



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001406

First-tier Tribunal No: PA/52425/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

27th October 2023

Before

UPPER TRIBUNAL JUDGE LINDSLEY
DEPUTY UPPER TRIBUNAL JUDGE LUCY MURRAY

Between

OYHM
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: None

For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Interpretation: Ms G Avila-Roa in Spanish

Heard at Field House on 10 October 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant 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

Introduction

1. The appellant is a citizen of El Salvador born in July 1985. He arrived in the UK on 9th November 2019 and claimed asylum. His application was refused in a decision of the respondent dated 11th May 2021. His appeal against the decision was allowed on humanitarian protection grounds by a Panel of First-tier Tribunal Judges, Short and Rhys-Davies, in a determination promulgated on the 26th November 2021.
2. Permission to appeal was granted to the Secretary of State and Upper Tribunal Judge Grubb found that the First-tier Tribunal Panel had erred in law for the reasons set out in his decision which appended to this decision as Annex A.
3. The matter came before us pursuant to a transfer order to remake the appeal. Judge Grubb concluded that he was satisfied that the First-tier Tribunal gave adequate, cogent and rationally sustainable reasons, at paragraph 64 of the decision, for concluding that the appellant had been subject to threats which were serious enough to cause him to leave his home area by the MS-13 gang, but not that the appellant had been asked to leave El Salvador by them. This finding was therefore preserved. However, Judge Grubb found that insufficient reasons were provided by the First-tier Tribunal for finding that it would be unduly harsh for the appellant to find safety through internal relocation and that he would not have sufficiency of protection if he did relocate internally in El Salvador, and so directed that the appeal should be remade on these issues. It is these issues that are therefore central to this decision.
4. We note at this point that neither the decision of the First-tier Tribunal nor the decision of Judge Grubb finding an error of law clarified whether the threat to “leave the area” by MS-13 meant a threat to leave the appellant’s home area of San Miguel or to leave the area controlled by MS-13. As MS-13 was, according to the CPIN in January 2021, the largest and most powerful gang in El Salvador this is an issue with which we must grapple.
5. At the start of the hearing we clarified whether the appellant wished to provide any updating evidence or whether he wished to rely upon his witness statements and interview evidence as adopted before the First-tier Tribunal. He said that he wished to update us on the situation with respect to his mental health. It was otherwise agreed that the hearing should simply consist of submissions by Mr Terrell for the respondent and the appellant. It was agreed that the appellant would rely upon the skeleton argument that was before the First-tier Tribunal as well as his oral submissions. It was clear that the skeleton argument argued that the appellant was entitled to Refugee Status on the basis that there was a Convention reason, namely imputed political opinion, so we asked that Mr Terrell address this and the country guidance case of EMAP (Gang violence - Convention Reason) El Salvador CG [2022] UKUT 335(IAC).

6. As a preliminary matter we also asked Mr Terrell to clarify the respondent's position on internal relocation. At paragraph 87 of the reasons for refusal letter it states: "With country information stating that MS 13 is a highly organised gang with the ability to track movements of individuals in and out of different areas - including raising suspicions of new people entering areas, internal reaction would not be a viable option. However, with the finding that it has not been accepted that you have come to the continued, targeted attention of MS 13 it is considered you can return to your hometown of San Miguel." In the respondent's review the schedule of issues is stated only to be: "Is the appellant's claimed fear of MS-13 credible and a barrier to his return to El Salvador?" On consideration of these documents, and the record of oral submissions before the First-tier Tribunal in the decision, we find that before the First-tier Tribunal relocation was conceded by the respondent.
7. Mr Terrell submitted that the respondent should be permitted to retract that concession, and argued that this was reasonable as the appellant clearly understood that internal relocation was an issue in this remaking hearing and was ready to argue the point with expert evidence. He also argued that the First-tier Tribunal had not accepted that the threat from MS-13 was as wide as the appellant had originally argued. In AM (Iran) v SSHD [2018] EWCA Civ 2706, Simon LJ accepted that the Court of Appeal "may, depending on the circumstances, permit a concession that was made in a tribunal hearing to be withdrawn. There are no all-embracing principles that will apply beyond those implicit in CPR Part 1.1" (paragraph 40). CPR.1.1 concerns the overriding objective, whereby the court will "deal with cases justly and at proportionate cost". Mr Terrell submitted it would be just to permit the concession to be withdrawn.
8. Mr Terrell also argued that notwithstanding what had been held in the reported decision of the Presidential Panel in Lata (FtT: principal controversial issues) UKUT 163(IAC) it remained open to this Upper Tribunal Panel to remake the appeal with respect to the issue of internal relocation. We raised this issue because in Lata it was found that in the context of a "reformed appeal procedure" case such as this the "task of a judge is to deal with the issues that the parties have identified"; and further that an issue not identified before the First-tier Tribunal is unlikely (Robinson obvious points aside) to make out a good ground of appeal. We have found that internal flight was not identified, even in the alternative, as a basis on which the respondent wished to argue their appeal before the First-tier Tribunal and we therefore find that it questionable that an error has been found on this basis by the Upper Tribunal.
9. However, we have ultimately concluded, having considered the case of Lata and noting that it was not found that an issue not identified could never form the basis of a good round of appeal, that it is just and fair to let this matter proceed to a remaking hearing; and given the preparedness of the appellant to deal with the issue and the position of the First-tier Tribunal not accepting the full extent of the threat he had said was made by MS-13 we find that it is just and fair to permit the

respondent to withdraw her concession with respect to internal relocation not providing safety if a threat was made out.

Evidence & Submissions - Remaking

10. The evidence of the appellant relating to internal relocation, both from his statements and oral evidence, is, in short summary as follows. He relocated to San Salvador in September 2019 as a result of threats from the MS-13 gang and lived there in hiding until he came to the UK in November 2019, and thus for a period of two months. He filed a police report whilst living in San Salvador as he feared the gang would come after him there, and left to claim asylum in the UK as soon as he could possibly do so as his belief was that it was only if he left the country that he would be safe. He believes that the police are unable to provide any sort of real protection as they are inept, scared and poorly resourced. The appellant was aware that the El Salvadorean government had had a crack-down on gangs but his view was that this was for political show in order for the President to be re-elected and that it did not lead to any greater degree of safety for him. He maintained that there were five major gangs operating in a very small country. As a result of his experiences the appellant gave evidence that he suffers from headaches, anxiety, panic attacks, depression and insomnia and takes two medications (citalopram and propranolol) for anxiety/panic attacks and to assist him with sleep, and another medication which addresses the gastrointestinal side affects of these drugs (omeprazole). It has been said to him by his doctor that he needs to take more powerful medications and have psychological therapy. He cannot simply stop taking his medications and he is uncertain whether they are available in El Salvador.
11. The position of the respondent, in the reasons for refusal letter and in oral submissions from Mr Terrell is in short summary as follows. Mr Terrell accepts that Dr Vicky Knox is an appropriate expert who has written a report compliant with the Presidential practice direction, although he does not accept all of her conclusions as he argues some of them do not apply the correct standard of proof and look to there being certain protection rather than sufficiency of protection. It is accepted that MS-13 were extremely powerful; were able to influence the authorities; frequently threaten and kill civilians and family members; and were able to trace and locate individuals in El Salvador. However, the extent of the threat made to this appellant is only that he should "leave the area" and not that he should go abroad, and thus if he continues to comply with this and does not go to his home area of San Miguel then there is no threat as the gang is "calm". It is further argued that the powerful position of MS-13 has now changed due to the crack-down on gangs by the government which is documented in the expert report of Dr Knox. The evidence is that the gangs, including MS-13, are no longer as organised as thousands of gang members have been detained and in some places gangs have disappeared altogether or dissolved into small mafias. This means that MS-13 are much less likely to find out about the appellant having made a report to the police about them, and thus to find out about a potential "major infraction" against them by the appellant; and overall the evidence points

to there being no real risk that the gangs would have the motivation or resources to pursue the appellant who, from the evidence before the Tribunal, was never a person of significant interest to them, in the context of their own issues of survival.

12. It is argued that it is also reasonable to expect the appellant to internally relocate as it would not be unduly harsh. The appellant is of course familiar with El Salvador in all respects; he has family including a sister in that country; there are mental health services in El Salvador, and we have no evidence he cannot obtain his medication in that country and we have no expert medical evidence showing that the appellant would suffer a deterioration in his mental health if he were removed.
13. Mr Terrell accepted however that if, contrary to his submissions above, the appellant was found to be at real risk of serious harm from the gangs in El Salvador on the basis of his report to the police, indicating an anti-gang viewpoint, his fear of such persecution would be for reasons of imputed political opinions, following the country guidance case of EMAP, and thus that he would have brought himself within the scope of the Refugee Convention.
14. The appellant relied upon the skeleton argument that was before the First-tier Tribunal. The key submissions from this document are that MS-13 are the largest gang in El Salvador and hold incredible power. It is argued that there is official complicity, and that officials acting or not acting for fear of gangs is a serious problem. As such MS-13 are able to heavily influence decisions and governance, including the level of protection offered to civilians by the State authorities. State authorities are unwilling to offer protection either due to sympathies with gang activity or fear for their own safety. It is argued that MS-13's power, influence, control, and ability to trace and kill individuals with impunity anywhere in the country; coupled with the fact that the authorities are, as the respondent notes in parts of her refusal letter, hamstrung by this to the point that the respondent doubts the appellant was even able to enter a police station or travel between cities without being stopped and harmed, showing that their power equals or exceeds the amount of power and ability a government would have over its territory and people. MS-13 is therefore able to operate as a quasi-State operation and the appellant cannot find safety by internally relocating or by reason of sufficiency of state protection.
15. The appellant added in oral submissions that he was at risk not just from MS-13 but from other gangs. If he went to areas not controlled by MS-13, such as those controlled by Mara-18/ Barrio-18, he would be thought to be rival gang member due to his place of origin or a spy or informer for MS-13 and so would be equally in danger. He believes he would still be seen as someone who was against MS-13 by them, and they would regard this as "treason" and they would want revenge on him if he returned. He believes that they currently know he is out of the country. The appellant submitted that the gangs have infiltrated the police and armed forces, and this is how they will know that he made a report to the police.

He argues that the President recently made a Treaty with the gangs and for this reason is being investigated by the United States of America. Although he accepts that there has been some action against gangs this was only undertaken to keep the President in power and not out of any real interest in safety of El Salvadorean citizens, and, he argues, the gangs are not neutralised and recently 60 people were killed in one day in El Salvador. The information from his family is that the situation remains the same and he remains in danger for his life if he returns to El Salvador as the gang would still look for him were he to return.

16. The appellant also argued that he would struggle to internally relocate in El Salvador for other reasons, beyond it not offering safety, and so it would not be reasonable to expect him to do this. He has poor mental health, as he has explained in his evidence, and struggles to go out in the UK beyond attending his doctor and doing food shopping. He states that being forced to return to El Salvador would make him suicidal, as he would rather die at his own hand than live with the uncertainty that he could be tortured to death by the gangs at any point in time.

Conclusions - Remaking

17. As set out at paragraph 4 above we must decide what the extent of the threat by MS-13 to the appellant is given that the existence of the threat, but not its precise extent is a preserved finding of the First-tier Tribunal. It is clear that it was not accepted as being a threat that he must leave the country, but a threat that he must leave "the area" or be killed. It is unclear as to whether this meant he must leave his home area of San Miguel or the area controlled by MS-13, at that time the largest and powerful gang in El Salvador. This is not clarified in the decisions of the First-tier or the error of law decision of Judge Grubb. It is also not clarified in the affidavit or the police report where the threat is recorded. The opinion of Dr Knox, as set out at paragraph 23 of her report is: "had the gang-members in San Miguel ordered the Appellant to leave the area, it is my professional opinion that this would preclude him from relocating to any MS-13 territory in El Salvador. In this case, were he to relocate to another MS-13 area and it to come to the attention of the gang-members that he had previously been ordered to leave an MS area, the same situation would arise. In my professional opinion, there would be risk that they would reissue death threats and demands to leave, and a reasonably likely risk that they would enforce this with the use of more violence." Looking at the evidence in the round we find that the meaning of the threat that the appellant must "leave the area" referred to the appellant having to leave the area controlled by MS-13 in El Salvador.
18. Secondly, we find that we must reach a conclusion as to whether, on the lower civil standard of proof, we accept that the police report made by the appellant in San Salvador in September 2021 will have come to the notice of MS-13. We find that it was accepted by the First-tier Tribunal that the appellant had made this report from what is said at paragraphs 53 and 55 of the decision of the First-tier Tribunal. The expert, Dr Knox, notes this fact at paragraph 20 of her report and

her opinion is that this significant raises the stakes for the appellant because: “it must be considered that the Appellant has since filed a police report, which changes matters (this is discussed below). The act of approaching the authorities and filing this report would be considered an act of ‘betrayal’ or traición, which is punishable with death and would likely result in active pursuit to locate and punish him throughout the country.” It is her opinion that the appellant’s report: “could have been leaked to gangs at any point, due to their infiltration of the authorities and the corruption and complicity (whether by force or by choice) of the police”. We must decide whether there is a real risk that this happened. We note that state of emergency in which the El Salvadorean government cracked down on the gangs was instituted on 27th March 2022, and that there was therefore a period of 6 months in which the gangs may have acquired this knowledge prior to the crack-down.

19. We consider the country of origin evidence with respect to gangs as summarised in the country guidance case of EMAP which was heard in April and June 2022 and thus included evidence both prior to and after the crack-down, although the decision does not include the longer term impact of the state of emergency on the gangs. We note that at paragraph 10 of that decision MS-13 was found to be considered the largest gang not only in El Salvador, a country of just 6.5 million people, but in the world. It is also found, at paragraph 12, to be organised, and to view reports of crimes to the police, at paragraph 41, as acts of political resistance. Gangs are so entwined with politics and politicians that it is found, at paragraph 45: “The gangs offer a “(para)military policing function”. The people don’t see much distinction between renta and official taxation: one goes in the pocket of the gangs, the other the politicians.” Most pertinently it is found at paragraph 48 of the decision that: “The infiltration of civilian state structures is reported to be similarly widespread. The police force is the institution most affected, particularly in rural areas. Professor McNamara writes that “many civilians know it would be dangerous to report crimes committed by gang members directly to the police, because police often forward that information to gang leaders”.” We are therefore satisfied on the totality of the country of origin evidence before us that the appellant has shown that there is a real risk that MS-13 would have become aware of his police report prior to April 2022, and that he would therefore be a person who faces a greater risk of being actively and lethally pursued than if he were simply a person who had been told to leave their area of influence as a person who had not paid renta.
20. We have no hesitation in finding that a real risk of serious harm to this appellant extended to the whole of El Salvador, in accordance with the withdrawn concession of the respondent, prior to April 2022, and thus that there was therefore no possibility of the appellant having sufficiency of protection and finding safety via internal relocation prior to April 2022. He had “betrayed” the largest and best organised gang in El Salvador in a context where, as set out at paragraph 42 of EMAP, gangs were operating country wide with activity in 94% of all municipalities, and as described by the US State Department were “highly organised, hierarchical, transnational criminal organisations”. Further El

Salvador is a geographically small country of some 6.5 million people; and it is the opinion of the expert Dr Knox that were the appellant to have returned it would have been likely that he would have been issued with death threats by MS-13 if found by them in their area, and that it would be reasonably likely that these would have been carried out, and if he were to have gone to a rival gang's, such as Barrio-18's, district he would have been likely to face denial of entry or death threats and violence.

21. We turn now to the evidence from Dr Knox's heavily referenced report, at paragraphs 53 to 65 in which she covers the situation in El Salvador from April 2022. The report was written on 27th April 2023 and so has the benefit of a year's literature on this issue. The report examines the impact on the gangs of the state of emergency declared on 27th March 2022 and the subsequent "unprecedented security crackdown" which resulted in the detention of over 64,000 people, purportedly all gang members but including children as young as 12 and those who had complied with orders of gang members, by February 2023. The reports reveals that this security crackdown has left El Salvador with "virtually no independent institutions left as a check on executive power" and, in the words of Freedom House there has been: "a process of fracturing democracy through militarization, intervention in the judicial system, political persecution, silencing of the parliament" and repression." Naturally human rights organisations have expressed grave concerns about these measures. However, it is also the case that these drastic measures have led to a significant reduction in gang activity and homicides: there were 495 homicides in 2022 compared with 1147 in 2021. The evidence shows that in some places gangs have now disappeared; their structures have been weakened and where they continue to operate running extortion activities these are more akin to small mafias. However, the thinktank "Insight Crime", cited in EMAP as a reliable source, concludes that if the failure to address the social dimensions of gangs and risk of regrouping in prison continues then: "the gang structures and influence is likely to reappear in some form in the future". Dr Knox's own research finds that "people have continued to be displaced because of gang violence and threats" with larger sums being extorted by gangs and police with the focus now being on residents rather than businesses, that there have been few guns and weapons seized by the authorities despite the large numbers of arrests, and that the police remain corrupted by infiltration of gang members.
22. We note that paragraph 339K of the Immigration Rules means that as we have found the appellant has been subject to a direct threat of serious harm we need good reasons to consider that such serious harm will not be repeated. The opinion of Dr Knox is that some degree of risk continues to apply particularly because of the appellant's report to the police, and concludes there is no evidence that the draconian security crackdown will: "increase security in El Salvador in a stable, meaningful and enduring manner". This is a very finely balanced decision. We remind ourselves of the lower civil standard of proof, a reasonable degree of likelihood, and the need for good reasons to consider that the threat of serious harm to the appellant would not repeat itself, and conclude on the basis of all of

the evidence before us that the appellant remains at real risk of death threats from gang members throughout El Salvador due to his police report given the continued existence of splinter mafias in some areas, the difficulty the appellant would have in knowing where they operated due to the instability of the situation and the previous reach of the MS-13 gang, the fact that guns and weapons which belonged to the gangs remain in circulation, and the inherent instability of the repressive and anti-democratic measures taken by the El Salvadorean President.

23. Mr Terrell accepted that if the appellant was found to have a well founded fear of persecution or serious harm by the gangs that this would be for a Convention reason, namely imputed political opinion as the police report would indicate to MS-13 that he did not agree with their authority, and following EMAP gangs are to be seen to be political actors. It follows that the appellant is entitled to succeed in his asylum appeal and on human rights grounds.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. Upper Tribunal Judge Grubb set aside the decision of the First-tier Tribunal.
3. We re-make the decision in the appeal by allowing it on Refugee Convention and Human Rights grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we 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 original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16th October 2023

Error of law Decision of Upper Tribunal Judge Grubb:

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent (“OYHM”) and a failure to comply with this direction could lead to contempt of court proceedings.

2. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

3. The appellant arrived in the United Kingdom on 9 November 2019 and claimed asylum. The basis of his claim was that he feared the MS-13 gang in his home area of San Miguel in El Salvador. He claimed that he had problems with MS-13 over time but that in May/June 2019 they had demanded money or “renta” from him. He claims that he had refused to cooperate with them or pay the “renta”. He claims that a gang member came to his house in September 2019 and told him that if he was not going to cooperate then he should leave or he would be killed. As a consequence, the appellant left San Miguel and went to San Salvador where he lived with his sister in hiding until 9 November 2019 when he came to the UK and claimed asylum.

4. On 11 May 2021, the Secretary of State refused the appellant’s claims for asylum, humanitarian protection and under the ECHR.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. In a decision dated 26 November 2021, the FtT (Judges Short and Rhys-Davies) allowed the appellant’s appeal on humanitarian protection grounds. The FtT accepted that the appellant would be at real risk of suffering serious harm in El Salvador and could not safely internally relocate. However, the FtT did not accept that the appellant’s fear of the MS-13 gang was for a Convention reason and so his claim succeeded on humanitarian protection grounds but was dismissed on Refugee Convention grounds.

The Appeal to the Upper Tribunal

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the grounds that the FtT had failed to give adequate reasons for its finding that the appellant would be at risk from the MS-13 gang on return to El Salvador and could not safely internally relocate.

7. On 5 January 2022, the First-tier Tribunal (Judge Scott-Baker) granted the Secretary of State permission to appeal.

8. The appeal was listed on 17 November 2022. The Secretary of State was represented by Ms Rushforth and the appellant by Mr Joseph, both of whom made oral submissions.

The Submissions

9. On behalf of the respondent, Ms Rushforth relied upon the grounds of appeal.

10. First, she submitted that the FtT had failed to give adequate reasons in para 64 of its decision for concluding that the appellant was at risk from the MS-13 in his home area. She submitted that since the FtT had found that the MS-13 gang member had told the

appellant to leave the area or if he did not and pay “renta” he would be killed, the FtT had not explained why in those circumstances the appellant would be at risk on return in his home area.

11. Secondly, Ms Rushforth submitted that the FtT had failed to explain in paras 65 and 67 why the appellant could not internally relocate and why the MS-13 would have the “desire” to locate him elsewhere in El Salvador.

12. Thirdly, Ms Rushforth also submitted (although this was not directly raised in the grounds) that the FtT had failed to give adequate reasons in paras 66 – 69 of its decision why the El Salvador authorities would be unable to provide a sufficiency of protection to the appellant. In particular, she submitted that the FtT had failed properly to take into account the evidence in the relevant CPIN, “El Salvador; Fear of Gangs” (January 2021) when it had referred to para 8.3.2 which was concerned with the risk to former gang members, which was not a proper description of the appellant. She submitted that the FtT had failed to consider all the circumstances, as required by para 2.5.11 of the CPIN, even if the state was not “unlikely to be able to provide effective protection”.

13. During the course of her submissions, I drew Ms Rushforth’s attention to para 87 of the respondent’s decision letter where, in relation to internal relocation, the Secretary of State accepted that the appellant would not be able to internally relocate if (contrary to the respondent’s position in the decision letter) there was a real risk to him from the MS-13 gang in his home area. Ms Rushforth acknowledged that this was, perhaps, inconsistent with the respondent’s position that the appellant would be able to obtain a sufficiency of protection in El Salvador. She acknowledged that the weight of the respondent’s grounds lay in the challenge to the FtT’s finding in para 64 that the appellant had established a real risk in his home area.

14. On behalf of the appellant, Mr Joseph submitted that the FtT had accepted (and it was not now challenged) that the appellant had received low level threats from the MS-13 gang over time and that in January 2019 these became more serious and that he was told that if he did not pay “renta” he should leave or be killed. Mr Joseph submitted that the FtT concluded, on the basis of those factual findings, that there was a real risk to the appellant of serious harm from the MS-13 gang if he returned to his home area.

15. Secondly, Mr Joseph submitted that, consistently with the CPIN, the FtT was entitled to find that the MS-13 gang would have the resources and desire to locate the appellant in another part of El Salvador and so he could not safely internally relocate.

16. Thirdly, as regards sufficiency of protection, Mr Joseph acknowledged that the FtT’s reference to para 8.3.2 of the CPIN was not directly relevant to the appellant who was not a gang member but was someone who had refused to pay “renta”. Further, the FtT at para 68 was not correct to take into account that the appellant would not be treated as “semi-retired” and would be expected to return to his previous activities as that too was concerned with gang members. However, Mr Joseph submitted that at para 66, the FtT had been entitled to take into account para 2.5.11 of the CPIN which indicated that sufficiency of protection was unlikely if a risk arose from MS-13 given its size, capability and influence as one of the main gangs.

Discussion

17. The FtT accepted the core of the appellant’s account although it did not accept each and every detail. The FtT accepted that the appellant had been threatened by the MS-13 gang who had required him to pay “renta” and had told him that if he did not leave the

area (but not the country as that was an embellishment by the appellant) he would be killed. At para 64 the FtT said this: “We have concluded that at least in some respects M’s account of why he fled El Salvador lacks credibility and some of the evidence provided could be said to be contrived. However, we accept that in September 2019, he received serious threats from MS-13, serious enough to persuade him to leave his home area and head to San Salvador. We also accept that he had been subject to lower levels of risk from MS-13 for some time and possibly years previously. We do not accept that MS-13 told him to flee the country. On that premise, and mindful of the requirement to make an overall assessment of M’s credibility by reference to all the evidence which we saw and heard, we have to consider whether the critical aspects of M’s account meet the standard of proof applicable to humanitarian protection claim; he faces a real risk of suffering serious harm in El Salvador”.

18. I accept that the concluding clause in the final sentence at para 64 is a finding by the FtT that the appellant would be at real risk of suffering serious harm if he returned to El Salvador. The substance of Ms Rushforth’s “reasons challenge” is that that conclusion or finding is not adequately reasoned. Of course, it is perfectly adequately reasoned as regard the risk to him whilst he was in San Miguel (his home area) as the FtT accepted the threat was made by a member of the MS-13 gang that if he continued not to pay “renta” unless he left that area, he would be killed. The fact that he did, indeed, leave his home area and move to San Salvador removed the risk to the appellant – in effect complying with the ultimatum given by the gang member. The grounds, on their face, appear to contend that because the appellant was then safe, in his words the “gang was now calm about me”, a finding that he would be at risk on return to his home area was irrational and inconsistent.

19. That, in my judgment, is not a logical argument. For whatever reason, on the evidence accepted by the FtT, the MS-13 gang gave the appellant an option of avoiding the risk of being killed (given that he would not pay “renta”) by leaving his home area. Had he remained, the threat would have remained operative. Although the FtT did not explicitly spell this out, it is readily apparent that it concluded that if he were to return to his home area the threat and risk to him would, once more, arise. The whole of the background to the appellant’s claim was that he was known to the MS-13 gang in his home area over a period of time when he had been asked to be a collaborator or informer but had refused and had then refused to pay “renta”. The FtT referred to the CPIN at para 9.32 in para 50 of its decision where evidence was set out that: “Killings are common place of extortion of individuals and small businesses is widespread and seen as a ‘tax’ on local communities by gangs. Many of those affected by extortion live in gang-affected neighbourhoods and consider that they simply have no choice but to pay or to flee their homes and neighbourhoods. And the threat from the gangs, individuals or whole families would simply disappear, leaving their homes abandoned or selling their homes cheaply.”

20. The FtT considered that this evidence was consistent with the appellant’s experience. It is clearly implied by the FtT’s approach to the evidence and its specific finding that, on return to his home area, the appellant who was previously know to the gang would, once again, come to their attention and be subject to precisely the same threats as before.

21. Reading para 64 of the FtT’s decision, but not in isolation and together with the totality of its reasons, I am satisfied that the FtT gave adequate, cogent and rationally sustainable reasons for concluding that in his home area the appellant would on return be at real risk of suffering serious harm at the hands of the MS-13 gang.

22. Although I am satisfied that the FtT was entitled to reach that finding, I am not satisfied that the FtT properly considered the issue of internal relocation and the issue of sufficiency of protection which was relevant to the risk to the appellant elsewhere in El Salvador, for example in San Salvador. 23. First, the respondent undoubtedly contended, both in the decision letter and at the hearing, that the authorities would be willing and able to provide a sufficiency of protection to the appellant from the MS-13 gang. The only relevant background material referred to by the FtT is at para 66 of its decision where para 2.5.11 of the CPIN is set out as follows: "Therefore, in general, given the weaknesses in the criminal justice system and the size, capability and inference of the main gangs, while the state is likely to be willing it is unlikely to be able to provide effective protection. However, each case will need to be considered on its facts taking into account the nature, capability and intent of the gang and the profile of [the] person."

24. Whilst that recognises that it is "unlikely" that effective protection will be provided, as Ms Rushforth submitted, it requires a consideration of all the circumstances.

25. In para 67, the FtT stated that: "MS-13 as one of the largest gangs in El Salvador are likely to have the resources and desire to locate him in any part of the country. The CPIN's description of how to leave a gang is also consistent with M's description of a situation while in the UK as the 'the gang was now calm about me' because of him being outside the country: 'In principle, gang members are not allowed to leave under any circumstances. They can, however, change status from 'active', to 'passive', or become what is known as 'semi-retired' ('Calmado'). The gang leaders in that area have to grant permission to a member to change his status. That permission is usually contingent on a number of stated and unstated factors: the member's 'commitment' to El Barrio, the member's duration in the gang, and the member's current family situation. Obtaining permission to transition into a Calmado is not easy, and being Calmado does not mean the gang member is not governed by gang rules. A member that is Calmado is still local to El Barrio."

26. Then at para 68, the FtT noted that on return to El Salvador the appellant: "would no longer be treated as 'semi-retired' and would be expected to return to his previous activities."

27. The difficulty with this assessment is that, as indeed Mr Joseph acknowledged, it has nothing to do with the appellant himself. He was, and is, not a member of the MS-13 gang. He was at best invited to be a collaborator or informant and, ultimately, left El Salvador because he would not pay "renta".

28. It is not clear, therefore, why the FtT concluded that, on the facts of the appellant's case and his particular circumstances, he was unlikely to be provided with effective protection. Certainly, that issue in relation to a place of internal relocation is not adequately reasoned. It is not, in itself, sufficient for the FtT to state at para 67 that because the MS-13 is one of the largest gangs in El Salvador, even if they have the resources, they have the "desire to locate" the appellant in any part of the country. Any assessment would have to have regard to the FtT's acceptance of the appellant's evidence that the MS-13 gave him the option of leaving his home area if he was not prepared to pay the "renta". That evidence, it could be said, suggests that the MS-13 interest in the appellant was only active or live if he remained in his home area.

29. In my judgment, therefore, the FtT's findings that the appellant could not safely internally relocate within El Salvador, including the issue of sufficiency of protection, was inadequately reasoned and the FtT's findings cannot stand in that regard.

30. For these reasons, and to that extent, the FtT erred in law in reaching its decision that the appellant had succeeded in establishing the basis for humanitarian protection.

Decision

31. For the above reasons, the First-tier Tribunal's decision to allow the appellant's appeal on humanitarian protection grounds involved the making of an error of law. That decision cannot stand and is set aside.

32. The appropriate disposal of this appeal is that it should be remade in the Upper Tribunal on the basis that the FtT's finding in para 64 stands.

33. The outstanding issues upon which findings must be made are: internal relocation including any issue of sufficiency of protection in that regard.

34. The appeal will be relisted for a resumed hearing in the Upper Tribunal in order to remake the decision as set out above.

Signed Andrew Grubb
Judge of the Upper Tribunal

6 December 2022