Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/11384/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons**
On 25 October 2021 (hybrid)	**Promulgated**
and 22 November 2021 (remotely)	**On 20 December 2021**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

A M
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the appellant: Ms R Moffatt, Counsel, instructed by Duncan Lewis Solicitors
For the respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the re-making of the decision in this case following my previous decision that the First-tier Tribunal had erred in law and that its decision. The error of law decision is appended to this re-making decision and the two should be read together.

2. The appellant is a citizen of Rwanda and of Hutu ethnicity. He arrived in United Kingdom in March 2002 and claimed asylum. This original claim was based on alleged problems the appellant would have faced on return as a result of political matters. The claim was refused, but the appellant was granted 4 years' exceptional leave to remain (it is unclear on what precise basis this was done). Prior to the expiry of that leave, the appellant applied for indefinite leave to remain. Following interviews conducted in 2007 and 2010, the application was refused on 17 October 2011, in part on the basis that, as a result of his alleged involvement in the Rwandan genocide of 1994, the appellant was excluded from the protection of the Refugee Convention by virtue of Article 1F(a). A certificate pursuant to section 55 of the Immigration, Asylum and Nationality Act 2006 was issued to that effect.

3. Specifically, it was alleged that the appellant had been involved in manning a roadblock in Kigali between April and May 1994 and that he was aware that ethnic Tutsis and moderate Hutus were identified at the roadblock and many were taken away to be killed. His denial of the allegations and his assertion that he had in fact provided assistance to civilians was disbelieved. Any suggestion that the appellant had acted under duress was rejected. Ultimately, the respondent concluded that the appellant had committed crimes against humanity. The claimed risk on return due to other political matters was rejected. The respondent concluded that the appellant would not be at risk on return to Rwanda for any reason.

4. The appellant's first appeal was heard by First-tier Tribunal Judge Ford in 2013. He made a number of findings to the effect that the appellant had in fact been involved in the genocide, as alleged by the respondent, and was excluded from the Refugee Convention by virtue of Article 1F(a). These findings were followed by the judge who heard the appellant's second appeal in 2020. Ultimately, he too concluded that the appellant was excluded.

5. Whilst I set aside the judge's decision, the findings on exclusion were expressly preserved. Thus, the scope of the resumed hearing is narrow. The two central questions to be addressed are as follows:

(a) On return to Rwanda, is it reasonably likely that the appellant's involvement in the genocide will be discovered by the authorities or any other relevant persons?

(b) If that involvement were to be discovered, is it reasonably likely that the appellant would be at risk of ill-treatment contrary to Article 3 ECHR at the hands of the authorities or non-state actors against which the authorities could not provide sufficient protection?

6. At the resumed hearing, it was agreed by the parties that Article 8 ECHR should also be considered. In all the circumstances, I deem this to be an appropriate course of action.

7. A final element of the appellant's case is the original asylum claim made by him in 2002 relating to alleged political matters. Ms Moffatt did not concede this aspect of the case, but acknowledged that there was no new evidence in respect of it and that there were significant adverse credibility findings arising from the First-tier Tribunal's 2013 decision.

Procedural issue: adjourned and part-heard hearings

8. The resumed hearing was originally listed on 25 October 2021. The appellant and Ms Moffatt attended in person, whilst Ms Cunha appeared remotely. It transpired that a supplementary bundle including, amongst other items of evidence, an updated country expert report, had not found its way to me. It had already been filed and served, but this was done late in the day. There was insufficient time for me to read and consider this evidence at the hearing itself and I adjourned the case. Before doing so, best use of the hearing was made in order to take the appellant's oral evidence. Thus, the case went part-heard.

9. The second hearing was conducted remotely. There were no technical issues and I was satisfied that representatives were able to present their respective cases without difficulty.

The evidence

10. In re-making the decision in this case, I have had regard to the appellant's main bundle (AB1), indexed and paginated A1-C25, his supplementary bundle (SB2, which I admitted in evidence without opposition from the respondent), indexed and paginated SB1-SB100, the respondent's bundle, and the appellant's oral evidence.

11. The main documentary evidence consisted of two reports from Dr Hazel Cameron, a lecturer at the School of International Relations, University of

St Andrews, dated 1 November 2019 and 21 October 2021, together with country information.

12. As regards the oral evidence, the appellant adopted his 2020 witness statement and was cross-examined at some length by Ms Cunha. He was asked about family members and any ties with Rwanda. He explained that he had not had no contact with his wife and child for a long time. His family had been relatively wealthy, owning residential and commercial property, as well as running a minibus taxi service. A bar which they had run ceased to operate after the genocide in 1994. In addition, "most" of the family's property had been seized. The appellant confirmed he had never been involved in political activities himself. His father had died in 1990 and his mother in 1995. He was supported by his sister in the United Kingdom. She had visited Rwanda in 2017. He confirmed that he had lived in that country after the genocide, but had resided "in fear". He had not lived there since 2002. He has an aunt with a property in a village in the southern province. In re-examination, the appellant stated that the family's properties had been taken and sold by auction after the genocide. He said that he had no deeds for any of the other properties.

The parties' submissions

13. Ms Moffatt relied on her skeleton argument. She submitted that the Rwandan authorities would come to know about the appellant's involvement in the genocide. As an undocumented returnee, he would need to be interviewed by the authorities either in the United Kingdom or at the point of return. He could not lie when questioned. The expert evidence indicated that there was an active interest in genocidaires. The nature of the Rwandan regime meant that there was a "hair trigger" (Ms Moffatt's phrase) approach to those of Hutu ethnicity. The appellant's long absence from the country would arouse suspicions. Once his past came to light, there would be a perception that the appellant was opposed to the government and/or that he would be seen as a "fugitive from justice" (again, Ms Moffatt's phrase). If these links in the chain could be established, there was a real risk that the appellant would be detained and the country information showed that ill-treatment would follow. Whilst there was no free standing medical claim, the appellant's HIV would be relevant when considering the conditions in which he would be detained.

14. In respect of Article 8, it was accepted that the appellant could not satisfy any of the relevant Immigration Rules on the grounds of suitability (specifically, S-LTR.1.8 of Appendix FM). However, the appellant would face prejudice from the general population as a Hutu, would not have a familial or social support network, would find it very difficult to re-integrate, and would face a risk of poverty.

15. Ms Cunha relied on her skeleton argument. There was insufficient evidence to show that the appellant would be prosecuted on return. If the appellant

was of sufficient interest to the authorities they would or could have sought his extradition from the United Kingdom. If the appellant required a temporary travel document, there was no evidence to suggest he would have to disclose his involvement in the genocide. Dr Cameron had not been to Rwanda since 2013 and appeared to have taken the appellant's case at its highest. His sister had returned to that country and had not been targeted. The Article 8 claim would fail because of the weighty public interest arising from the appellant's past.

Findings of fact

16. The majority of the relevant factual findings in this case are those preserved from the First-tier Tribunal's decisions in 2020 and 2013. In essence, the appellant was materially involved in the genocide in 1994.

17. I make the following additional findings of fact. It is quite clear that the appellant has never been politically active, either in Rwanda or United Kingdom. I accept that he is HIV positive, but there is no up-to-date medical evidence to indicate that this represents any significant difficulty to him in this country. In the absence of any reliable evidence to the contrary, I find that the same applies if he were to return to Rwanda. I accept that he is supported by his sister in this country. I find that she did in fact visit Rwanda in 2017 and was not subjected to any difficulties.

18. It is difficult to gain a clear and reliable picture as to what, if any, ties the appellant retains with Rwanda after a long absence from that country. He has been deemed an untruthful witness in respects by two First-tier Tribunal judges and this is not to be ignored when I assess the evidence before me. I found certain aspects of his oral evidence to be vague, although I do bear in mind the historical nature of the events addressed, together with his lengthy period outside of the country. It is also right to say that he has been fairly consistent about certain aspects of his family's background, including their relatively wealthy status before the genocide.

19. Ultimately, I make the following findings. I accept that prior to the genocide in 1994 his family did own several residential properties, a bar, and a minibus taxi. It is plausible, and I accept, that much of the property would have been seized (whether officially or not) following the genocide and once the appellant had fled the country. However, I do not accept that this applies to all of the property. The appellant told Judge Ford in 2013 that after returning to Rwanda with his wife, he ran a bar in the capital, the inference being that this was from 1995 until approximately 2001 (see paragraph 15 of Judge Ford's decision). Before me, he claimed that this evidence was wrong. In all the circumstances, I do not accept this explanation. Firstly, the appellant has been consistently untruthful about a number of matters over the years. Secondly, he has not offered a

reasonable explanation as to why the evidence to judge Ford was "wrong". Thirdly, he has an interest in disassociating himself from any ties in Rwanda. Fourthly, his oral evidence was that "most" property had been seized, not all. Overall, I find that the property from which the bar was run was never seized and it is highly likely that the rights to it remain vested in the appellant and that he would be able to assert those rights on return.

20. I find that the appellant has an aunt residing in the southern province. Little detail has been provided and I do not accept the appellant's simple assertion that she would be unable to help in any way whatsoever. There is nothing to indicate that some sort of support from her (economic or some other practical form) would not be open to the appellant on return.

21. I find that the appellant resided in Rwanda from 1995 until he came to United Kingdom in 2002. As did judge Ford, I find that he did not experience any difficulties from the authorities during this period. Specifically, I find that he was never identified as a genocidaire, either when he was checked coming back into the country in 1995 or at any time thereafter: the appellant has never made a claim to the contrary. He has, however, maintained his claim that he was arrested in late 2001 and accused of involvement with an opposition political party. This aspect of his account was roundly disbelieved by Judge Ford in 2013. There has been no evidence to even remotely suggest that those clear findings should be disturbed and, in light of the well-known Devaseelan principles, I find that this aspect of his claim remains untruthful. Therefore, the appellant's original protection claim has no reliable basis to it. I reiterate that the appellant has no political profile whatsoever as regards any actual activities or suspicions manifested through any actions by the authorities.

Conclusions on Article 3

22. I begin by addressing the general human rights situation in Rwanda. In so doing I have considered the two reports from Dr Cameron, together with the country information to which I have been referred.

23. There has been no meaningful challenge to Dr Cameron's qualifications and suitability to provide expert opinion on the matters with which this appeal is concerned. Ms Cunha did note that Dr Cameron had not actually been to Rwanda since 2013, but this of itself does not in my view materially undermine her evidence. I am satisfied that Cameron is a suitably qualified expert. That does not of course mean that I am bound to accept each and every aspect of her reports.

24. A number of passages in Dr Cameron's reports indicate the existence of significant human rights problems in Rwanda. Multiple references are provided at paragraphs 12 of Ms Moffat's skeleton argument and I do not propose to quote the evidence at any great length here. By way of examples, Dr Cameron asserts that:

(a) security forces regularly arbitrarily arrest and detain people without due process;

(b) there is unfairness in the judicial system;

(c) ill-treatment of detainees is widespread.

25. I note that a number of Dr Cameron's sources, particularly in respect of her 2019 report, are relatively old (although her second report is supported by more up-to-date information). Her opinions on the general human rights situation are however consistent with other sources, including the latest United States State Department human rights report 2021, which contains the following passage in the Executive Summary:

> "Significant human rights issues included: unlawful or arbitrary killings by the government; forced disappearance by the government; torture by the government; harsh and life-threatening conditions in some detention facilities; arbitrary detention; political prisoners or detainees; politically motivated reprisal against individuals located outside the country; arbitrary or unlawful interference with privacy; serious restrictions on free expression, press, and the internet, including threats of violence against journalists, censorship, and website blocking; substantial interference with the rights of peaceful assembly and freedom of association, such as overly restrictive nongovernmental organization laws; and restrictions on political participation."

26. That same report states that life threatening or harsh conditions prevail in many prisons and detention centres. In addition, there have been "numerous reports" that some individuals perceived as opponents to the government have been detained:

> "Some opposition leaders and government critics faced indictment under broadly applied charges of genocide incitement, genocide denial, inciting insurrection or rebellion, or attempting to overthrow the government. Political detainees were generally afforded the same protections, including visitation rights, access to lawyers and doctors, and access to family members, as other detainees. The government did not generally give human rights or humanitarian organizations access to specific political prisoners, but it provided access to prisons more generally for some of these organizations."

27. Taking the evidence as a whole, I accept that there are significant human rights problems in Rwanda and that, in general terms, known or perceived political opponents may be targeted by the security forces.

28. The core issue in this appeal is whether the Rwandan authorities will know or suspect that the appellant is a genocidaire and, if they do, what the consequences of such knowledge or suspicion might be.

29. In respect of the first limb of this issue, Dr Cameron provides evidence about the authorities' intelligence-gathering apparatus, which she describes as "strong" and exists both within and outside of Rwanda. She opines that the security forces use operatives and covert informants. There is some country information which supports the existence of monitoring by the authorities, including overseas. A Freedom House report from February 2021 entitled "Out of Sight, Not Out of Reach; The Global scale and Scope of Transnational Repression" provides examples of the Rwandan authorities intimidating those seen as opponents to the regime in other countries around the world. This has included surveillance, physical and other threats. The report states that:

> "The government usually targets individuals who challenge it to criticism or active resistance, or who question its version of Rwandan history. Authorities take an extremely broad view of what constitutes dissent and seek to exert control over the totality of the diaspora, including through is embassies and official diaspora organisations.
>
> …
>
> Kagame's regime has gained an international reputation for maintaining stability and economic growth, but at least some of the regime's longevity is made possible by persistent suppression of political dissent through surveillance, intimidation, and violence. These tactics are used indiscriminately within Rwanda and are mirrored outside the country."

30. The body of evidence as a whole satisfies me that the Rwandan authorities do indeed operate what appears to be a fairly sophisticated model of intelligence-gathering, both within and outwith its borders. The evidence clearly points towards a targeting of individuals known or perceived to be political dissidents, with that term given a relatively broad meaning.

31. Dr Cameron's opinion that the appellant himself would be at risk on return to Rwanda because he is an individual who participated in the genocide proceeds from the premise that the authorities "will be aware" of the decision that the appellant has been excluded from the Refugee Convention because of his activities in the genocide (AB/B43, SB35). For the following reasons, I do not accept that the premise is well-founded.

32. Firstly, contrary to Dr Cameron's view at SB24, the appellant has never in fact admitted his role in the genocide; his involvement results from the findings of judges who have not accepted his own account. Thus, there is no basis on which it could be said that the appellant has accepted a status as a genocidaire.

33. Secondly, there is no evidence that the appellant has ever spoken to anyone about his case or any of the judicial findings made against him. The decisions of the First-tier Tribunal have never, at least on the evidence before me, been made public and my error of law decision carried an anonymity direction and only uses the appellant's initials. There has been no media interest in the appellant's case. In light of this, there is no

evidential basis to establish, even on the lower standard of proof, that the Rwandan and authorities *already* know about the appellant's involvement in the genocide.

34. Thirdly, I am not prepared to accept that the Rwandan authorities operate such a pervasive intelligence-gathering apparatus in this country as to have been able to track the appellant down and then discover the contents and/or findings made in his appellate proceedings over the course of time.

35. Fourthly, on his own evidence, the appellant has never been involved in any form of political activity in the United Kingdom. Further to what is said in the preceding paragraph, there is no evidential basis on which the Rwandan authorities are reasonably likely to have obtained information as to the appellant's history as result of any activities.

36. Fifthly, the appellant was never identified as a genocidaire whilst residing in Rwanda between 1995 and 2002. There has never been any suggestion that the appellant has been the subject of any legal proceedings in Rwanda, or that there has ever been an extradition request, or other form of communication with the United Kingdom authorities in respect of his status as a genocidaire.

37. The next question is whether it is reasonably likely that the Rwandan authorities would at some point prior to or on return come to know of the appellant's history. Ms Moffatt has submitted that the appellant will need to be re-documented prior to return and will be questioned in this country as part of that process: as he cannot be expected to lie, it follows that his past will come out.

38. I accept as a general proposition that an individual cannot be expected to lie when questioned by the authorities of his/her country. This indeed was the position adopted by the respondent as long ago as 2004: see IK (Returnees – Records – IFA) Turkey CG [2004] UKIAT 00312, at paragraph 85. What is important to examine in any given case is (a) whether the individual would indeed be questioned *and* (b) if they were to be, the nature of such questions.

39. There is no evidence before me to indicate that individuals in the position of the appellant would be interviewed by the Rwandan authorities prior to return. I accept that he would require a temporary travel document, but it does not follow that he would be subject to a face to face interview. Even if he were, there is no evidence to indicate that he would be asked questions relating in any way to the genocide. In this regard, it is important to place the appellant's case in its proper context. Notwithstanding his participation in the genocide and his departure from Rwanda thereafter, he returned to the country and resided there between 1995 and 2002. It is not therefore the case that he fled the country after the genocide and had not returned since. If asked why he last left Rwanda, he could truthfully say that it was not connected to the genocide and it was not connected to any political

activity (bearing in mind that his claim to the contrary has been disbelieved and is therefore deemed to be untrue). If asked about any political affiliations or activities, he can truthfully state that there are none. There are no legal proceedings as regards his part in the genocide. There is no reasonable likelihood of the authorities requiring the appellant to actually provide a copy of the judicial decisions which have been issued in this country.

40. If it is said that the appellant's status as a Hutu and a person who has been away from Rwanda for a significant period of time is, in and of itself, sufficient for the authorities to ask him about the genocide, I do not accept this to be a reasonably likely state of affairs. I accept that Hutus may be viewed with some general suspicion, but the evidence as a whole does not support a contention that every member of that ethnic group will be seen as a potential participant in the genocide and will therefore be asked questions about it at an interview. In this case, the appellant has no political profile whatsoever in the United Kingdom or Rwanda. There is nothing of any substance which would be reasonably likely to excite the interest of the authorities such as to prompt them to ask if he had been involved in the genocide. Ms Moffatt's use of the phrase "hair trigger" in respect of the authorities' attitude towards Hutus is not to be found in the evidence and, with respect, I do not accept that it accurately reflects the true position.

41. As to the reasons why the appellant would need to be documented prior to return, it will be apparent to the authorities that he is a failed asylum-seeker. In my judgment, aside from questions about any political affiliations or activities in the United Kingdom (which the evidence as a whole suggests would be the focus of any enquiry should one take place at all), it is simply not reasonably likely that the authorities would be inclined to interrogate any further.

42. If it is the case that there will be no interview in the United Kingdom, there is no evidence to suggest that all failed asylum-seekers are interviewed at any length at the airport on return to Rwanda. I am not prepared to simply assume that they are. I would accept that basic matters of identity would be double-checked (the initial process would of course have been undertaken when issuing the temporary travel document in the United Kingdom).

43. If it were the case that a more in depth interview was to be conducted on arrival, the considerations discussed in paragraphs 39 and 40, above, apply. In light of these, it is not reasonably likely that the appellant would be asked direct questions about any participation in the genocide and would therefore not be in the position of having to either disclose it or lie.

44. Although certain aspects of Dr Cameron's evidence appears to suggest that the appellant would be at risk on return simply as a Hutu who had been absent from the country for a considerable period of time, that is not the way in which his case has been presented to me. In any event, I do not

accept that any such wide-ranging risk category exists, having regard to the evidence as a whole. If there was indeed a generalised risk, I would certainly expect to see a stronger evidential basis than is apparent in the materials to which I have been referred.

45. Therefore, in light of my primary conclusions there is no real risk to the appellant from the Rwandan authorities. It is not reasonably likely that his involvement in the genocide will come to light, he has no political profile (actual or perceived), and there is no other basis on which a risk of Article 3 ill-treatment could arise.

46. This is a case in which it is appropriate to address the alternative scenario, namely that the appellant's participation in the genocide did in fact come to the authorities' attention through possible questioning prior to return or at the point of return.

47. Dr Cameron's evidence is that this history would result in the appellant been deemed a political opponent and therefore at risk of being detained and ill-treated.

48. I would be prepared to accept that if the appellant was at real risk of being perceived as a political opponent of the regime to the extent that his detention was warranted, he would face a real risk of treatment contrary to Article 3, whether that was at the hands of the security forces or by virtue of the conditions of detention in which he would be kept for a material period of time.

49. However, having regard to the facts of this case and the combination of Dr Cameron's evidence and the country information, I conclude that the appellant has failed to get over the "if" stage of the chain of events set out in the preceding paragraph. This conclusion is based on the following considerations, all of which must be read together.

50. Firstly, as a matter of fact, the appellant has no actual political profile at all. There are no affiliations or activities which the authorities would already be aware of or could uncover. Applying at least a degree of rationality to the regime's efforts to suppress dissent, whilst at the same time recognising its authoritarian nature, it is not reasonably likely that this appellant could be perceived as an individual who was anti-government and/or represented any form of threat to its control.

51. Secondly, the fact that the appellant has been absent from Rwanda for a long period of time does not find support in the evidence as representing a material risk factor, either in isolation or in combination with other considerations.

52. Thirdly, the country information to which I have been referred and aspects of which I have cited previously, does not support a contention that the regime's adverse interest is so all-encompassing as to lead to the detention of an individual such as the appellant. In the absence of any

political affiliations or activities in the United Kingdom, or any from his time in Rwanda, the sole basis on which any adverse interest could be predicated is the appellant's involvement in the genocide. Yet Dr Cameron's reports do not, in my judgment, provide a sufficient evidential base (applying the lower standard of proof) that such participation, in and of itself, would lead to the designation now of being a political opponent whose detention is warranted.

53. Dr Cameron clearly makes the assertion that the appellant would be at risk, but when this is interrogated there is in my view an absence of source materials to back it up. I fully appreciate that an expert is entitled to provide their own opinion based on source materials as well as their overall experience. However, in respect of the latter I consider what she says in the context of the evidence as a whole. An assertion that *any* participant in the genocide would, *for that reason alone* (there being no prior or subsequent political affiliations or activities or any other material factors), be at risk on return is a significant position to adopt and, in my judgment, one requiring a sufficiently sound evidential basis, subject to the lower standard of proof. I cannot find such a basis in Dr Cameron's two reports. With respect to the author, I do not regard her underlying assertion as to risk, if it is based solely on her own opinion, as being sufficiently explained.

54. Looking at the country evidence, I have looked carefully for connections between the genocide and any current risk of being detained. There are very few. As quoted previously, the 2021 United States State Department human rights report includes the following passage:

> "Some opposition leaders and government critics faced indictment under broadly applied charges of genocide incitement, genocide denial, inciting insurrection or rebellion, or attempting to overthrow the government."

55. The appellant is clearly not an opposition leader or government critic. He is not a "fugitive from justice" (a term used by Ms Moffatt in her skeleton argument) and there is no real risk of any legal proceedings been initiated against him on return which would point towards detention and ill-treatment. The evidence relating to the regime's surveillance of citizens abroad makes no reference to non-politically active individuals who might have participated in the genocide but have done nothing subsequently to suggest anti-government views or in any way to have undermined the version of history propagated by the regime.

56. Fourthly, there are other considerations in this case. The appellant re-entered Rwanda after the genocide in 1995 and resided there without difficulties for approximately seven years. He was never deemed to be of adverse interest for any reason during this time. Whilst in no way decisive, it is relevant that notwithstanding his role, his ethnicity, and the fact that he resided in Rwanda for a relatively short period of time after President Kagame took office in 2000, there were no problems.

57. The other relevant consideration is the fact that the appellant's sister visited Rwanda in 2017 and did not experience any difficulties. It is self-evident that she was not in precisely the same position as the appellant. Having said that, it is equally clear that she was a close family member. Country evidence shows that family members of those deemed to be political opponents are intimidated and harassed: SB95. That the appellant sister experienced no difficulties is indicative, at least to an extent, of the absence of any adverse interest in the appellant. It also demonstrates that there is no generalised risk to Hutus.

58. In summary, I conclude that even if the appellant's participation in the genocide came to light, there is no real risk that he would be of sufficient interest to the authorities such as to lead to detention and ill-treatment.

59. The final issue as regards the Article 3 claim is any risk to the appellant from non-state actors as a result of his participation in the genocide, against which the authorities would be unable or unwilling to provide sufficient protection.

60. In her 2021 report, Dr Cameron provides evidence on the issue of societal attitudes and their consequences. Having explained why she believes that the appellant's history would come out once questions from the local community were asked of him, Dr Cameron concludes at paragraphs 80 and 81 that:

> "80. Revenge attacks and killings of Hutu's suspected of being involved in the genocide by non-State actors was an issue in the first two decades post-genocide, but due to stringent policing, it has over the past 8 years become all but non-existent.
>
> 81. It is my opinion that current country conditions dictate that the Appellant will not be at risk of harm from non-state actors seeking retribution for his role in the genocide on his return to Rwanda."

61. There is no other evidence which contradicts the clear views of Dr Cameron. In all the circumstances, I conclude that there is no risk from non-state actors.

62. Paragraph 82 of Dr Cameron's report provides the opinion that people within the community "may" report the appellant to the authorities if/when they come to know about his participation in the genocide. For the reasons stated previously, I have concluded that there is no risk from the authorities even if they did come to know about his history. Therefore, any reporting by a community in which the appellant was to settle would not lead to a real risk from the authorities.

63. There is then no real risk to the appellant on any basis. The question of internal relocation does not arise.

64. The appellant's appeal is dismissed on Article 3 grounds.

Conclusions on Article 8

65. I am willing to accept that the appellant has established a private life in the United Kingdom, although the actual evidence relating to this is thin. I do not accept that there is any family life in the United Kingdom. The fact that the appellant is supported by his sister because he is unable to work due to his immigration status is not sufficient in light of the well-known caselaw. I note that family life has not in fact been pursued by Ms Moffatt.

66. Any removal as a consequence of the refusal of the human rights claim would constitute an interference with that private life. The respondent's decision was clearly in accordance with the law and it pursues the legitimate aim of maintaining effective immigration control.

67. As regards proportionality, Ms Moffatt quite properly accepted that the appellant could not meet any of the requirements of the Immigration Rules for the primary reason that he fails the suitability requirements by virtue of his exclusion from the Refugee Convention: see paragraph 276ADE(1)(i) of the Rules and S-LTR.1.1 and 1.8 of Appendix FM to the Rules. I therefore go on to conduct a general proportionality balancing exercise, with specific reference to section 117B of the Nationality, Immigration and Asylum Act 2002, as amended.

68. The maintenance of effective immigration control is in the public interest. The appellant has been the United Kingdom for a lengthy period, but the great majority of his residence in this country has been unlawful, with only 4 years of precarious lawful status. There are no strong or compelling features of the appellant's private life such as to justify anything more than "little weight" being attributed to the private life.

69. The fact that the appellant cannot satisfy any of the Immigration Rules is a relevant consideration. The primary reason why he cannot do so is of particular importance in this case. The appellant is a genocidaire and has been excluded from the Refugee Convention. That is, on any view, a significantly adverse matter. In my judgment, the public interest in maintaining effective immigration control applies with even greater strength to an individual who not only has no lawful status in this country, but also committed crimes against humanity in the past. The opprobrium attached to this latter status is reflected in the suitability requirements under Appendix FM and I give significant weight to this consideration.

70. The appellant has received treatment for HIV whilst in the United Kingdom. There is no evidence to indicate that this has been funded on a private basis. He must therefore have had recourse to public funds through the NHS. This counts against him in the balancing exercise. Even if it did not, the public funds issue would be of neutral value.

71. I have had regard to the points made in evidence referred to in paragraph 22 of Ms Moffatt's skeleton argument, together with her oral submissions on the position in which the appellant might find himself on return to Rwanda in so far as Article 8 is concerned. I accept that there is prejudice against Hutus, but I do not accept that there is any official discrimination such that he would be unable to re-integrate into Rwandan society and establish a reasonable private life within a reasonable period of time. The appellant was not, on the evidence before me, subjected to "institutionalised racism" during the period 1995 to 2002. The evidence does not demonstrate systematic denial of access to basic needs. Rwanda is a poor country and of course the appellant has been away for a long period of time. Dr Cameron notes that there have been "substantial improvements in living standards" and a "significant improvement in access to services and human development indicators." The appellant has at least one relative still living in rural Rwanda and I have found that he probably has access to a property (the bar), or at least could enforce his right to it (I make it clear that my overall conclusion on proportionality would not be affected even if there was no property). There is no evidence to suggest that the appellant is unable to work. He is supported in this country by his sister and there is no evidence to show that she would not be willing and able to provide at least some support were he to return to Rwanda. In all the circumstances, I do not accept that he would be faced with "violence, discrimination and social and economic disenfranchisement", as asserted in Ms Moffatt's skeleton argument. I have no doubt that life would be difficult, but that does not provide a significant consideration in the appellant's favour.

72. In the appellant's favour, I accept that there was a significant delay in the processing of his application for further leave to remain between 2006 and 2011 and then again between 2015 and 2019 in respect of his further representations. There is no specific evidence from respondent as to the cause of these delays. I do note that in respect of the second period of delay the appellant had already had an appeal dismissed and had been found to be excluded from the Refugee Convention. In any event, the combined effect of these delays does go to reduce the public interest in this case to an extent.

73. The appellant has also resided in this country for a long period of time. Much of this has been due to the delay in processing his claims, as described above.

74. The appellant's health has not played a meaningful role in his appeal. There is no evidential suggestion that his condition would either prevent him working or would result in any significant obstacle to the re-establishment of a life in the wonder such as to constitute a significant factor in his favour.

75. I regard the appellant's ability to speak English as a neutral factor.

76. Having weighed up all the considerations set out above, I conclude that the factors in the appellant's favour, in particular the delays, do not, by some margin, outweigh the very considerable factors resting in the respondent's side of the balance. The public interest arising in this case is particularly strong and the appellant's private life discloses no exceptional or compelling features.

77. In all the circumstances, the respondent's refusal of the Article 8 claim was and remains proportionate.

Conclusions on the Refugee Convention

78. In light of the preserved findings in this case, the appellant is excluded from the Refugee Convention by virtue of Article 1F(a). Therefore, his appeal must fail in so far as this aspect of his case is concerned.

Conclusions on humanitarian protection

79. The appellant is also excluded from humanitarian protection, pursuant to paragraph 339D(i) of the Immigration Rules and his appeal is dismissed on this basis as well.

Anonymity

80. An anonymity direction has been in place throughout these proceedings. It does not automatically follow that this state of affairs should continue. The public interest in open justice is strong and I have carefully considered whether anonymity is still required. There is clearly a public interest in knowing the identity of individual who participated in the rebound and genocide.

81. As this case involves a claim for international protection and an aspect of that claim concerns whether the Rwandan authorities have would be able to identify the appellant, it is appropriate to maintain the anonymity direction notwithstanding the fact that this appeal is being dismissed.

Notice of Decision

82. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.

83. I re-make the decision by dismissing the appeal on all grounds.

Signed: H Norton-Taylor Date: 6 December 2021

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed: H Norton-Taylor Date: 6 December 2021
Upper Tribunal Judge Norton-Taylor

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11384/2019 (V)

THE IMMIGRATION ACTS

Heard remotely from Field House **Decision & Reasons Promulgated**

On 27 May 2021

.....

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

A M
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the appellant: Ms R Moffatt, Counsel, instructed by Duncan Lewis & Co
For the respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Kemp, MBE ("the judge"), promulgated on 13 May 2020. By that decision, the judge dismissed the appellant's appeal against the respondent's decision,

dated 7 November 2019, refusing his protection human rights claims. The claims were made by way of further submissions, dated 2 December 2015, following a previous unsuccessful appeal to the First-tier Tribunal which was dismissed by a decision of Judge Ford, promulgated on 22 May 2013, and subsequently upheld by the Upper Tribunal by a decision promulgated on 6 November 2013 (AA/12200/2011).

2. The appellant, a citizen of Rwanda, is of Hutu ethnicity. He arrived in United Kingdom in March 2002 and claimed asylum. This original claim appears to have been based on alleged problems the appellant would have faced on return as a result of political matters. The claim was refused, but the appellant was granted 4 years' exceptional leave to remain (it is unclear on what precise basis this was done). Prior to the expiry of that leave, the appellant applied for indefinite leave to remain. Following interviews conducted in 2007 and 2010, the application was refused on 17 October 2011, in part on the basis that, as a result of his alleged involvement in the Rwandan genocide of 1994, the appellant was excluded from the protection of the Refugee Convention by virtue of Article 1F(a). A certificate pursuant to section 55 of the Immigration, Asylum and Nationality Act 2006 was issued to that effect.

3. Specifically, it was alleged that the appellant had been involved in manning a roadblock in Kigali between April and May 1994. It was further alleged that the appellant was at least aware that ethnic Tutsis and moderate Hutus were identified at the roadblock and many were taken away and killed. The appellant's denial of the allegations and his assertion that he had in fact provided assistance to civilians was disbelieved. Any suggestion that the appellant had acted under duress was rejected. Ultimately, the respondent concluded that the appellant had committed crimes against humanity. The claim of a risk on return due to other political matters was rejected. The respondent concluded that the appellant would not be at risk on return to Rwanda for any reason.

The decision of Judge Ford

4. In a thorough decision, Judge Ford set out in detail the evidence before her. Importantly, this included the 2007 and 2010 interviews. When setting out her findings of fact, Judge Ford noted the material inconsistencies between those two sources of evidence: in the first, the appellant had appeared to accept saw people being taken away from the roadblock to be killed; in the second, he had sought to deny this, asserting that no one had been killed at the roadblock he had attended (see paragraph 102 of the decision).

5. Judge Ford rejected the appellant's protestations of non-involvement in, or unawareness of, killings. The core findings of fact can be summarised as follows:

a) The appellant had manned a checkpoint in Kigali for a period of five weeks between April and May 1994. The appellant had not been forced to undertake this task, nor had he been threatened with death if he refused (paragraphs 96 and 100);

b) The appellant was "very well aware" that the roadblock was being used to identify Tutsis and moderate Hutus and that the consequences of identification led, in many cases, to individuals being taken off and killed (paragraphs 105 and 116);

c) The appellant was never personally involved in the killings, but was concerned with the identification of Tutsis and moderate Hutus "in the knowledge that they were at serious risk of being injured or killed as a result." He knew that the Tutsi population was been subjected to genocide by the Interhamwe (paragraph 105, 106, and 116);

d) The appellant's assertion that a number of the inconsistencies in his evidence had been caused by interpretation was rejected (paragraph 107);

e) The appellant had not transported injured individuals to hospital (paragraph 108 and 109);

f) The appellant had driven members of the Interahamwe on "looting expeditions" (paragraph 118);

g) On the basis of the appellant was unable to rely on the defences of duress or superior command (paragraphs 124 and 125).

6. Judge Ford concluded that the respondent had made out her case on exclusion. She went on to reject the claim put forward by the appellant in relation to the political matters which had formed the central plank of the original asylum claim (paragraphs 129-137).

7. Bringing all of his findings together, Judge Ford concluded that the appellant was not at risk on return to Rwanda on any basis. In particular, the appellant was not at risk of being identified as an individual who had manned a roadblock during the genocide and therefore being placed at risk of ill-treatment (paragraph 139).

8. Judge Ford's decision was upheld by the Upper Tribunal in all material respects (see in particular, paragraphs 25 and 26 of its decision).

The appellant's further submissions of 2015

9. The further submissions relied on an expert report from Dr Hazel Cameron and other materials. The central thrust of the submissions was that, in light of the new evidence, Judge Ford's findings were rendered unsafe, that the appellant should not be excluded from the protection of the Refugee Convention, and that he would be at risk on return by virtue of the political matters previously relied on, specifically that he would be regarded as a political opponent of the government.

The decision of the First-tier Tribunal now under appeal

10. At [9], the judge correctly directed herself to authorities relevant to exclusion under Article 1F of the Refugee Convention (these included JS (Sri Lanka) [2010] UKSC 15; [2011] 1 AC 184 and Al-Sirri [2009] EWCA Civ 222; [2009] Imm AR 624). At [10] she listed the sources of evidence considered when reaching her decision. That list expressly includes the appellant's most recent witness statement, dated 6 March 2020, and the 2007 and 2010 interviews. Recognition that the appellant gave oral evidence and adopted the 2020 witness statement is provided at [15].

11. The judge correctly identified credibility and the impact of Dr Cameron's report thereon as being "the crux" of the appeal before her ([20]). She directed herself, again correctly, that inconsistencies were not fatal to a claim: the ultimate question was whether that claim was believable or not.

12. At [21]-[23], the judge turned to the decision of Judge Ford, this being the "starting point" for her consideration of relevant factual matters relating to the issue of exclusion (following the well-known Devaseelan principles). Those findings are summarised consistently with what is set out in paragraph 5, above.

13. At [25], the judge summarised the appellant's case as it then stood, namely a denial that he had manned a checkpoint connected to the killings of civilians, or alternatively that the defence of duress was applicable. In the next paragraph, the judge makes reference to Dr Cameron's report, which the appellant relied on in support of his assertions as to past events. References to Dr Cameron's evidence are stated at several in the decision thereafter, including [27]-[30], [33], [36]-[37], and [40]. The central thrust of Dr Cameron's evidence, namely that material aspects of the appellant's claim were plausible, was acknowledged. The judge went on to state that, "… plausibility does not always equal credibility" and "with this in mind I have therefore considered the appellant's evidence, as considered by Immigration Judge Ford, in light of the new country expert evidence."

14. At [29], and based on Dr Cameron's evidence, the judge made a finding in the appellant's favour and contrary to what Judge Ford had said in relation

to who told him (the appellant) to man the roadblock. It was accepted that the original came from the President, although that would have been implemented by others at a local level. In the following three paragraphs, the judge assesses the appellant's evidence (including Dr Cameron's report) in the context of Judge Ford's previous findings. Having done so, at [33] and [34], the judge concluded as follows:

> "33. Therefore, even in light of the expert report now provided, I find that the findings of Immigration Judge Ford still stand as a valid and that I am satisfied that whilst working on this roadblock the appellant identified Tutsis and moderate Hutus, and that he did so with the knowledge that the identification would be used to separate those individuals and taken (*sic*) them elsewhere to be killed and that he did so in the knowledge that the killings were because of their ethnicity and/or their perceived opposition to the authorities. I find it wholly incredulous that the appellant did not know the extent of the genocide until much later. I also find that the appellant was involved in looting as he initially claimed, and that he has then later attempted to distance himself from this behaviour by retracting his alleged involvement in the hope that this minimised his perceived involvement with the genocide.
>
> 34. Consequently, in light of the above findings, I am in agreement with Immigration Judge Ford that there are serious reasons to consider that the appellant aided and abetted the commission of crimes against humanity during the genocide, that the *actus reus* and *mens re*a are therefore met, that the burden of proof is discharged by the respondent to the requisite standard, and that the previous finding that Article 1F(a) is satisfied still stands as valid."

15. The judge then went on to consider the defence of duress, again in the context of the evidence from the appellant and Dr Cameron. Having summarised Judge Ford's findings on this issue and Dr Cameron's evidence, at [38], the judge found as follows:

> "38. With the defence of duress the question is whether or not there *was* a threat of imminent death or of continuing serious harm; on the evidence before me I am not satisfied that any such threat was made or directed against the appellant. The appellant came from a wealthy, established and I find that he was part of the group activity of looting etc. by way of choice because it was the path of least resistance and not due to any specific threat of death or serious harm levied against him. Further, I do not find that working on the roadblocks to identify Tutsis for their elimination can be said to be a necessary or reasonable act to avoid any perceived threat, nor do I find that the appellant being involved in such activity was done so as to avoid a greater harm than the one being caused; the death of many Tutsis in horrific circumstances cannot be said to be of lesser harm than the appellant's possible but not certain death. Therefore, I find that the five requirements of the defence of duress are not satisfied and consequently the appellant cannot rely upon this defence in order to mitigate his actions."

16. The final relevant aspect of the judge's decision is set out at [39]-[46] and relates to the claim that the appellant would have been at risk of death or

ill-treatment contrary to Articles 2 and 3 ECHR if returned to Rwanda on the basis that his history of participation in the genocide (as it was found to be by the judge and Judge Ford, albeit denied by the appellant himself) would be detected by the authorities, with serious consequences. This argument was rejected by the judge, largely on the basis of evidence from the Global Campaign for Rwandans' Human Rights ("GCRHR"). The judge concluded that any findings made by a tribunal in the United Kingdom would be irrelevant to the views of the authorities in Rwanda: the latter would not view the appellant with significant hostility. The judge also took account of the fact that the appellant had lived in Rwanda for some time after the genocide and had not experienced difficulties.

17. Article 8 is then considered, but found not to have assisted the appellant.

18. The appellant's appeal was accordingly dismissed on all grounds.

The grounds of appeal and grant of permission

19. The grounds of appeal can be summarised in the following terms:

(1) The judge failed to address, or provide reasons in respect of, a core factual dispute, namely the appellant's denial of relevant participation in the genocide;

(2) The judge failed to make findings on plausibility, by reference to Dr Cameron's report;

(3) The judge failed to adequately assess risk on return if the appellant had participated in the genocide and this history came to light;

(4) The judge erred in his consideration of the defence of duress;

(5) The judge erred in his consideration of Article 8, albeit this ground was dependent on the success of others.

20. Permission to appeal was granted by Upper Tribunal Judge Perkins on 17 February 2021.

The hearing

21. The hearing was conducted remotely and there were no technical difficulties.

22. Ms Moffatt relied on the grounds of appeal and made additional oral submissions on each in turn.

23. On ground 1, she highlighted the conflict between the appellant's answers in his 2007 interview and those provided in the 2010 interview: the latter sought to clarify the former and included denials of any involvement, direct or otherwise, in the killings of civilians during the genocide. She emphasised the judge's favourable finding at [29] and submitted that because of this, all credibility findings were "up for grabs". The judge was not entitled to "cherry pick" particular findings made by Judge Ford.

24. On ground 2, the judge had not adequately considered the expert evidence as regards the plausibility of the appellant's case.

25. Ms Moffatt confirmed that ground 3 essentially depended on the premise that the appellant had done what the judge found him to have done as regards participation in the genocide. Dr Cameron had specifically addressed the issue of risk on return in such a scenario, but the judge had failed to consider the evidence. Further, the GCRHR evidence concerned a different factual scenario from that which would face the appellant on return.

26. Ground 4, relating to duress, was said to depend on the success of grounds 1 and 2. Ground 1 affected the third necessary criterion for the defence of duress, and the fourth and fifth criteria had been wrongly considered by the judge, particularly in light of the challenge under ground 2.

27. Ms Moffatt confirmed that ground 5 depended on the success of the other four.

28. I raised the question of whether, even if the judge had erred as claimed, the appellant's underlying protection claim, as originally put, had any merit to it. Ms Moffatt's response was that it had effectively been rejected because of other adverse credibility findings relating to the exclusion issue. If the appeal to the Upper Tribunal succeeded, that aspect of the appellant's protection claim would have to be looked at again.

29. Ms Cunha began her submissions by accepting that the judge had materially erred in respect of ground 3, namely a failure to consider the question of risk on return in light of Dr Cameron's evidence. However, Ms Cunha opposed the appellant's appeal in all other respects.

30. At the end of the hearing I reserved my decision.

Conclusions on error of law

31. I propose to address the grounds of appeal and my conclusions thereon in order.

Ground 1

32. In respect of ground 1, I conclude that the judge did not materially err in law. He was clearly right to have directed himself that the findings of Judge Ford represented the "starting point" for his own assessment.

33. In my judgment it is abundantly clear that the judge correctly identified the potential significance of Dr Cameron's evidence, it being both new and from a suitably qualified expert.

34. The judge was correct to have stated that "plausibility does not always equal credibility." Such a self-direction was, in my view, uncontroversial. At the start of the very next paragraph, the judge then began to bring together the two central threads in the appeal, namely previous findings of Judge Ford and Dr Cameron's report. That is precisely what the judge should have done.

35. On analysis, it cannot be said that the judge somehow failed to recognise the factual dispute arising from the 2007 and 2010 interviews: everything stated by the judge at [20]-[33] points in precisely the opposite direction. The judge did not treat the factual issue as being "uncontroversial", but gave it careful consideration in light of the previous findings and the new evidence. As set out earlier in my decision, Judge Ford specifically considered the 2007 and 2010 interviews, including the important inconsistency relating to the appellant's involvement at the roadblock. Reading her decision sensibly and in its proper context, the failure of the judge to have expressly mentioned the 2010 interview does not indicate that he was either unaware of it, had not had it in mind, or was not conscious of the fact that Judge Ford had considered it as part of his fact-finding exercise in 2013.

36. In addition, I reject Ms Moffatt's submission that the judge had somehow "cherry-picked" findings made by Judge Ford, or had failed to treat all credibility issues as "up for grabs." If the latter phrase was intended to mean that Judge Ford's findings simply fell away because the judge found in the appellant's favour on the question of who originally gave instruction to man the roadblock, then that is misconceived. The judge was entitled to consider Judge Ford's findings in light of the new evidence and to then conclude that the new evidence justified departing from one aspect of those findings. It did not follow that the rest of the previous findings should necessarily be departed from: all depended on the assessment of the evidence as a whole. In this regard, I am satisfied that the judge adequately considered Dr Cameron's evidence (and indeed the appellant's own more recent evidence, as listed at [10]) and was entitled to conclude that the core findings of Judge Ford remained "valid", or, to put it another way, undisturbed. That conclusion, clearly stated at [33], was sustainable. Reliance on the previous findings as a whole was also sufficient to support the judge's conclusion that the respondent had shown that the appellant was excluded from the protection of the Refugee Convention by virtue of Article 1F(a).

Ground 2

37. I conclude that there is no error of law here.

38. This aspect of the appellant's challenge concerns plausibility and the consideration of Dr Cameron's evidence. It will be clear from my decision thus far that the judge did have the expert report at the front of his mind when assessing overall credibility (which included the element of plausibility, but was not confined thereto). He was acutely aware that Dr Cameron had stated that material aspects of the appellant's case were plausible. I cannot see that the judge has failed to consider the appellant's case in the context of plausibility in general and Dr Cameron's evidence in particular, all of which of course had to be set in the context of Judge Ford's previous findings. On the contrary, the judge conducted a rounded assessment. With respect, ground 2 is in truth a simple disagreement with the judge's findings.

Ground 3

39. In my judgment, Ms Cunha was right to have conceded that the judge materially erred in respect of the risk on return issue. On the premise that the appellant had been involved in the genocide (as found by the judge and Judge Ford), the factual position that he (the appellant) would have found himself in on return to Rwanda was not the same as that considered by the GCRHR evidence. By contrast, Dr Cameron had specifically addressed what appears to be the accurate factual position on which the issue of risk on return should have been assessed.

40. I am not satisfied that a risk on return to the appellant in light of his particular history (as found by the judge) could be properly discounted such as to render the judge's error immaterial. On this basis, and, for the reasons set out above and below, this basis *only*, the judge's decision is set aside. I will return to the implications of this later on.

Ground 4

41. I am satisfied that the judge properly took Dr Cameron's evidence on the issue of duress into account. This evidence was considered through the prism of the Devaseelan principles relating to Judge Ford's previous findings.

42. It is common ground that in order for the defence of duress to be available to an individual, all five requirements specified in Article 31 of the ICC Statute must be satisfied (see, in this regard, AB (Article 1F(a) – defence -

duress) Iran [2016] UKUT 376 (IAC), at paragraph 63). The requirements are:

i. There must be a threat of imminent death or of continuing or imminent serious bodily harm;

ii. Such threat requires to be made by other persons or constituted by other circumstances beyond the control of the person claiming the defence;

iii. The threat must be directed against the person claiming the defence or some other person;

iv. The person claiming the defence must act necessarily and reasonably to avoid this threat;

v. In so acting the person claiming the defence does not intend to cause a greater harm than the one sought to be avoided.

43. The difficulty in the appellant's path is this. Having undertaken what I have already deemed to be a lawful assessment of the evidence, the judge concluded that Judge Ford's findings of fact on core issues should not be departed from. Amongst those was the finding that the appellant manned the checkpoint "by way of choice" and not due to any specific threat of death or serious harm made against him. In light of this, the judge held that the third requirement of the defence of duress could not be satisfied: that is the clear effect of the first two sentences of [38]. The conclusion reached was open to the judge, given my rejection of grounds 1 and 2. Thus, at least one requirement of the defence could not be made out. This in turn leads me to reject the challenge mounted under ground 4.

44. I would, however, state an observation on the judge's view, as expressed in the second part of [38], that the appellant's role at the roadblock was undertaken in order to avoid a greater harm than the one being caused. It is manifestly the case that the murder of Tutsi civilians was horrendous. It is, nonetheless, perhaps difficult to see how an individual who might (hypothetically) have been threatened with their own death, could reasonably be expected to sacrifice their life in order to avoid the risk of many others being killed. This particular issue does not arise in the present case, however, for the reasons set out in paragraph 43, above.

Ground 5

45. Ms Moffatt quite properly accepted throughout that the success of this ground depended on the success of grounds 1-4. On the basis of what I have already said, ground 5 must be rejected.

Disposal and scope of the re-making decision

46. I am setting the judge's decision aside. There is no power under the Tribunals, Courts and Enforcement Act 2007 to set aside only part of a decision of the First-tier Tribunal. However, it is quite clear that the only error of law I have found to exist relates to the narrow issue identified in ground 3.

47. There is no question of remitting this case to the First-tier Tribunal. There will be a resumed hearing in the Upper Tribunal, following which the decision will be re-made. In so doing, the judge's findings of fact relating to the appellant's involvement in the genocide are preserved. For the avoidance of any doubt, the relevant findings are to be found at [29]-[38] of the judge's decision, with reference to paragraphs 96, 100, 105-110, 115-119, 123-126 of Judge Ford's 2013 decision, subsequently upheld by the Upper Tribunal.

48. In light of the narrow basis upon which I have set the judge's decision aside and the preserved findings of fact, the appellant is an individual who falls to be excluded from the protection of the Refugee Convention, pursuant to Article 1F(a).

49. The re-making decision will be concerned with the issue of risk on return, with reference to Articles 2 and 3 ECHR. That risk is to be assessed in light of the following questions:

(1) On return, is it is reasonably likely that the appellant's involvement in the genocide (as confirmed by the preserved findings of fact) will be discovered by the Rwandan authorities or any other relevant persons?

(2) If that involvement were to be discovered, is it reasonably likely that the appellant would be at risk of death or ill-treatment by the authorities or non-state actors against which the authorities could not provide sufficient protection?

50. There is a further matter. As mentioned in paragraph 28, above, the appellant had put forward a protection claim based upon his alleged political involvement/associations which, on the face of it, might be seen as separate from the exclusion issue that preoccupied the judge's consideration on appeal. That original claim was not expressly addressed by the judge. This may well have been because the focus of the appeal before him rested on the exclusion issue. Further or alternatively, it may be because Judge Ford did consider that claim in detail and, for reasons set out at paragraphs 128-138 of her 2013 decision, rejected it entirely. Those findings were upheld by the Upper Tribunal (see paragraph 26 of its decision).

51. It seems to me that the underlying protection claim put forward by the appellant can and should be examined as part of the re-making decision.

This is because the judge had not expressly dealt with it. Having said that, the findings of Judge Ford will constitute a firm starting point for the re-making decision.

52. My provisional view is that the resumed hearing should be conducted on a face-to-face basis.

53. I issue directions, below, to assist in the progression of this case.

Anonymity

54. The First-tier Tribunal made an anonymity direction and, in all the circumstances, it is appropriate for this to be maintained.

Notice of Decision

55. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

56. I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

57. The decision in this case will be re-made by the Upper Tribunal following a resumed hearing.

Directions to the parties

1. **No later than 5 days after** this decision is sent out, the appellant is to inform the Upper Tribunal and the respondent whether it is intended to call the appellant to give oral evidence at the resumed hearing and, if it is, whether an interpreter will be required;

2. **At the same time**, the appellant may raise any objections to the resumed hearing being conducted on a face-to-face basis;

3. **No later than 10 days after** this decision is sent out, the respondent may raise any objections to the resumed hearing being conducted on a face-to-face basis;

4. On receipt of the information required from the appellant and any objections from the parties, further directions will be issued.

Signed: H Norton-Taylor Date: 10 June 2021

Upper Tribunal Judge Norton-Taylor