



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/04402/2019 (V)

THE IMMIGRATION ACTS

**Heard at Field House via Skype for Decision & Reasons
Business Promulgated
On 10 July 2020 On 27 July 2020**

Before

THE HON. MR JUSTICE LANE, PRESIDENT

Between

**RM
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Patel, Counsel, instructed by Broudie Jackson Canter

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of El Salvador born in 1976, arrived in the United Kingdom on 12 December 2018 and claimed asylum. The appellant's claim to be in need of international protection arose from his asserted fear of being perceived by the "the notorious MS13 Gang" in El Salvador as a government informant. The MS13 Gang were concerned that the appellant had deliveries made to his home by a government vehicle. On the last occasion when he had met what he assumed to be members of the MS13 Gang, the appellant had been asked what he did by way of

employment. When he said that he was in sales, his interlocutors accused him of telling lies.

2. The appellant reported the matter to the police, who said that they would investigate it. The police would make contact with the appellant when they had more information. The appellant went to live in a hostel. Two days later he telephoned the police for an update, but was told that they were very busy.
3. The appellant considered asking family members if he could live with them but they also lived in gang-controlled areas and so he decided it would not be safe there for him or the family members. Considering that he had nowhere in El Salvador to which he could go, the appellant decided to leave the country and claim asylum abroad.
4. On 24 April 2019, the respondent refused the appellant's claim for asylum and humanitarian protection. At paragraph 36 of the decision letter, the respondent noted that background information on MS13 said that dozens of El Salvador police had been killed in the past three years, mostly, it was thought, by MS13 "an international street gang". At paragraph 37, the respondent stated that if the appellant had been investigated by MS13 and told that he was a police informant, it was inconsistent with the background information about MS13 that the appellant had not been threatened or harmed in any way.
5. At paragraph 41, having set out other matters which the respondent considered to comprise inconsistencies in the appellant's account, it was "not accepted that you have received death threats from MS13 and this part of your claim is rejected".
6. The respondent, nevertheless, went on to consider whether state protection was available to the appellant in respect of MS13. At paragraphs 51 to 59, background evidence was cited. The respondent concluded that there was a functioning police force in El Salvador. Since the appellant contacted the police only two days after his initial report and had not contacted them further, the respondent considered that the appellant had not given the police "the adequate opportunity to investigate your report, and as such you have not substantiated your claim that the police would be unwilling or unable to offer you protection" (paragraph 61).
7. The letter then noted evidence regarding the conviction of members of MS13 in El Salvador, and the imposition of long sentences of imprisonment. A report mentioned in the letter described El Salvador's "Iron Fist" crackdown on gangs.
8. Overall, at paragraph 71, the respondent concluded that the appellant had failed to establish a sustained and systemic failure of state protection on the part of the authorities in El Salvador.

9. Beginning at paragraph 72, the letter considered the availability of internal relocation. The appellant told the respondent that he could not relocate because the gangs were all over the neighbourhoods. However, the respondent considered that the appellant had failed to establish he would be at heightened risk from rival gangs or that MS13 members would have the means or motivation to seek out the appellant, if he were to relocate to another area of El Salvador.
10. At paragraph 83, the respondent decided that, in any event, the appellant had not put forward a well-founded fear of persecution by reason of race, religion, nationality, membership of a particular social group or political opinion. Furthermore, the appellant was not entitled to a grant of humanitarian protection.
11. Having concluded that the appellant was not entitled to remain in the United Kingdom by reference to Articles 2 or 3 of the ECHR, the letter turned to the Article 8 private/family life of the appellant. It was the respondent's conclusion that the appellant did not qualify for leave by reference to Article 8, either within the ambit of the Immigration Rules or outside them.
12. The appellant appealed to the First-tier Tribunal against the decision of the respondent. His appeal was heard at Manchester on 14 June 2019. The resulting decision of the First-tier Tribunal Judge was promulgated on 1 July 2019.
13. At paragraph 20, the judge noted the submission of Ms Patel, for the appellant, that challenging the authority of the gang was sufficient to cause him to be of adverse interest to them. Some 10% of the population of El Salvador are affiliated to gangs.
14. At paragraph 22, the judge noted the UNHCR report, contained in the material submitted on behalf of the appellant, which stated at page 86 of the bundle that gangs in El Salvador are reported to exercise high levels of social control over all aspects of life of members of the population in the areas under the gang's control. Paragraph 22 then notes the UNHCR report as giving examples of types of behaviour considered to be expressing a challenge to the gang's authority. I observe here that these are said to include:

“criticising the gang; refusing a request or “favour” by a gang member; arguing with or looking mistrustfully at a gang member; refusing to participate in gang activities or to join the gang; rejecting the sexual attention of a gang member; having (perceived) links with a rival gang or a zone controlled by a rival gang; refusing to pay extortion demands; wearing certain clothing, tattoos or other symbols; participating in civil, religious or other organisations viewed as undermining the gang's authority; and passing on information of other gangs to rivals, authorities or outsiders.”
15. The passage continues by noting that in some cases a stranger accidentally turning up uninvited in a gang zone is reportedly taken as a

serious affront to the gang's authority. Persons who live in localities that serve as "invisible" boundaries between the territories of rival gangs, or where the control of one gang is being disputed by another gang, also face a heightened risk of being perceived as having links with the rival gang.

16. At paragraph 23, the judge concluded that a person perceived or suspected of being a police informant by a gang such as MS13 "could depending on their particular circumstances potentially fall within the definition of refugee due to their actual or imputed political opinion".
17. At paragraph 24, the judge turned to the analysis of the appellant's claim. The judge was concerned by the suggestion that gang members adversely interested in the appellant would not just approach him in the street twice and visit his apartment once; "they would actually take some action in the form of threats and actual physical violence". In this regard, the judge considered that the events described by the appellant "are not consistent with the country information and what is known about the activities of the prominent gangs such as MS13".
18. At paragraph 25, the judge noted that the appellant had not feared for the safety of any of his family members or friends and they had not been approached by the gang or threatened or intimidated by them. That too, according to the judge, was inconsistent with the country information.
19. Paragraph 28 records evidence given by the appellant to the judge of examples of circumstances in which one could fall foul of a gang. The appellant mentioned hairstyles. He also said that if someone wore clothing that displayed a number "6", that number, if turned upside down to look like a "9", meant "twice nine is eighteen" and "18" are the opposing gang to MS13, so wearing a "6" suggests support for Gang 18".
20. In paragraph 28, the judge said that he had gone into some detail in this regard as the appellant's evidence, in the judge's view "does not stand up to scrutiny" even to the lower standard.

"To suggest that a person would be harmed or even killed solely because of his/her hairstyle or solely because of the fact they are wearing something displaying a number "6" is not supported in the country information and I find it is evidence of the appellant's somewhat furtive imagination."

21. At paragraph 29, the judge questioned the appellant's interaction with the police. On his own account, the appellant had failed to wait to see if the police could identify the persons he had referred to in his complaint. If the appellant did not believe the police could do something about the complaint, the judge could not understand why the appellant decided to make the complaint to them in the first place. The judge did not find the appellant's evidence to be credible in this regard.
22. At paragraph 30, the judge noted that the appellant's family had not been approached or threatened by any gangs, let alone harmed. This too struck the judge as problematic. The UNHCR evidence suggested that

contraventions were dealt with severely and that the family members of those regarded as “informants” could be targeted.

23. At paragraph 33, the judge considered the issue of internal relocation. He noted the appellant’s evidence of gangs being influential in La Paz and Chalatenango. The judge was not satisfied that the appellant would be perceived as a police informant. At paragraph 34, the judge noted the appellant’s evidence that “all the country is controlled by the gangs”. The judge, however, found that this influence varied from place to place and that gangs do not have total “control” throughout El Salvador. The judge did not find the appellant credible in this regard.
24. Having applied his factual findings to the Refugee Convention, the provisions of the Immigration Rules relating to humanitarian protection and Articles 2 and 3 of the ECHR, the judge dismissed the appellant’s appeal against the refusal of the appellant’s international protection claim. So far as private and family life was concerned, the judge noted that the appellant had no family in the United Kingdom, that he was single and relatively healthy and could find work again in El Salvador. The judge, accordingly, also dismissed the appellant’s appeal by reference to Article 8.
25. The appellant applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal. Following the refusal by the First-tier Tribunal for permission to appeal, Ms Patel, on behalf of the appellant, renewed her application to the Upper Tribunal. The first of the grounds took issue with paragraph 24 of the First-tier Tribunal Judge’s decision. As we have seen, there the judge stated that the events described by the appellant were not consistent with the country information regarding gangs such as MS13. The ground contended that the judge was here “simply agreeing with the respondent” and that an appellant was “entitled to know the exact basis and reasons why he has lost his appeal”.
26. The second ground concerned paragraph 26, where the First-tier Tribunal Judge found it not credible that the MS13 gang would “not actually challenge [the appellant] as to what they believe he is capable of informing the police against them or question him about any activities he has with the police”. The ground contended that the judge had not engaged with the background evidence about El Salvadorian gangs and their behaviours. Reference was made to the information in the UNHCR report, at page 86 of the appellant’s bundle, to which I have already made reference.
27. This led to the criticism of paragraph 28, where the First-tier Tribunal Judge considered it to be an aspect of the appellant’s “somewhat furtive [sic] imagination” that a person could be harmed or even killed solely because of his or her hairstyle or wearing something like a number “6”. The evidence at page 86 of the bundle had not been considered.

28. The grounds also challenged the judge's finding regarding family members. The judge had failed to notice that the appellant's family members were not living with him at the same address or in the same area. This was the reason they had not been targeted by the MS13 Gang.
29. So far as internal relocation was concerned, the grounds submitted that the judge had failed to consider that, by moving from one area to another, which might be controlled by a rival gang, the appellant risked serious harm, according to the background evidence. The appellant could be "perceived to be a spy for the gang from his home area".
30. The next ground submitted that the judge had misunderstood the appellant's case, in saying what he did at paragraph 27 of the decision. The fact that government vehicles were arriving at the appellant's address suggested to the gang that the appellant was involved with the government. At paragraph 27, the judge had missed the point. The fact that, in reality, the appellant's job did not involve sensitive information harmful to the criminal gangs in El Salvador was irrelevant.
31. The last ground submitted that the judge had failed to take account of the evidence of the appellant, in his witness statement, that he feared that he might have been threatened by the gang as a means of extorting money from him.
32. Following the refusal by the Upper Tribunal of permission to appeal, the appellant sought a judicial review of the Upper Tribunal's decision. In granting permission, HH Judge Pearce, sitting as a Judge of the High Court, found it was arguable that the First-tier Tribunal Judge had not identified the country evidence that led him to conclude the appellant's account was not credible. Following the grant of permission, the decision of the Upper Tribunal was quashed.
33. The hearing on 10 July 2020, which took place from open court at Field House with the representatives attending remotely by means of *Skype for Business*, was listed as an oral hearing of the appellant's application for permission to appeal. Mr Melvin, however, helpfully confirmed that, were I to find an arguable error of law in the decision of the First-tier Tribunal, the respondent would be content for the Upper Tribunal to proceed immediately to determine whether that error was material, such that the First-tier Tribunal Judge's decision should be set aside. In the light of this, I heard submissions regarding what might ensue in the light of such a finding.
34. I am not persuaded that the ground which caused the High Court to grant permission to bring judicial review has any arguable merit. It is quite manifest that, in saying what he did at paragraph 24, the First-tier Tribunal Judge was referring to the background evidence referenced at paragraph 36 of the respondent's letter of refusal, concerning the many killings by MS13 of police officers in El Salvador. The judge was plainly referring also to the UNHCR material highlighted by the appellant at pages 86 and 87 of

the bundle. The point made by the First-tier Tribunal Judge was that the appellant's account of his interactions with MS13 members (as he perceived them) involved those members taking a remarkably restrained attitude, that was wholly at variance with the appellant's own background evidence, as well as that referred to by the respondent.

35. There is, however, plain merit in the criticism of the findings in paragraph 28 of the judge's decision. As we have seen, the judge did not regard the appellant's evidence of the adverse reaction of gangs to such matters as hairstyles and dress as supported in the country information. It is clear from paragraph 28 that this was a material reason why, overall, the judge decided that the appellant had fabricated his claim to be in need of international protection.
36. I have already set out the passage from the UNHCR report at page 86 of the bundle. The non-exhaustive list, which includes "wearing certain clothing, tattoos or other symbols" shows that the appellant's assertions, far from being merely a product of the appellant's fecund imagination, were entirely in line with the background evidence. Indeed, the finding at paragraph 28 is, I consider, inconsistent with the judge's finding at paragraph 24. The gangs in El Salvador are capable of, and prone to, immediate and extreme hostile reactions to a wide range of things, which on any objective view are of little or no significance.
37. I also find that the First-tier Tribunal Judge's treatment of the appellant's family is flawed. If the family were living with or close to the appellant, within the area of MS13, what the judge found at paragraph 30 regarding the absence of evidence that the family had been threatened, would be justifiable. However, the judge had not dealt with the fact that the family were not living in the same part of El Salvador. In so far as the judge considered that, wherever the family might be, MS13 could reach them, this appears to be inconsistent with the judge's own finding, at paragraph 34, regarding the extent of the power and control of El Salvador gangs.
38. These errors mean that it is necessary to consider the criticisms advanced by the grounds of the judge's findings regarding internal relocation. I consider that there is merit in the challenge that, in finding the appellant could relocate, the First-tier Tribunal Judge has not engaged with the background evidence concerning the problems that may be faced by people moving from one part of El Salvador to another part, where that other part is under the control of a different gang, which may be hostile towards a newcomer.
39. For these reasons, I conclude that there are not only arguable errors of law in the decision but that those errors are actual and material. Thanks to the position adopted by Mr Melvin, it is, therefore, possible for the Upper Tribunal to proceed immediately to set aside the First-tier Tribunal Judge's decision.

40. Ms Patel submitted that it might be useful to retain the case in the Upper Tribunal, with a view to giving country guidance regarding the position of gangs in El Salvador. The problem with this submission, however, is that the upshot of my findings is that the appellant's case will need to be reconsidered afresh, with no findings of fact preserved. Experience suggests that this can pose difficulties for the giving of country guidance.
41. In all the circumstances, I consider that the appropriate course is to remit this case to be re-decided on all issues by the First-tier Tribunal.

Decision

The decision of the First-tier Tribunal is set aside. The matter is remitted to the First-tier Tribunal for a fresh hearing on all issues.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Mr Justice Lane

Dated: 17 July 2020

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber