



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005360
First-tier Tribunal No:
PA/03368/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 18 March 2024

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

DNSC
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr C Holmes of Counsel, instructed by Broudie Jackson & Canter
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard remotely at Field House on 13 March 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) 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 (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. By the decision of the First-tier Tribunal (Judge Gibbs) dated 8.11.23, the appellant, a citizen of El Salvador, has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Kelly)

promulgated 5.10.23 dismissing his appeal against the respondent's decision of 3.7.20 to refuse his claim for international protection.

2. Following the helpful submissions of both representatives, I reserved my decision to be given in writing, which I now do.
3. In summary, the grounds argue that the First-tier Tribunal (i) failed to take account of material matters, namely the country background information and the relevant case law; (ii) engaged in a procedural irregularity by raising of his own accord the issue of risk on return when this had not previously been challenged; and (iii) failed to recognise the applicable Convention reasons.
4. In granting permission, Judge Gibbs merely found that the grounds disclose an arguable error of law but did not explain why that conclusion was reached.
5. The First-tier Tribunal Judge accepted the appellant's narrative of difficulties in El Salvador and the city of San Salvador where he lived in the territory of the MS13 gang but in undertaking his 60Km commute to work passed through the territory of Gang 18. Credibility was not in issue.
6. The appellant's witness statement and oral evidence was to the effect that he had been attacked and threatened by gang members on three occasions and directed not to enter the area again. At [36] of the decision, the judge accepted that he had been attacked and threatened by gang members on his daily bus route commute to work and that if he had continued to follow that pattern, he would likely have become the victim of a further attack. However, the judge found that was the extent of his risk, one confined to particular streets in San Salvador, and suggested that he could avoid those streets without needing to relocate away from the area, noting that the risk was not individual to the appellant but a general one applying to every member of his generation living in El Salvador.
7. The three grounds somewhat overlap. In support of the first ground, Mr Holmes argued that in narrowing the risk on return the judge failed to take material matters into account, namely the extent to which armed gangs exercise extraordinary levels of strict social control of everyday life of the population of their territories, enforced by the use of threats and violence, as found by the EMAP Country Guidance at [46] and the CPIN at 10.2. It was submitted that the findings of the First-tier Tribunal were inconsistent with the case law and CPIN and that this background material and guidance does not support the view taken by the judge that the gangs would cease their adverse interest in the appellant if he were to avoid the particular streets on which he was attacked. Mr Holmes went as far as to suggest that it was impossible to reconcile the judge's conclusion on this issue with the Guidance and country background information. Mr Holmes relied in particular on the appellant having failed to comply with the gangs' rules or commands and referred me to 2.4.2 of the CPIN.
8. However, I am satisfied from a reading of the decision that the judge has fully taken all relevant evidence into account and did not overlook it. As EMAP held, each case must turn on its own facts and the judge made a careful assessment of that evidence, as can be seen, for example, between [24] and [31] of the decision. Nothing in the grounds demonstrates that relevant material was not taken into account. Furthermore, it was not irrational for the judge to distinguish the appellant's situation from that in EMAP.
9. The particular facts of this case were unusual and different to that considered in EMAP. The appellant had been subjected to three attacks, analysed by the judge at [34] of the decision. The first was a robbery which even the appellant did not attribute to gang violence. It is important to note the finding that the second and

third attacks were unrelated to each other and carried out by different perpetrators. The second attack was a case of mistaken identity and the third was based upon suspicion and not belief that the appellant was a rival MS13 gang member. The judge found that what happened to the appellant could happen to any young person travelling through the area where he was attacked. Mr Terrell has also pointed out that on the facts of this case neither the appellant nor his family had been attacked or threatened in their home area. Neither was he attacked at his place of work, only on the particular route which took him through the Gang 18 territory. In those circumstances, the judge's finding that the risk was related to the particular streets where the attack happened and not any individual targeting of the appellant is well-reasoned. At [34] the judge also found that he was not on a 'hit list' of suspected rival gang members and that the third attackers were unlikely to have known of the second attack; the two attacks were unrelated. The judge provided clear and cogent reasoning for concluding that there was no risk to the appellant outside that particular area, that these were no more than random attacks, and that the risk could be eliminated by not going into that area. I am satisfied that these findings were not inconsistent with EMAP, were within the range of findings rationally open to the Tribunal, and that no error of law is disclosed by this ground.

10. Overlapping with the first ground, the second ground argues that it was procedurally irregular for the judge to raise the question of extent of risk when there had been no suggestion by the respondent that there might not be a real risk of harm to the appellant in his home area in the event that his narrative was accepted. It is suggested that contrary to Lata (FtF: principal controversial issues) India [2023] UKUT 163 (IAC), the judge went behind the settled position of the parties, took a matter for himself, and went on to dismiss the appeal on the basis of his own case theory.
11. However, at the outset of the hearing the judge raised with Mr Holmes the issue as to whether the appellant's narrative gave rise to a risk. Although Mr Holmes submitted that it was "inappropriate" for the judge to determine the appeal on that basis, the appellant through Mr Holmes had the opportunity to address this issue during the hearing. In fact, it appears that Mr Holmes questioned the appellant in his oral evidence on matters relating to the nature of the risk. I am satisfied that the judge was not prohibited from raising this issue and that he very properly put the appellant on notice of it so that there was an opportunity to address it. Furthermore, Mr Holmes has not demonstrated that there was any prejudice to the appellant by the judge taking the issue. At [33] Mr Holmes is reported to have not sought to suggest that consideration of the issue would lead to procedural unfairness "given my having raised it at the outset of the hearing and the consequent investigation of the issue during the course of the appellant's evidence". Unarguably, the appellant had a fair opportunity to address the issue. I also note that Mr Holmes did not seek an adjournment to adduce further evidence on the issue and does not suggest to me that there is in fact any further evidence or submission that could have been produced or made over and above that made to Judge Kelly. Effectively, Mr Holmes merely seeks to stand on a point of principle rather than any substantive unfairness in the First-tier Tribunal.
12. The third ground argues that the judge was in error to find that the Convention was not engaged. Mr Holmes argued that the primary claim was one of a straightforward refusal to comply with demands related to the gangs' control over persons moving around their territories, which clearly puts him as a member of a particular social group (PSG). This is developed in the grounds on three different bases: as a person perceived to be opposed to the gangs, as a person mistakenly perceived to be a member of a rival gang, and a person who has refused to comply with the gangs' demands. Mr Holmes argued that any one of those three

would be sufficient. Mr Holmes also submitted that where the mistaken attribution of gang membership or imputed political opinion results in treatment amounting to serious harm, then as a matter of law the victim necessarily falls within the scope of the Convention. However, whether the appellant fell within a Convention reason rather stands or falls with the other grounds.

13. At [37], after considering EMAP (Gang Violence – Convention Reason) El Salvador CG [2022] UKUT 03355 (IAC), the judge explained why, in his view, a Convention reason did not apply to this appellant, stating: *“I am accordingly not satisfied, on the particular facts of this appeal, that a ‘Convention reason’ extends to those who suffer violence as a result of being misidentified by its perpetrators.”* In particular, the judge noted that the appellant had never been a gang member and the attacks upon him arose from either ‘simple’ robbery or mistaken identity: *“Mistaken identification of one person for another is not in my judgement the same thing as imputing a political opinion to an individual who is otherwise correctly identified as the person who supposedly holds that opinion.”* The judge found that the reason he had twice fallen victim to gang violence had nothing to do with any actual or imputed political opinion or membership of a PSG, *“but everything to do with the high levels of lawlessness in El Salvador that allows gang members to perpetrate random acts of violence with apparent immunity”*.
14. At [38] the judge went on to find that the risk was confined to particular streets in San Salvador and that the appellant could easily avoid entering those streets without the necessity for him to relocate to an entirely different area. I am satisfied that those findings were entirely open to the judge on the evidence and that cogent reasoning has been provided for finding the Convention did not apply. It cannot be said that this conclusion was perverse or irrational, or one that no properly directed judge could have reached. In this case the appellant was not individually targeted in his home area, or at work, only on a particular route he took to commute. That avoiding that route may mean losing his employment is not sufficient to bring him within the Convention.
15. In any event, even if the circumstances amount to a Convention reason, on the particular facts of this case this appellant would not be at risk, provided he avoided crossing into Gang 18 territory, something the judge found could easily be accomplished.
16. In all the circumstances, for the reasons outlined above, no error of law is disclosed in the making of the decision of the First-tier Tribunal.

Notice of Decision

The appellant’s appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands as made.

I make no order as to costs.

DMW Pickup

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Judge of the Upper Tribunal
Immigration and Asylum Chamber

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13 March 2024