other to risk and sentenced to 16 months imprisonment.
> …
> 11. The Appellant made further submissions on 18 August 2020 and 14 April 2020. On 2nd September 2020 the Respondent recognised that the Appellant is a victim of modern-day slavery in respect of his involvement with JM and his associates. The Appellant's asylum and

> human rights claims were refused on 1 March 2021. It is against this decision that this Appeal is brought."

25. As there noted, it is not disputed that the Appellant was a victim of modern-day slavery at the hands of JM whilst in the UK. It is also not in dispute that JM fled from the UK back to Zimbabwe. As noted at [97] of Judge Devlin's decision, the Respondent "accepted that there are conclusive grounds to believe that the [A]ppellant is a potential victim of human trafficking/modern slavery".

26. The Judge went on at [98] to set out the Respondent's reasons for not accepting that the Appellant would be at risk from JM on return to Zimbabwe. One of those reasons was that JM would be unaware of the Appellant's return. Judge Devlin did not accept that to be the case. The Respondent also concluded that JM did not have connections with politics or Zanu-PF. The Judge accepted that to be the position but that is only tangentially relevant to the issue I have to determine (when looking at sufficiency of protection).

27. The third reason given by the Respondent is the relevant one for my purposes namely that it was not clear why JM would seek him out in Zimbabwe. Judge Devlin dealt with the evidence about that issue at [107] to [110] as follows:

> "107. The Respondent's second reason was that 'it [was] not clear why [JM] would seek him out in Zimbabwe [or] why he would feel compelled to work for him'.
>
> 108. This also slightly mis-states the Appellants position. The Appellant did not claim that 'he would *feel* compelled to work for [JM]'. On the contrary, what he said was that '[he could] not return to Zimbabwe as [his] life was at risk there …[from] [JM]' (Statement, paragraph 42). Nevertheless, I accept that there is a real question as to why [JM] should seek the Appellant out in Zimbabwe.
>
> 109. I note that the Appellant claimed that [JM] had fled the United Kingdom at the end of 2007 (Statement, paragraphs 10 and 12) – i.e., around 15 years ago. I also note that he claimed that 'After [his] release [from prison in 2010, he] met one of [JM's] friends who told [him] that [he] had two more things to do and then my debt would be paid off' (*ibid,* paragraph 12). He went on to say that '[he] found someone to cash cheques for them'. The lapse of time, and the fact that the Appellant appears to have done what was asked of him, in order to pay off the debt, might be thought to argue against [JM] having any interest to seek the Appellant out in Zimbabwe.
>
> 110. However, I also note that, in their letter of 14 April 2020 (Stitched bundle, page 1046), the Appellant's representatives stated that '[the Appellant had] instructed [them that he feared] that if he is returned to Zimbabwe [JM] will kill him for providing information to the Police'. It seems to me that that provides a plausible explanation as to why [JM] should seek the Appellant out in Zimbabwe (notwithstanding the considerations adverted to above)."

28. The Judge set out his analysis of the findings in this regard at [126] to [129] of the decision as follows:

> "126. In any event, the Appellant claimed to have been subjected to direct threats of ill-treatment and serious harm, in the relevant sense. Thus, he claimed that (a) 'in 2007 …[JM] threatened to kill [his] family if he did not come back to work for him' (Statement paragraph 10); (b) 'while [he] was on bail [JM] threatened to kill [his] family, if he cooperated with the Police ' (*ibid,* paragraph 11); (c) 'he received messages telling him that he would be killed if [he] returned to Zimbabwe' (paragraph 12); (d) '[JM had] been sending [him] threats through people … [some against his] family back home … [and some against him] stating that if [he] ever comes back to Zimbabwe, [they] will find him' (paragraph 42); and (e) 'The last threat was about 3 years ago when I bumped into someone on a night out and they said 'do you know that [JM] is still looking for you?' (paragraph 42).
> 127. I do not understand the Appellant's account of having been subjected to death threats when he was forced back into modern slavery in 2007; when he was released on bail; or when he was charged, to be challenged. Nor do I see how it could be. I have acknowledged that 15 years have elapsed since [JM] fled the United Kingdom. However, it must be remembered that he is an individual who forced the Appellant into abducted the Appellant [sic] and forced him into modern slavery, not once but twice. He also threatened him and his family. The common sense, rationality, practical experience and general information to be imputed to me as a reasonable Judge are of only very limited use when it comes to making judgements about the likely behaviour of such a person.
> 128. In any event, the Appellant incriminated [JM] in 2010. He did so again, in 2017. In those circumstances, I do not consider there can be said to be anything inherently implausible in his claim that [JM] was looking for him after his release from prison in 2019. On the contrary, when viewed in light of the evidence as a whole, I consider that claim to be credible.
> 129. In all the circumstances, I find that I am satisfied that there is credible evidence from which an inference of future ill-treatment by [JM] may be drawn. There does not seem to me to be any good reason why such a conclusion should not be reached. I have already found that I am satisfied that there is a real risk that [JM] would be able to locate the Appellant in Harare…"

29. In the course of his submissions, I explored with Mr Greer the basis on which it is said that the Appellant is a member of a PSG and at risk for that reason. Mr Greer expressly accepted that the Appellant did not claim that he would be re-trafficked on return to Zimbabwe and therefore did not claim to be at risk from others aside JM. Although he said in his submissions that JM had also been responsible for exploiting others apart from the Appellant whilst in the UK, he did not draw my attention to any evidence in that regard. In any event, I do not consider that to be of relevance when determining whether the Appellant is part of a PSG of former victims of modern-day slavery.

30. In short, therefore, and based on the undisturbed findings made by Judge Devlin, the Appellant's case is squarely that he would be at risk on return to Zimbabwe from JM who continues to seek out the Appellant because the Appellant incriminated JM in relation to the crimes of which the Appellant was convicted which were instigated by JM. It is to be inferred that JM fled back to Zimbabwe to avoid criminal prosecution. His activities in the UK were thereby disrupted by the police interest. As such, Judge Devlin accepted that this would provide motivation for JM to seek out the Appellant on return to Zimbabwe.

Discussion

31. I begin with the Respondent's submission that the changes made by NABA should be taken into account. I appreciate that the issue regarding interpretation of what constitutes a PSG will soon become academic as a result of those changes. However, the changes are not retrospective. Ms Ahmed submitted that I should nonetheless take them into account as reflecting the UK Government's views as to how the PSG test should be interpreted in this regard. Whilst I recognise that the changes made by NABA reflect the views of the UK legislature, that is no different to the views expressed by the CJEU in relation to the Qualification Directive (see [11] above). That does not mean that this is the way in which the Refugee Convention should be interpreted absent the legislative changes which do not have effect in relation to this appeal.

32. However, the guidance given in DH and followed in EMAP is not binding on me. I have to consider whether it is highly persuasive as Mr Greer submitted it is, and whether it applies to the instant case.

33. Ms Ahmed suggested that a different interpretation of the Refugee Convention could be taken depending on the facts. If she meant that literally, I reject that submission. However, obviously the interpretation advocated in DH has to be applied to the facts of the case when determining whether it applies. That is the approach which I have taken.

34. As I have indicated, the approach in DH is based primarily on the House of Lords' judgment in K and Fornah. Although the decision in DH is not binding on me, and the speeches in K and Fornah in relation to the disjunctive approach are strictly obiter, the judgment in K and Fornah in particular is highly persuasive. As I have already pointed out, the extracts from the speeches on which the guidance in DH relies are set out at [52] of the decision in DH. The conclusion of the House of the Lords as to the definition of a PSG is perhaps best summarised at [118] of the judgment in the speech of Lord Brown of Eaton-Under-Heywood who said this:

> "First, I entirely accept the definition of a particular social group contained in paragraph 11 of the UNHCR 2002 Guidelines as set out in

> para 15 of Lord Bingham's speech. The EU Council Directive 2004/83/EC (the Asylum Qualification Directive) and any Regulations brought into force under it will, I conclude, have to be interpreted consistently with this definition."

35. Given the reliance there placed on the UNHCR Guidelines, it is appropriate to take these as my next port of call when considering the guidance in DH. Paragraph 11 of the UNHCR Guidelines reads as follows:

> "The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches:
> *a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."*

36. That paragraph follows an analysis of the approach in various jurisdictions as follows:

> "5. Judicial decisions, regulations, policies, and practices have utilized varying interpretations of what constitutes a social group within the meaning of the 1951 Convention. Two approaches have dominated decision-making in common law jurisdictions.
> 6. The first, the 'protected characteristics' approach (sometimes referred to as an 'immutability' approach), examines whether a group is united by an immutable – characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status). Human rights norms may help to identify characteristics deemed so fundamental to human dignity that one ought not to be compelled to forego them. A decision-maker adopting this approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it. Applying this approach, courts and administrative bodes in a number of jurisdictions have concluded that women, homosexuals, and families, for example, can constitute a particular social group within the meaning of Article 1A(2).
> 7. The second approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large. This has been referred to as the 'social perception' approach. Again, women, families and homosexuals have been recognized under this analysis as particular social groups, depending on the circumstances of the society in which they exist.
> 8. In civil law jurisdictions, the particular social group ground is less well developed. Most decision-makers place more emphasis on

> whether or not a risk of persecution exists than on the standard for defining a particular social group. Nonetheless, both the protected characteristics and the social perception approaches have received mention.
> 9. Analyses under the two approaches may frequently converge. This is so because groups whose members are targeted based on a common immutable or fundamental characteristic are also often perceived as a social group in their societies. But at times the approaches may reach different results. For example, the social perception standard might recognize as social groups associations based on a characteristic that is neither immutable nor fundamental to human dignity – such as perhaps, occupation or social class."

37. That analysis thereafter leads UNHCR to advocate that the "two approaches ought to be reconciled" to avoid "the protection gaps which can result" ([10]). It is then for that reason that UNHCR recommends as it does at [11] of the UNHCR Guidelines that a single standard incorporating both approaches should be adopted.

38. The UNHCR Guidelines are thus in essence the foundation of the disjunctive approach on which the Appellant in this case relies. Having considered the origin of that disjunctive approach which comes not principally from the guidance in DH but from the House of Lords in K and Fornah, itself based on the UNHCR Guidelines, I am persuaded that I should follow the guidance in DH.

39. That though is not the end of the matter as DH was a very different case on its facts. That was a case involving an innate characteristic (mental health problems). Further as [2] of the headnote makes clear, a person suffering mental ill health might well qualify whether a conjunctive or disjunctive approach is adopted. Paragraph [4] of the headnote is also worthy of note:

> "The assessment of whether a person living with disability or mental illness constitutes a member of a PSG is fact specific to be decided at the date of decision or hearing. The key issue is how an individual is viewed in the eyes of a potential persecutor making it possible that those suffering no, or a lesser degree of disability or illness may also qualify as a PSG."
> [my emphasis]

40. Mr Greer drew my attention to [40], [43] and [46] onwards of the decision in DH. I do not consider that [40] and [43] assist as those relate to the facts in DH and in particular the appellant's mental health condition. Paragraphs [46] onwards concern the correct test in relation to membership of a PSG. I have already accepted based on the UNHCR Guidelines (cited at [48] of the decision in DH) that a disjunctive approach applies. In other words, the Appellant can succeed if he falls within either the first or second limb of the definition in Article 6 of the Qualification Directive as set out at [8] above.

41. As I have already indicated, however, the guidance in DH arises in different circumstances. Mental health is an innate characteristic. The Appellant does not rely on possessing such a characteristic. Neither does he say that he could succeed based on a "social perception" approach. It is not suggested that victims of modern-day slavery or former victims of modern-day slavery are perceived differently by society in Zimbabwe. That is different from the position which pertains to female victims in Albania and certain other countries. As I have already concluded at [22] above, that is why the cases relied upon by the Appellant do not assist me.

42. The Appellant relies on having a common background which he says cannot be changed. Before looking at his case in this regard, it is appropriate to return to the UNHCR Guidelines and what is said about this aspect of the definition at [12] and [13] of the UNHCR Guidelines as follows:

> "12. This definition [that is to say that proposed at [11] of the UNHCR Guidelines] includes characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.
> 13. If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart."

43. The UNHCR Guidelines go on to make further points which are relevant to my consideration of this case as follows (so far as relevant):

> "The role of persecution
> 14. As noted above, a particular social group cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of being persecuted. Nonetheless, persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society. To use an example from a widely cited decision, '[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their

persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.

No requirement of cohesiveness

15. It is widely accepted in State practice that an applicant need not show that the members of a particular group know each other or associate with each other as a group. That is, there is no requirement that the group be 'cohesive'. The relevant inquiry is whether there is a common element that group members share….

16. In addition, mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.

Not all members of the group must be at risk of being persecuted

17. An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group. As with the other grounds, it is not necessary to establish that all persons in the political party or ethnic group have been singled out for persecution. Certain members of the group may not be at risk if, for example, they hide their shared characteristic, they are not known to the persecutors, or they cooperate with the persecutor.

Relevance of size

18. The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2)….the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.

19. Cases in a number of jurisdictions have recognized 'women' as a particular social group. This does not mean that all women in the society qualify for refugee status. A claimant must still demonstrate a well-founded fear of being persecuted based on her membership in the particular social group ….

Non-State actors and the causal link ('for reasons of')

20. Cases asserting refugee status based on membership of a particular social group frequently involve claimants who face risks of harm at the hands of non-State actors, and which have involved an analysis of the causal link…Under the Convention a person must have a well-founded fear of being persecuted and that fear of being persecuted must be based on one (or more) of the Convention grounds. There is no requirement that the persecutor be a State actor…

21. Normally, an applicant will allege that the person inflicting or threatening the harm is acting for one of the reasons identified in the Convention….That is, the harm is being visited upon the victim for reasons of a Convention ground.

22. There may also arise situations where a claimant may be unable to show that the harm inflicted or threatened by the non-State actor is related to one of the five grounds. For example, in the situation of domestic abuse, a wife may not always be able to establish that her husband is abusing her based on her membership in a social group… Nonetheless, if the State is unwilling to extend protection based on one of the five grounds, then she may be able to establish a valid claim for

> refugee status: the harm visited upon her by her husband is based on the State's unwillingness to protect her for reasons of a Convention ground.
> 23. This reasoning may be summarized as follows. The causal link may be satisfied: (1) where there is a real risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason."

44. The first question is whether the Appellant can be said to be a member of a PSG based on his historic experiences as a former victim of modern-day slavery.

45. I accept that it might be said that former victims of modern-day slavery constitute a group. However, that does not necessarily mean that they constitute a PSG.

46. I accept that the Appellant as a former victim of modern-day slavery might share a background in common with other such victims but can it really be said that this is a background which cannot be changed? Paragraph [12] of the UNHCR Guidelines does not assist in that regard as it is concerned with "characteristics" and not background. Paragraph [13] is of more assistance but that turns on the "social perception" approach which Mr Greer accepts does not apply here (but which I accept might apply in other contexts and no doubt explains the reasoning in cases where female former victims of trafficking have been accepted to form a PSG). There is a recognition at [6] of the UNHCR Guidelines that a PSG may be recognised based on "a past temporary or voluntary status that is unchangeable because of its historical permanence". However, that still begs the question whether the Appellant's background is something which cannot be changed. After all, the Appellant does not say that he remains a victim of modern-day slavery nor that he is at risk of re-trafficking on return to Zimbabwe as a result of that status.

47. I accept that the Appellant cannot change history. He was a former victim of modern-day slavery and that historical incidence cannot be undone. However, I do not understand the UNHCR Guidelines to suggest that a historical fact which cannot be changed is sufficient. What is required is a historical characteristic or common shared experience which cannot be changed and which therefore gives rise to an ongoing risk of persecution.

48. If the common background is not something which is immutable then, as the UNHCR Guidelines suggest, one looks to the societal perception limb of the PSG definition to ascertain whether the PSG exists. Again, that may well be why other cases finding former victims of trafficking to be a PSG are based on that second limb. Mr

Greer accepted that the Appellant here cannot succeed based on that limb. There is no background evidence to suggest that former victims of modern-day slavery are perceived any differently from any other member of society in Zimbabwe.

49. I asked Mr Greer to explain what is meant by the words "particular social group" and what "particular social" adds to the word "group". He was unable to provide a satisfactory response.

50. Mr Greer first said that the word "social" meant that there must be a group. However, that is circular and in any event not supported by the UNHCR Guidelines which make clear that there is no requirement for cohesiveness nor that the group be any particular size. That latter point would not assist the Appellant in any event as, aside from an unparticularised submission that JM had exploited others during his time in the UK, there is nothing to suggest that there is a group which exists of former victims of modern-day slavery from Zimbabwe or even former victims of modern-day slavery exploited by JM (at least not one identifiable as such).

51. Mr Greer then said that one must look to the motivation of the persecutor. However, that runs contrary to [14] of the UNHCR Guidelines. The group cannot be defined by the persecution although the actions of a persecutor might serve to identify or create a group. However, that is not this Appellant's case. He claims to be at risk from JM not because he was a former victim of modern-day slavery but because JM is seeking revenge (in effect) against the Appellant for providing information about him to the police in the UK.

52. Mr Greer finally submitted that the words "particular social" are otiose. I do not accept that submission. The requirement is not simply that there be a group but that the group be one which is identifiable and one which has some societal context.

53. It is difficult to see how the Appellant can claim to be a member of a PSG. It is not suggested that Zimbabwean society views former victims of modern-day slavery any differently from any other person. It is not suggested that the Appellant is at risk of re-trafficking whether by JM or any other exploiter in Zimbabwe. It is not suggested that any other former victim of modern-day slavery is at risk of further exploitation whether from JM or any other trafficker in Zimbabwe.

54. I have carefully considered what is said in EMAP which might be closer to the facts of this case than DH (see in particular the headnote at (iv)). However, I do not consider that this case assists me. First, the guidance and the decision there is largely predicated on the alternative Convention reason of imputed political opinion. Second, although PSG is considered in the alternative, as is said at [95] of the decision, "for many claimants from El Salvador, either approach will do". Third, as is pointed out at [96] of the decision, "[i]t might be said

that people in El Salvador who believe in law and order, and who consequently oppose the gangs, share a belief so fundamental to their identity or conscience that they should not be forced to renounce it". That is not based on common background as such. Finally, the need for consideration of the disjunctive approach arose from a perceived protection gap in relation to those whose opposition is discreet. However, as is clear from the reasoning which follows, that issue was resolved by the "social perception" approach and not by a reliance on any common background. The reasoning in that case does not avail the Appellant in this case.

55. That brings me on to the final point – causation. It is here that the Appellant's arguments fail, whatever the position in relation to the existence of a PSG. As I have already indicated and as Judge Devlin found, the Appellant is at risk from JM not because he was a victim of modern-day slavery at the hands of JM in the past but because JM is seeking revenge for the Appellant's past actions in providing information about his activities to the police in the UK (see [110] of Judge Devlin's decision cited at [27] above).

56. JM's motivation can be tested by asking whether he is seeking to exploit others who are former victims of trafficking. Although there is said to be some evidence that he exploited other victims in the past, there is no evidence that he is seeking to re-traffic those formerly exploited. The Appellant does not claim to fear being re-trafficked whether by JM or anyone else in Zimbabwe.

57. I accept of course that the Appellant could only provide information to the police because he was exploited by JM. That is how the link arises. However, that does not mean that the Appellant is at risk from JM for a Convention reason. JM is not threatening the Appellant with a view to re-trafficking him. Mr Greer accepted that this was not the Appellant's case.

58. Ultimately, the Appellant's claim is that he is at risk from JM because he, as one individual, provided evidence against JM as another individual. That JM was at that time exploiting the Appellant is irrelevant to the claim save as the reason why the Appellant was in a position to provide information to the police.

59. For those reasons, I do not accept the argument that JM is motivated by the Convention reason of the Appellant being part of a PSG (even if such existed) of former victims of modern-day slavery. The risk arises because JM is seeking retribution for the Appellant's past actions.

60. Nor can it be said that the reason there would be no sufficiency of protection against the risk posed by JM is because of the existence of a Convention reason. The reason that Judge Devlin found there would be no sufficiency of protection is set out at [129] of his decision by

reference to [34] of the Appellant's expert report which is there cited as follows:

> "It is my opinion that there are significant weaknesses in the state's commitment to protect its citizens, in part due to the political manipulation of the police force and in part due to an utter lack of financial resources. There is a real risk that the Appellant will be unable to depend upon the protection of the state on his return should he be victimised by [JM] or any of his associates."

61. That does not point to the reason for the absence of protection having any link to the Appellant's status as a former victim of modern-day slavery. Judge Devlin did not accept that JM had any links to the Zimbabwean state ([106]).

CONCLUSION

62. For the foregoing reasons, I conclude that the Appellant cannot rely on PSG as a Convention reason for the risk he faces on return to Zimbabwe. However, as I have already set out, he cannot be returned to Zimbabwe following the finding that he faces a risk contrary to Article 3 ECHR against which the Zimbabwean authorities cannot or will not protect him. The Appellant's medical claim, founded on Article 3 ECHR, has also succeeded and the conclusion in that regard is also preserved.

NOTICE OF DECISION

The Appellant's appeal is dismissed on Refugee Convention grounds.

The Appellant's appeal is allowed on protection (Article 3 ECHR), humanitarian protection and human rights grounds (Article 3 ECHR)

L K Smith

Judge of Upper Tribunal
Immigration and Asylum Chamber
Date: 24 January 2024

APPENDIX: ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER Case No: UI-2022-006085
First-tier Tribunal No: PA/51317/2021

THE IMMIGRATION ACTS

Decision and Reasons Issued:

……19th September 2023….

Before

UPPER TRIBUNAL JUDGE LESLEY SMITH
DEPUTY UPPER TRIBUNAL JUDGE MALIK KC

Between

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Appellant

and

PD (ZIMBABWE)
(ANONYMITY DIRECTION MADE)

Respondent

Representation

For the Appellant: Ms Arifa Ahmed, Senior Presenting Officer
For the Respondent: Mr Jonathan Greer, Counsel

Heard at Field House on 21 July 2023

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State from the decision of First-tier Tribunal Judge Devlin ("the Judge") promulgated on 21 November 2022. By that decision, the Judge allowed PD's appeal from the Secretary of State's decision to refuse his protection and human right claims.

Factual background

2. PD is a citizen of Zimbabwe and was born on 15 June 1983.

3. PD arrived in the United Kingdom as a visitor on 4 February 2002 and then overstayed. He was encountered on 2 September 2004 and was found to be in possession of cheques and credit cards that did not belong to him. He claimed asylum on 4 September 2004, which was refused by the Secretary of State on 7 October 2004. He was convicted of failing to surrender to custody on 11 August 2005. He was convicted of driving offences on 16 August 2005. He was convicted of failing to surrender to custody again on 21 September 2005. He was convicted of resisting or obstructing a constable on 16 January 2006. He was convicted of an offence as to false representations on 29 May 2009 and was sentenced to 2 years imprisonment.

4. The Secretary of State advised PD of his liability to deportation on 23 June 2009 and a deportation order was signed on 1 October 2009. The Secretary of State refused his associated protection and human rights claim on 29 March 2010 with a right of appeal to the First-tier Tribunal. PD did not exercise that right.

5. PD was convicted of theft on 20 April 2011. He was convicted of battery on 29 January 2015. He was convicted of battery and breach of a conditional discharge on 13 July 2015. He was convicted of failing to comply with the requirements of a community order on 13 July 2016. He was convicted, again, of failing to comply with the requirements of a community order on 4 January 2017. He was convicted of offences as to false representations on 10 March 2017 and was sentenced to 16 months imprisonment. He was convicted of assault occasioning actual bodily harm on 10 January 2019 and was sentenced to 6 months imprisonment.

6. PD was referred as a potential victim of trafficking on 23 May 2019 and received a positive reasonable grounds decision on 7 June 2019. He made fresh protection and human rights claims on 14 April 2020 and 18 August 2020 respectively. The Secretary of State refused that claim on 1 March 2021 and declined to revoke the deportation order, with a fresh right of appeal to the First-tier Tribunal. PD exercised that right on this occasion. PD’s appeal was heard by the Judge on 21 October 2022. There were four issues before the Judge.

7. The first issue was whether PD is excluded from international protection by reference to section 72 of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”). The Judge resolved that issue in PD’s favour and held that he has successfully rebutted the presumption in section 72 of the 2002 Act. The Judge took the view that PD was not a danger to the community in the United Kingdom

8. The second issue was whether PD was a refugee or eligible for a grant of humanitarian protection. The Judge rejected PD’s claim of being at risk on

return to Zimbabwe from the state, ZANU-PF or their supporters. The Judge, however, accepted that PD would be at risk at the hands of an individual who we shall refer to as JM.

9. The third issue was whether PD's removal from the United Kingdom would be incompatible with Article 3 of the ECHR on account of his health. PD contended that his return to Zimbabwe would result in a significant deterioration in his mental health resulting in a high risk of suicide. The Judge rejected that claim. The Judge, however, held that the removal of PD, who is HIV positive, would be incompatible with Article 3 on account of his physical health.

10. The fourth issue was whether PD's removal from the United Kingdom would be incompatible with Article 8 of the ECHR. The Judge took the view that it was neither necessary nor appropriate for him to make any findings in relation to that issue. The Judge held that his findings on the first three issues were sufficient for him to allow the appeal.

11. The Judge, accordingly, allowed PD's appeal in a decision promulgated on 21 November 2022. The Secretary of State was granted permission to appeal from the Judge's decision on 16 December 2022.

Grounds of appeal

12. The Secretary of State has pleaded three grounds of appeal.

13. The first ground is that the Judge erred in law in allowing the appeal on the Refugee Convention grounds. The Judge's finding that PD has successfully rebutted the presumption in section 72 of the 2002 Act is wrong in law. The Judge failed to identify a Convention reason and failed to explain why there is no sufficiency of protection in Zimbabwe.

14. The second ground is that the Judge erred in law in allowing the appeal on the humanitarian protection grounds. The Judge, as pleaded in the first ground, failed to explain why there is no sufficiency of protection in Zimbabwe.

15. The third ground is that the Judge erred in law in allowing the appeal on Article 3 grounds. The Judge failed to have adequate regard to appropriate procedural obligations and erred in his assessment of the evidence.

Submissions

16. We are grateful to Ms Ahmed, who appeared for the Secretary of State, and Mr Greer, who appeared for PD, for their assistance and able submissions.

17. Ms Ahmed relied on her Rule 25 response. She developed the first ground orally and invited us to find that the Judge's decision as to the

Refugee Convention grounds is wrong in law. She abandoned the second ground on the basis that it essentially made the same point as advanced in the first ground. She also developed the third ground orally and invited us to find that the Judge's decision on Article 3 grounds is wrong in law. She submitted that this appeal should be allowed and the Judge's decision be set aside.

18. Mr Greer relied on his Rule 24 response. He resisted each of the Secretary of State's grounds of appeal. His overall submission was that this appeal amounted to a mere disagreement with the Judge's decision and findings. He invited us to dismiss the appeal and uphold the Judge's decision.

Approach of the Upper Tribunal

19. We bear in mind the following well-established principles as to the approach in appeals from the decisions made by the First-tier Tribunal.

20. First, the First-tier Tribunal is a specialist fact-finding tribunal, and the Upper Tribunal should not rush to find an error of law in its decisions simply because it might have reached a different conclusion on the facts or expressed themselves differently, as the appeal is available only on a point of law: see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 [2008] 1 AC 678, at [30].

21. Second, where a relevant point is not expressly mentioned by the First-tier Tribunal, the Upper Tribunal should be slow to infer that it has not been taken into account: see *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49 [2011] 2 All ER 65, at [45].

22. Third, when it comes to the reasons given by the First-tier Tribunal, the Upper Tribunal should exercise judicial restraint and should not assume that the First-tier Tribunal misdirected itself just because not every step in its reasoning is fully set out: see *Jones v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19 [2013] 2 All ER 625, at [25].

23. Fourth, the issues that the First-tier Tribunal is deciding and the basis on which the First-tier Tribunal reaches its decision on those issues may be set out directly or by inference: see *UT (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 1095, at [27].

24. Fifth, judges sitting in the First-tier Tribunal are to be taken to be aware of the relevant authorities and to be seeking to apply them without needing to refer to them specifically, unless it is clear from their language that they have failed to do so: see *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 [2020] 4 WLR 145, at [34].

25. Sixth, it is the nature of the fact-finding exercise that different tribunals, without illegality or irrationality, may reach different conclusions on the same case and the mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law: see *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10 [2017] WLR 1260, at [107].

Discussion

Ground (1): Refugee Convention

(a) Section 72 of the 2002 Act

26. The first limb of this ground concerns section 72 of the 2002 Act. Ms Ahmed submitted that the Judge applied the wrong test. She focused her submissions on paragraph 42 of the Judge's decision where the Judge, among other things, stated:

> "I note that, although the Appellant is presently of low risk to the public, Ms Caffrey is clear that "any prediction of violence risk is based largely on [the Appellant's] current presentation and cannot provide a broad projection for violence over a long period". Moreover, there is little evidence that the factors identified by Ms Caffrey as decreasing the risk of re-offending, actually apply. On the other hand, Ms Caffrey's principal concern is with a recurrence of partner violence. I do not wish to minimise that in any way. However, his previous offending in this regard would not be of sufficient seriousness to trigger the presumption in section 72(2) of the 2002. Nor is there any indication that there is a danger that the Appellant's offending is likely to escalate …"

27. Ms Ahmed submitted that the Judge erred in stating that PD's previous offending would not be of sufficient seriousness to trigger the presumption in section 72 of the 2002 Act. She referred us to *SB (cessation and exclusion) Haiti* [2005] UKIAT 00036, at [81]-[84], and submitted that the Judge failed to appreciate that the starting point is that there is a statutory presumption that PD does constitute a danger to the community, and it is PD who needs to rebut the presumption against him.

28. In our judgement, Ms Ahmed's submissions seek to read one sentence in the Judge's decision in isolation and ignore the context. We must read the Judge's decision as a whole. The Judge, at paragraph 26, quoted section 72 of the 2002 Act, which demonstrates that he was aware of the statutory presumption and the test. The Judge then, at paragraph 27, referred to guidance given by the Court of Appeal in *EN (Serbia) v Secretary of State for the Home Department* [2009] EWCA Civ 630 [2010] 3 WLR 182 and correctly noted that section 72 of the 2002 Act "is to be interpreted as creating rebuttable presumptions in relation to both the seriousness of the crime and in relation to danger to the community". Paragraph 28 of the Judge's decision further shows that he

recognised that the key question was whether there is "rebuttal of the presumption that [PD] was a danger to the community". The Judge carefully scrutinised the expert evidence given by Ms Caffrey as to that question at paragraph 29-40. Ultimately, and with adequate reasons, the Judge accepted the expert evidence. In the end, at paragraph 43, the Judge noted that the decision on this question was not "an easy decision to make" and acknowledged "considerations pointing either way". He looked at everything in the round and concluded that PD "has successfully rebutted the presumption".

29. We find that there was no misdirection in law by the Judge. He directed himself properly and asked himself the correct question. He resolved that question in PD's favour. He referred to the relevant case law on the subject and gave adequate reasons. He was entitled to conclude that PD has successfully rebutted the presumption in section 72 of the 2002 Act. The findings of fact were open to him on the evidence. His conclusion is neither perverse nor irrational.

(b) Convention reason

30. The second limb of this ground entails a complaint about the Judge's failure to identify a Convention reason. Ms Ahmed pointed out that the Judge found that PD was not at risk from the state, ZANU-PF or their supporters. She further pointed out that the Judge found that JM was not involved in politics or connected to the state, and would not be able to utilise the state machinery in order to find PD. She submitted that the risk found by the Judge could not be based on political opinion for the purpose of the Refugee Convention.

31. The Judge, at the outset of his analysis, at paragraph 123, noted that the Secretary of State accepted PD to be a potential victim of human trafficking. Mr Greer referred us to *HD (Trafficked women) Nigeria CG* [2016] UKUT 00454 (IAC) at [9], *HC and RC (Trafficked women) China CG* [2009] UKAIT 00027 at [36], *TD and AD (Trafficked women) CG* [2016] UKUT 00092(IAC) at [119(h)] and *AZ (Trafficked women) Thailand CG* [2010] UKUT 118 (IAC) at [140], and submitted that PD, as a historical victim of trafficking, fell within the a particular social group for the purpose of the Refugee Convention. He submitted that this was not an issue that was identified by the parties before the Judge and, therefore, its resolution was not required.

32. We do not accept this submission. The Judge, as we note above, roundly rejected the claim based on political opinion. If he was allowing the appeal on the Refugee Convention grounds, it was necessary for him to consider and determine whether PD, as a historical victim of trafficking, fell within a particular social group in Zimbabwe. There is no finding by the Judge on this point. The authorities referred to by Mr Greer do not relate to the situation in Zimbabwe and, moreover, they are about trafficked women. We find that the Judge erred in law on this point. There

is no clear and inevitable answer to this point and its resolution will require further evidence and submissions from the parties.

(c) Sufficiency of protection

33. The third limb of this ground is about sufficiency of protection. Ms Ahmed submitted that the Judge failed to give adequate reasons for his finding that there is no sufficiency of protection for PD in Zimbabwe.

34. The answer to this submission is at paragraphs 129, 130 and 138 of the Judge's decision. The Judge, at paragraph 129, quoted the expert evidence given by Dr Cameron as to the satiation in Zimbabwe as follows:

> "It is my opinion that there are significant weaknesses in the state's commitment to protect its citizens, in part due to the political manipulation of the police force and in part due to an utter lack of financial resources. There is a real risk that the Appellant will be unable to depend upon the protection of the state on his return should he be victimised by [JM] or any of his associates."

35. The Judge, at paragraph 130, accepted this evidence and found it to be adequately reasoned and properly sourced. The Judge noted that it was not inconsistent with the country guidance or country background information. The Judge was perfectly entitled to accept this evidence. Ultimately, the Judge, at paragraph 138, found that PD would be at real risk in Zimbabwe "and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country". This was a conclusion open to the Judge on the evidence and is adequately reasoned.

36. Ms Ahmed referred us to paragraphs 82-87 of the Judge's decision. The Judge at those paragraphs expressed concerns as to certain aspects of Dr Cameroon's evidence. In our judgement, there is simply nothing wrong in the Judge accepting Dr Cameroon's evidence on one point and finding it unpersuasive on another point. This, in reality, demonstrates the care with which the Judge has scrutinised Dr Cameroon's evidence. It is not credible that the Judge simply forgot what he had stated at paragraphs 82-87 of his decision when he made his findings as to sufficiency of protection at paragraphs 129, 130 and 138. The Judge's decision, read as a whole, discloses no error of law as to sufficiency of protection.

Ground (2): Humanitarian protection

37. Ms Ahmed, as we note above, abandoned this ground at the hearing. If she had pursued it, we would have rejected it for the reasons set out above.

Ground (3): Article 3

38. The Supreme Court's judgment in *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17 [2020] 2 WLR 1152, adopting *Paposhvili v Belgium* [2016] ECHR 1113 [2017] Imm AR 867, provides that an applicant, in order to succeed on Article 3 ill-health grounds, must provide evidence demonstrating that:

(1) they are seriously ill,

(2) they have provided substantial grounds for believing that there is a real risk
that, if returned to the receiving country,
(i) appropriate treatment would either be absent (i.e., unavailable to anyone) or inaccessible to them in particular; and
(ii) this absence or lack of access to appropriate treatment would expose them either,
(a) to a serious, rapid and irreversible decline in their state of health resulting in intense suffering, or
(b) to a significant (i.e., substantial) reduction in life expectancy.

39. In *AM (Article 3, health cases) Zimbabwe* [2022] UKUT 131 (IAC), at [1] of the judicial head note, the Upper Tribunal noted that, for the purpose of (1) above, the burden of establishing that an applicant is seriously ill is on them. For the purpose of (2) above, it is also for an applicant to adduce evidence capable of demonstrating substantial grounds for believing that there is a real risk of proscribed consequences. The Upper Tribunal, at [3], clarified that, for the purpose of (2)(ii)(a) above, it is insufficient for an applicant to merely establish that their condition will worsen upon removal or that there would be serious and detrimental effects. What is required is intense suffering. Generally speaking, whilst medical experts based in the United Kingdom may be able to assist in this assessment, many cases are likely to turn on the availability of and access to treatment in the receiving state. Such evidence is more likely to be found in reports by reputable organisations, clinicians and country experts with contemporary knowledge or expertise in medical treatment and related country conditions in the receiving state. Clinicians directly involved in providing relevant treatment and services in the country of return and with knowledge of treatment options in the public and private sectors are likely to be particularly helpful. The Upper Tribunal, at [4], added that it is only after the threshold test has been met and thus Article 3 is applicable, that the returning state's obligations summarised in *Savran v Denmark* [2021] ECHR 1025 become of relevance.

40. Ms Ahmed's submissions on this ground concern solely the Judge's conclusion that the initial threshold test was met in this case. She submitted that the Judge failed to make a finding on the availability or accessibility of alternative treatment for PD's condition in Zimbabwe.

41. It is tolerably clear that the Judge directed himself properly. He referred to applicable case law at paragraph 188 and identified the relevant questions. The Judge then, at paragraph 189-201, considered the expert evidence given by Dr Morgan, Dr Chimbetete and Dr Cameroon. He addressed and answered the relevant questions with care at paragraphs 202-215. Looking at all the evidence in the round, at paragraph 216, the Judge found that PD's evidence met the threshold test and, consequently, it was for the Secretary of State to dispel the doubts raised by it. The Judge was entitled to arrive at this conclusion on the evidence. His reasons are adequate and disclose no error of law. The Judge's conclusion is one that was open to him on the evidence.

42. It is true, as Ms Ahmed submitted, that the Secretary of State provided a list of HIV drugs said to be available in Zimbabwe. The Secretary of State, as Mr Greer, who also appeared below, submitted, did not specifically argue that any of these alternative medications would be suitable for PD's treatment. In any event, the Judge, at paragraph 214, after analysing the evidence, found that it "raises serious doubts about the availability of treatment, delays in treatment and the availability of adequate monitoring, pos[t]-pandemic". The Judge considered those concerns in the light of PD being "a late presenter and the need for him to be monitored carefully and clinically managed by a highly specialised HIV unit, particularly if he has co-morbidity of depression". The Judge carefully considered the question as to the availability and accessibility of the treatment in Zimbabwe and resolved it PD's favour. His conclusion that the initial threshold test is met is not vitiated by any legal error.

Conclusion

43. For all these reasons, we uphold the Judge's decision save as to the issue of a Convention reason. On that issue, the Judge has made no findings and thereby erred in law.

44. Having regard to paragraph 7.2 of the Senior President's Practice Statement for the Immigration and Asylum Chamber and the guidance given in *AEB v Secretary of State for the Home Department* [2022] EWCA Civ 1512 [2023] 4 WLR 12 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 46 (IAC), we retain the appeal at the Upper Tribunal for re-making of the decision. The re-making of the decision will involve determination of a narrow issue as to whether PD falls within a particular social group for the purpose of the Refugee Convention.

Directions for the resumed hearing

45. We give the following directions as to the future conduct of this appeal:

(1) The appeal shall be listed for a face-to-face resumed hearing with a time estimate of three hours before Upper Tribunal Judge Lesley Smith on the first available date after two months from the sending of this decision. No interpreter will be booked for the hearing unless requested within 14 days from the sending of this decision.

(2) Within 28 days from the date when this decision is sent, PD shall file and serve a skeleton argument and any evidence addressing the issue of whether he falls within a particular social group for the purpose of the Refugee Convention.

(3) Within 14 days from service of PD's skeleton argument, the Secretary of State shall file and serve a skeleton argument and any evidence addressing that issue.

(4) PD, no less than 7 days before the resumed hearing, shall file and serve a composite authorities bundle.

46. These directions must be followed unless varied, substituted or supplemented by further directions. The parties are reminded that any failure to comply with these directions may result in the making of an adverse order pursuant to the power under Rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Anonymity

47. In our judgement, given that this is a protection claim, having regard to the Presidential Guidance Note No 2 of 2022, *Anonymity Orders and Hearing in Private*, and the Overriding Objective, an anonymity order is justified in the circumstances of this case. We therefore make an order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Accordingly, unless and until a Tribunal or court directs otherwise, PD is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to parties. Failure to comply with this direction could lead to contempt of court proceedings.

Zane Malik KC
Deputy Judge of Upper Tribunal
Immigration and Asylum Chamber
Date: 16 August 2023