



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003935

First-tier Tribunal No:
PA/55835/2021;
IA/17517/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

14th September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AAFI
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr C. Bates, Senior Home Office Presenting Officer

For the Respondent: Mr C. Holmes, counsel instructed by Broudie,
Jackson, Canter solicitors

Heard remotely at Field House on 23 August 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and the members of his family are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant and his family members, likely to lead members of the public to identify the appellant and his family members. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of El Salvador, born on 20.11.74. he arrived in the United Kingdom on 29.5.19 with his wife and 4 children and claimed asylum on arrival on the basis that he had a well founded fear of persecution from a gang, MS-13/Mara Salvatrucha. This application was refused in a decision dated 9.10.19. He appealed against this decision, which was dismissed in a decision and reasons dated 4.12.19. he sought and was granted permission to appeal to the Upper Tribunal and the decision of the First tier Tribunal was set aside by the Upper Tribunal on 17.7.20. On 5.10.20 his appeal was re-heard by the First tier Tribunal and dismissed and the Claimant became appeal rights exhausted on 22 January 2021. The Claimant's wife gave birth to a further child, a son born on 11.9.20.
2. Submissions in support of a fresh asylum and human rights claim were made on 29.7.21. These were refused with the right of appeal on 25.11.21. The SSHD submitted a review on 25.2.22. On 16.6.22 the appeal hearing took place before First tier Tribunal Judge Trent, when there was no appearance by or on behalf of the Home Office. Expert evidence was given live to the First tier Tribunal by Dr Andrew Redden, who was accepted by the SSHD to be an expert in Latin American history including the conflict in El Salvador.
3. In a decision and reasons promulgated on 22 June 2023, the judge allowed the appeal. The SSHD sought permission to appeal to the Upper Tribunal, in time, on 27.6.22 which asserted as follows:

"1. Making a material misdirection of law on any material matter.

a) It is respectfully submitted that the First Tier Tribunal Judge (FTTJ) has materially erred in law by finding that the Appellant is a member of a Particular Social Group (PSG) and therefore his appeal falls to be allowed under the Refugee Convention.

b) It is submitted that the appellant, as a person who has defied the criminal gangs in El Salvador, would not have a distinct identity or would be treated differently by surrounding society because of any claimed innate characteristic.

c) It is submitted that although the Appellant would be subjected to different treatment from members of the criminal gang he has defied, there is no evidence referred to by the FTTJ that those people who have defied the criminal gangs are treated or viewed differently by the remainder of the surrounding society in El Salvador. Additionally, it is submitted that the FTTJ has failed to provide any adequate reasons for why the appellant's defiance of

the criminal gangs amounts to an innate characteristic that singles him out for different treatment by the rest of society and not just members of the criminal gangs who seek to harm him.

d) As a result, it is submitted that the FTTJ's conclusions are not evidence based and therefore contain a material error in law."

4. Permission to appeal was granted by UTJ Pickup in a decision dated 30.9.22 in the following terms:

"2. It is arguable that the judge erred in law in finding at [66] of the decision that the appellant, who refused to comply with demands made by a gang, was by that reason a member of a Particular Social Group (PSG). It is difficult to see how such a person could be regarded differently by the surrounding society in El Salvador. He may fear harm from a gang or its members, but that is arguably insufficient to amount to an innate characteristic. The challenged finding was material to the outcome of the appeal."

5. In a rule 24 response dated 23.12.22 the Claimant's representative asserted in respect of Ground 1 that this was a factual disagreement and fundamentally misunderstood the effect of authority by seeking to re-introduce a conjunctive approach to the PSG criterion: DH (PSG: mental health) Afghanistan [2020] UKUT 223 (IAC) and the recent country guidance decision in respect of gangs and El Salvador: EMAP [2022] UKUT 00335 (IAC) the headnote to which provides:

"COUNTRY GUIDANCE:

(i) The major gangs of El Salvador are agents of persecution.

(ii) Individuals who hold an opinion, thought or belief relating to the gangs, their policies or methods hold a political opinion about them.

(iii) Whether such an individual faces persecution for reasons of that political opinion will always be a question of fact. In the context of El Salvador it is an enquiry that should be informed by the following:

(a) The major gangs of El Salvador must now be regarded as political actors;

(b) Their criminal and political activities heavily overlap;

(c) The less immediately financial in nature the action, the more likely it is to be for reasons of the victim's perceived opposition to the gangs.

(iv) As the law stands at present, so taking the disjunctive approach, those fearing gang violence in El Salvador may be considered to be

members of a particular social group where they can demonstrate that they share an innate characteristic, a common background that cannot be changed, or a characteristic so fundamental to their identity or conscience that they should not be forced to renounce it."

6. In relation to ground 2, the Claimant's representatives indicated that they will seek to argue that the Judge's decision should be upheld on other grounds in light of the Judge's factual conclusions and the guidance now provided in *EMAP* which postdated the decision of the FtT. Consequently, the Claimant now seeks to argue that he risks persecution on account of his actual or imputed political opinion such that his appeal should succeed in any event.

Hearing

7. At the hearing before the Upper Tribunal Mr Bates for the SSHD challenged the Judge's findings that the Claimant met the requirements of a particular social group (PSG) under the 1951 UN Refugee Convention. He submitted that the Judge did not go on in the alternative to allow the appeal under HP or article 3 grounds, but there had been no challenge to the Judge's findings of fact on sufficiency of protection or internal relocation. In relation to the Convention ground, the Judge did not find in the Claimant's favour on imputed political opinion but found in his favour on the PSG: [65] and [66]. Mr Bates submitted that this was a misdirection and inadequate in terms of reasoning.
8. Mr Bates submitted that *EMAP* makes the point that the gangs are agents of persecution and at headnote 3: "*(c) The less immediately financial in nature the action, the more likely it is to be for reasons of the victim's perceived opposition to the gangs.*" The reason this Appellant fears persecution is failure to pay a debt. Mr Bates sought to rely upon [123] and [124] of *EMAP* in support of his contention that the Appellant is not a person of conscience openly and publicly opposing the gangs. Mr Bates sought further to rely upon [139] and [140] of *EMAP* with regard to the economic and criminal context and submitted that the Appellant is a person who has refused to comply with the demands of gangs and that this is not enough to bring him within a PSG and the Judge at [66] did not go far enough to provide that rationale.
9. Mr Bates maintained the SSHD's position that there is a material error of law and that the Judge had failed to provide adequate reasons as to why defiance of the gang would put him at risk. But he also accepted that the Judge had made findings in favour of the Appellant with regard to sufficiency of protection and internal relocation.

10. In his submissions, Mr Holmes opposed the SSHD's appeal on the PSG point and sought to resurrect the political opinion argument following new country guidance in the case of *EMAP* (op cit). Mr Holmes submitted that, with regard to the PSG issues, the SSHD's grounds of appeal are entirely without a grasp of the irony in attempting to introduce a conjunctive approach to the question of PSG, which was disapproved by the Upper Tribunal in *DH* (op cit) as set out in the rule 24 at [10] and this was followed by the Upper Tribunal in *EMAP* last year. The reason it is significant is that the Judge both applied and properly reached conclusions under the ambit of the guidance, following a disjunctive approach at [65] and [66] where the Judge had one of three options to choose from: he could conclude either the Claimant had a distinct characteristic, shared background or would be perceived distinctly by society. The Judge concluded there is an innate characteristic and common background not because the Claimant is afraid but because he has defied the gang's demands, in common with other individuals who have defied a gang. It was not necessary for him then to necessarily show that group of people is perceived separately by society.
11. Mr Holmes submitted that the assertion at (b) of the grounds of appeal that the Appellant would not have a distinct identity or would be treated differently by surrounding society because of any claimed innate characteristic was a straightforward disagreement with the judge's finding and the SSHD was not here alleging any legal error.
12. Mr Holmes accepted that ground (c) and the assertion that: "*there is no evidence referred to by the FTTJ that those people who have defied the criminal gangs are treated or viewed differently by the remainder of the surrounding society in El Salvador*" gets close to alleging a legal error but is a re-introduction of the conjunctive approach. This is followed by a reasons challenge where the SSHD acknowledges an innate characteristic had been made out but says he also needs to establish distinct member of society and would be singled out, which is wrong as such an approach is entirely contrary to the guidance set out in *DH* (op cit).
13. With regard to the political opinion aspect of the case, Mr Holmes submitted that at [64] the judge appears not to have treated his submission at its height and that the Home Office CPIN was wrong. It is clear now from *EMAP* which set out the country guidance that it is clear that the gangs operating in El Salvador are political actors and the judge was wrong not to conclude as such. Mr Holmes submitted that there is a clear finding at [66] that the Claimant is an individual who has defied gang authority but refusing to pay extortion demanded of him and in those circumstances as a dissenter who challenged the authority of the gangs any mistreatment would be on the basis of perceived political opinion.

14. Mr Bates replied with regard to the political opinion aspect which in effect was a cross appeal by Mr Holmes. He accepted that the Judge erred in concluding that it would be impossible for someone to be considered on the basis of imputed political opinion in light of the CG case of *EMAP* and that this could lead to a finding in favour of the Claimant. Mr Bates drew attention to headnote 3(c) of *EMAP* and the need to assess whether the action was financial in nature e.g. a failure to pay further monies. He submitted that it was not clear cut that the judge would have arrived at the same conclusion automatically in light of the country guidance case.
15. I reserved my decision which I now give with my reasons.

Decision and reasons

16. I find no error of law in respect of the Judge's finding that the Claimant is a member of a particular social group. At [65] the Judge directed himself in accordance with the decision in *DH* (op cit) which the Judge noted held, following article 10(1)(d) of QD that correctly defined, a particular social group could be either that the group shares an innate characteristic or common background that cannot be changed or may be perceived as different by the surrounding society and thus have a distinct identity in their country of origin. The Judge went on at [66] to find that the Claimant was a member of a group of persons who have refused to comply with a major gang's demands, which leaves them in a position of sharing a characteristic or common background which cannot be changed. This finding is consistent with the approach set out in *DH* and is correct in law. I agree with Mr Holmes that the SSHD has failed to apply this approach in the grounds of appeal, which are misconceived.
17. Whilst Mr Bates also relied upon the reasons challenge set out at (c) in truth this is simply a different way of saying the same thing and it was not necessary for the FtTJ to find or the Claimant to show both that he had an innate characteristic and that this singles him out for different treatment by the rest of society and not just members of the criminal gangs who seek to harm him.
18. For the avoidance of any doubt, the approach taken by the FtTJ is also consistent with the approach taken by the panel of the Upper Tribunal in *EMAP* (op cit). However, as the panel in *EMAP* made clear, the position from 28 June 2022 when section 33 of NABA 2022 came into force mandates a restrictive, conjunctive approach in that a group only constitutes a PSG if it meets both the condition that members of the group share an innate characteristic, a common background that cannot be changed or a characteristic or belief that is so fundamental to identity of conscience that a person should not be forced to renounce it *and* that the group has a distinct identity because it is perceived as being different by the surrounding society.

This postdates both this Claimant's case before the First tier Tribunal and *EMAP* and so is inapplicable as those asylum claims were lodged prior to 28.6.22. Mr Bates quite properly did not submit that section 33 of NABA was applicable to this Claimant's case.

19. Mr Holmes submitted in the alternative that the Claimant also has a well founded fear of persecution on the basis of imputed political opinion, based on the findings of the country guidance case of *EMAP*. In light of my decision above that there is no material error of law in the decision and reasons of the First tier Tribunal Judge it is not necessary for me to determine this argument. However, I note that the FtT found as follows at [63]:

"63. In my judgement, even if MS-13 can be viewed as a quasi-political organisation for the reasons Mr Holmes puts forward, the refusal by the Appellant to pay extortion money is so apolitical in nature as to be obviously unattributable to any political opinion. Coupled with the observations in the CPIN as to the lack of political ideology of MS-13 and the lack of evidence of targeting on political grounds - and here there is no suggestion that the Appellant was targeted for any political reason - I do not find that the Appellant's fear is based on actual or imputed political opinion."

20. However, in *EMAP* the panel of the Upper Tribunal reached a contrary conclusion, finding at [115]:

"115. We are wholly satisfied that MS-13 and B-18 must today be regarded as political actors in El Salvador. These gangs, whose leadership now work in tandem against the government, are now estimated by the ICG to have a presence in 94% of municipalities. They are in control, or have a significant degree of control, across "vast" areas of the country, where they subject the resident population to "an extraordinary level of social control". This may not involve the provision of 'services' as we would understand it, but they do not have to be acting as a proxy government in order to be exercising power. The Supreme Court of El Salvador has declared gang violence to be "politically motivated" in its designation of the gangs as 'terrorists'. The evidence consistently indicates that they have infiltrated all major branches of government and the security services, at both national and local level: to borrow the phrase used in Gomez [at 40], here "criminal and political activities heavily overlap".

21. The panel of the Upper Tribunal then proceeded to consider the spectrum of the type of case that may or may not engage the imputed political opinion Convention reason, holding at [122]:

"122. In between those two poles is the area of overlap where the criminal and the political motivations of the gangs are harder to

separate. It is true that punishment for resistance will often be inflicted in pursuit of criminal, economic objectives, but in the context of El Salvador that is not all it is. The subject of extortion who takes a stand and refuses to pay, the victim of violence who turns to the state for assistance, the youth who resists the pressure to join a gang are all in our view likely to be able to establish that an effective cause of the persecution they fear is the opinion or belief that they hold about the gang. The less immediately financial in nature the point of the adverse attention, the more likely it is going to fall towards the political end of the spectrum."

22. I consider that the Claimant in this case can properly be held to fall into the category of case "*the subject of extortion who takes a stand and refuses to pay*" since that was the basis of his flight from El Salvador. Consequently I find that, in the alternative, the Claimant has a well-founded fear of persecution on the basis of his imputed political opinion.

Notice of Decision

22. I find no material error of law in the decision and reasons of the FtT Judge. I dismiss the appeal by the SSHD with the effect that the decision of the First tier Tribunal allowing the Claimant's appeal is upheld.

Rebecca Chapman

DUT Judge Chapman

13 September 2023