



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-000844

First-tier Tribunal No: PA/50592/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

26th January 2024

Before

UPPER TRIBUNAL JUDGE REEDS

Between

NASA
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G. Brown, Counsel instructed on behalf of the appellant

For the Respondent: Mr M. Diwnycz, Senior Presenting Officer

Heard at (IAC) on 22 January 2024

DECISION AND DIRECTIONS

1. The appellant appeals, with permission, against the determination of the First-tier Tribunal promulgated on 31 August 2021. By its decision, the Tribunal dismissed the appellant's appeal on protection grounds against the Secretary of State's decision dated 26 January 2021 to refuse his protection and human rights claim.
2. The FtTJ did make an anonymity order and no grounds were submitted during the hearing for such an order to be discharged. Anonymity is granted because the facts of the appeal involve a protection claim.
3. 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.

The background:

4. The factual background can be summarised as follows. The appellant is a national of El Salvador who arrived in the United Kingdom with his dependents on 11 February 2019 and claimed asylum on arrival. The basis of his claim was that he would face persecution if he were returned to El Salvador because he was a member of a Particular Social Group targeted by criminal gangs for defying them. In the alternative it was claimed that the stance he had taken would be regarded as political opinion against the gangs and would also amount to a Refugee Convention reason.
5. The respondent in her decision of 26 January 2021 granted the appellant humanitarian protection based on his credible evidence of the existence of a real risk of being caused serious harm by the same criminal gang. However the respondent did not agree the serious harm would be for a Refugee Convention reason. The appellant appealed the decision, and the appeal came before the First-tier Tribunal on 10 August 2021. It was recorded that it was agreed between the parties at the credibility of the appellant was not in issue and the factual account was accepted. The issue was whether the appellant's claim fell within a Convention reason.
6. In a decision promulgated on 13 August 2021 the FtTJ dismissed the appeal. When considering the issue of whether the appellant fell within a PSG, whilst the FtTJ accepted that the appellant had an unchangeable characteristic (previously refusing to comply with the demands of criminal gangs), he found that this could not be separated from the acts of persecution relied upon. That there was no evidence to sustain the view that those who defied criminal gangs would be sufficient in number or readily identifiable to constitute a discernible group. He found that the real reason why the appellant was being targeted was for criminal acquisitive gain not because he was regarded as a part of a social group that was discriminated against (see paragraph 26). When considering whether the persecution was motivated by imputed or, the FtTJ, applying *Gomez*, considered that to qualify for asylum on grounds of imputed political it must be capable of being political in nature. Whilst the judge accepted that the background information did demonstrate the criminal gangs in El Salvador wield power and exert great control, he did not find that they were "parties to major power transactions." He therefore dismissed the appeal.
7. The appellant sought permission to appeal on the basis that the FtTJ erred in law in the conclusions reached as to whether or not the claim fell within a Refugee Convention reason by misdirecting himself in law in the application of *Gomez* and *Montoya*, failing to consider material evidence (UNHCR guidelines) that the gangs control the areas they reside in a political and quasi-governmental way.
8. Upper Tribunal Judge Perkins granted permission on 19 January 2022 for the following reasons:

"I give permission on all of the grounds. It may be that the First-tier Tribunal Judge did not consider properly the evidence concerning the power of gangs in El Salvador and it may be that the Judge gave wrong reasons for determining that the appellant is not a refugee."
9. At the hearing before the Upper Tribunal there was agreement between the parties that the decision of the FtTJ involved the making of a material error on a point of law. This had been set out in a Rule 24 response sent by the respondent to the Tribunal on 28 September 2023. It set out that the respondent did not oppose the appellant's application for permission to appeal and invited the

tribunal to determine the appeal with a fresh oral (continuance) hearing to consider whether the appellant satisfies a Refugee Convention reason. It also set out that the respondent noted the subsequent CG of EMAP (Gang violence- Convention Reasons) El Salvador CG [2022] UKUT 335 that concluded, adopting the disjunctive approach then applicable (headnote iv), that being a police informer met the requirements to be considered a member of a PSG [141]. The FTT hearing was on 10 August 2021, the appellant was found to be a police informant (conceded in refusal decision of 26 January 2021, “risk on return” section). It set out that the panel considered evidence dating prior to the FTT and consequently the respondent did not oppose the grounds. Mr Diwnycz confirmed the contents of the Rule 24 response.

10. As a preliminary issue, the parties views were canvassed about part of the contents of the Rule 24 response which had referred to the new provisions in NABA 2022. It was unclear whether it was being submitted that Section 33 of the 2022 Act applied (as to the definition of “PSG”).
11. Having had the opportunity to consider the issue of jurisdiction, it was agreed between the parties that Section 33 and the provisions of NABA 2022 did not apply to the appeal. I agree. The country guidance decision in EMAP (Gang violence- Convention Reasons) El Salvador CG [2022] UKUT 335 refers to the changes made to the legislation from 28 June 2022 when section 33 of NABA 2022 came into force. Applying Section 30 of the Act, the new provisions do not apply as this appellant’s claim was lodged prior to 28 June 2022.
12. Both advocates were therefore in agreement that the FtTJ had erred in law in his analysis of whether the facts of the appellant’s claim, which were not in dispute, fell within a Refugee Convention reason, namely that of political opinion/imputed political opinion or whether he fell within a Particular Social Group (“ PSG”). The legal issues had, since the FtTJ’s decision been clarified in the CG decision of EMAP (as cited).
13. Article 1A(2) of the Refugee Convention 1951 defines a refugee as an individual who: “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” Article 33 provides that no Contracting State shall return a person in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened by reasons of his race, religion, nationality, political opinion, or membership of a particular social group.
14. Neither party had provided any further evidence for the remaking hearing but both advocates confirmed that the only issue was to assess the appellant’s factual background which had been accepted by the respondent in the light of the new Country Guidance decision of EMAP (Gang violence- Convention Reasons) El Salvador CG [2022] UKUT 335.
15. The headnote to that decision reads as follows:
 - (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.

16. Mr Brown summarised the basic facts of the appellant's case as set out in the FtTJ's decision. The appellant is a national of El Salvador. On 15.10.2015 the appellant was threatened by 2 member of the MS-13 gang who were attempting to extort \$50 per week from him. The following week the gang members visited his home twice and threatened his family on both occasions giving him 2 weeks to comply with their extortion demand or they would kill his daughter. In December 2017, the appellant was threatened by another gang member. This gang threatened to 'disappear' him and his family if he did not comply with their request. The gang members believed that the appellant was a police officer. On 20.05.2019 the appellant was threatened by 3 gunmen who accused the appellant of being in communication with the police. They gave the appellant 2 days to leave his home. The appellant fears that if he were to return to El Salvador he will be killed by the gang members.
17. As set out above, the respondent accepted the appellant's account of adverse attention from gangs in El Salvador and in particular MS-13 and his account was found to be detailed, plausible and internally and externally consistent . It was further accepted that the appellant's actions meant that he would be perceived as a police informant. This is set out in the decision letter under the heading "risk on return," where it was accepted as a material fact that he had received the adverse attention from the gangs and that his actions would mean that he was perceived as a police informant. It was accepted that he resided in an area controlled by the gang and that there was sufficient reason for the gang to have an interest in him such as their belief he was a police informant.
18. On the factual account accepted by the respondent and set out in the appellant's witness statement at paragraphs 10 to 11, Mr Brown submitted that the appellant would have imputed to him political opinion or in the alternative the appellant would fall within a PSG. Mr Brown referred to the guidance in EMAP (as cited) and in particular paragraphs 112 - 122. Whilst each case is fact specific, he submitted that in terms of imputed political opinion the appellant's case is made out as he was perceived to be a police informant. The Upper Tribunal had referred to a spectrum of cases and where the problem is purely criminal. However, Mr Brown

submitted that on the facts of this case the motive for the persecution is that the gangs had imputed to the appellant imputed political opinion and on the facts of the case that he was a police informant and as a result of that perception it imputed resistance to their activity. That was sufficient to bring him within the Convention ground of imputed political opinion as on the face of it he had resisted the actions of the gangs, who held a quasi-political position in El Salvador.

19. In the alternative, he submitted that the facts of the appeal were consistent with paragraph 123 - 124 of EMAP and that he would also fall within a PSG, as an individual who resisted the gangs in El Salvador as he was able to demonstrate that he shared an innate characteristic or a common background that could not be changed. The panel found that this could include those who make a public or visible stand against the gangs as they are likely to be perceived as different by the surrounding society. The UT found that those who privately, discreetly opposed the gangs would not and their claims would fail. Mr Brown submitted that the appellant fell within that earlier category as he did not oppose the gang in a private way but had made a police report against the gangs activity (see p31 AB).
20. In summary Mr Brown submitted that the appellant could fall within either the Refugee Convention ground of imputed political opinion or that of a Particular Social Group, and that it was this which had been argued before the FtTJ as set out at paragraph 17.
21. Mr Diwnycz on behalf the respondent accepted that there had been an error of law in the decision of the FtTJ and as set out in the rule 24 response. Given that acceptance there is no dispute between the parties that the FtTJ erred in his analysis of Convention reason by reference to the legal issues in the context of El Salvador as set out at paragraphs 25-28 of his decision as the grounds set out. The decision of the FtTJ is therefore set aside. As to the remaking the decision, Mr Diwnycz further conceded that having considered the decision in EMAP, the appellant's case under either Refugee Convention ground had been made out and that the appellant's denunciation to the police "had marked him out." He made no further submissions.
22. Mr Brown has submitted that the appellant has a well-founded fear of persecution on the basis of imputed political opinion when applying the country guidance decision in EMAP. The decision deal with this issue between paragraphs 112-122.
23. Paragraph 115 of EMAP states as follows:

"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”.

24. The UT in its decision also considered the type of case that may or may not engage the Convention reason of imputed political opinion, noting that all cases are “fact specific.”

25. At paragraph 120-122 the UT set out the following:

“120. There will be cases at one end of the spectrum where the motive for persecution is purely political. Professor McNamara gives the example of an individual involved in anti-gang youth programmes. Another example would be the targeting of an individual who speaks out against a gang-selected candidate, or a local politician who refuses to advance the policies they urge upon him.

121. There will be cases at the other end of the spectrum where the motive for persecution is purely criminal. The most obvious example of that would be the shopkeeper subject to extortion by his local *clica*. The act of extortion itself may be crippling for the shopkeeper, and he may be living in terror of what might happen should he refuse to pay, but absent other features the motive is wholly financial, and criminal in nature. We doubt the gang has given any thought at all to what the shopkeeper thinks about their policies or methods.

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.”

26. When applied to facts of the appellant’s claim, I accept that the appellant falls within the category of case as someone who had been the subject of extortion and had taken a stand by involving the police and had been treated as a police informant. Whilst he had been the subject of extortion (as set out at paragraph 121) the appellant’s factual claim falls within that identified at paragraph 122, and that someone who is the subject of extortion who takes a stand and refuses to pay and/or who has been the victim of violence and turns to the state for assistance is likely to be able to establish that the effective cause of the persecution they fear is the opinion or belief they hold about the gang. It therefore falls towards the political end of the spectrum as identified at paragraph 122 and set out above. Mr Diwncyz on behalf of the respondent when providing his submissions conceded that the appellant did fall into that category and did not seek to argue otherwise. Thus it was accepted on behalf of the respondent that the appellant did fall within the Convention grounds of imputed political opinion.

27. Neither party referred to the recent changes in El Salvador and in particular the crackdown on gangs by the government following the State of Emergency on 27th

of March 2022. The decision in EMAP was heard in April and June 2022 and therefore included the position prior to and after the crackdown. There is reference to members of the gangs being detained.

28. When assessing the factual account of the appellant which is not in dispute and had been accepted by the respondent, it is accepted that the appellant would be at real risk of serious harm from the gangs in El Salvador on the basis of his opposition to the gangs and his extortion and the police report and that he was perceived as a police informant. This would, as Mr Brown submitted, demonstrate that he disagreed with the gangs and his fear of persecution would be for reasons of imputed political opinion, as set out in EMAP.
29. The evidence in EMAP(see paragraph 10) referred to MS-13 is the largest gang in El Salvador, but also in the world . The UT also set out that MS-13 were organised (paragraph 12) and to view reports of crimes to the police, at paragraph 41 as acts of political resistance (see paragraph 41) That there is official complicity and that officials acting or not acting fear of gangs is a serious problem and thus they are able to influence decisions and governance including the level of protection provided to its citizens by the authorities (see paragraph 48). At paragraph 48 it is recorded that the infiltration of civilian structures is reported to be similarly widespread with the police force as the institution most affected, particularly in rural areas. “Prof 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.”
30. The respondent accepts that a police report was made, this and that the appellant was viewed by the gang members as a police informant. On the chronology of events this would have happened in 2019 and therefore before the crackdown. He would therefore be a person who faced a greater risk of harm, notwithstanding the security crackdown. There is a reasonable likelihood based on that material that this would be known and therefore falls within the Refugee Convention ground of imputed political opinion.
31. That being the case it is not strictly necessary to consider whether the appellant fell within a “PSG.” As 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.
32. When applied to the factors accepted by the respondent, the appellant fell within a member of a group of people who had refused to comply with the demands of the gang identified as MS-13, which puts them in the position of sharing a common background or characteristic which cannot be changed or perceived as different by the surrounding society. At paragraph 124, the panel concluded that those who make a public or visible stand against the gangs would qualify as they are likely to be perceived as different by the surrounding society. Given the visible and public stand against the gang made by the appellant and his status as albeit a perceived police informant (see paragraph 141 of EMAP).
33. Consequently for those reasons it is agreed between the parties that the appellant has established that the FtTJ’s decision involved the making of an error on a point of law. It has been further agreed that the appellant’s claim as set out before the FtTJ and accepted by the respondent, falls within a Convention Reason and therefore the appellant’s appeal is allowed under the Refugee Convention.

Notice of Decision:

34. The decision of the FtTJ involved the making of a material error of law and is set aside. It is remade as follows: the appeal is allowed on Refugee Convention grounds.

Upper Tribunal Judge Reeds
Upper Tribunal Judge Reeds

24 January 2024