



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

Case No: UI-2022-006695

First-tier Tribunal No: PA/53761/2021  
IA/10538/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 25 June 2024**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SAFFER**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**JDMC**  
**(ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr Diwynicz a Senior Home Office Presenting Officer

For the Respondent: none - in person

**Heard at Phoenix House (Bradford) on 17 June 2024**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, JDMC is granted anonymity.**

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

**DECISION AND REASONS**

1. For consistency with the First-tier Tribunal I will hereafter refer to JDMC as the Appellant and the Secretary of State as the Respondent.

2. The Appellant was born on 12 November 1997. He is a citizen of El Salvador. He appealed against the decision of the Respondent, dated 13 July 2021, refusing his claim to be a refugee. His humanitarian protection claim was granted by the Respondent.
3. The Respondent refused the refugee claim as it was not accepted that fearing the MS-13 gang engages the 1951 Refugee Convention. That is because the gangs do not have a specific ideological basis or political programme and he cannot be therefore said to be able to found a claim based on actual or imputed political opinion, and he does not have an immutable characteristic and is therefore not in a particular social group.
4. The Respondent appeals against the decision of First-tier Tribunal Judge Forster, promulgated on 31 May 2022, allowing the appeal.

### **Permission to appeal**

5. Permission was granted by First-tier Tribunal Judge Seelhoff on 22 June 2022 who stated:

“3. The single ground asserts that the Judge erred in holding that those who are accused of defying criminal gangs form a particular social group because in doing so no evidence has been cited to support that conclusion.

4. The judge considers this issue [13-15]. There is no reference to any background evidence or independent evidence supporting the conclusions which the judge expresses as being “in my view”. The ground of appeal is arguable.”

### **The First-tier Tribunal decision of 31 May 2022**

6. Judge Forster made the following findings:

“13. The undisputed facts about the Appellant are that he is a male within an age range of males which gangs usually recruit in El Salvador. Age and gender are immutable characteristics which cannot be changed. I accept that young males targeted for recruitment by gangs are capable of forming a particular social group and that as a group they are perceived by society as being different because not all males are targeted by or belong to gangs.

14. The Appellant’s evidence, which has not been challenged by the Respondent, is that the two gang members tried to recruit him or at least to force him to take part in their criminal activities. It was the same men who then extorted \$60 a month from him.

15. In my view, males such as the Appellant, who are of interest to the gangs, who have defied instructions and who have reported matters to the police, could form a particular social group. They have a common background and shared experience. The Appellant cannot change the fact that he has rejected MS 13 and gone to the police. This makes him distinct from others in society who acquiesce to the gangs’ activities. The background evidence supports a finding that the Appellant like those who have chosen to report the gangs will face violent reprisals.”

### **The Respondent’s grounds seeking permission to appeal**

7. The grounds asserted that:

- "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."

## Respondent's position

8. There was no rule 24 notice. Mr Diwnycz submitted that when the appeal was heard, EMAP (Gang violence - Convention Reason) El Salvador CG [2022] UKUT 335 (IAC) had not been promulgated.

## Discussion

9. Neither Judge Forster nor Judge Seelhoff had the benefit of the guidance given by the Upper Tribunal in EMAP which was heard on 27 April and 9 June 2022 and promulgated on 16 November 2022. The headnote reads;

- (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.*

10. The fact that EMAP had not been promulgated when Judge Forster considered the appeal does not indicate that a material of law occurred. That is because Judge Forster reached precisely the same conclusion the Upper Tribunal did whilst considering the appeal at the same time as the Upper Tribunal did. He referred to the "background evidence" in [15]. Whilst it would have been helpful to particularise that, I note that in the bundle before Judge Forster were 421 pages of background evidence that entitled him to reach that view, none of which differed in any material

way, and SOME of which was the same before the Upper Tribunal in EMAP at [6]. It comprised “compendium” evidence from for example the Respondent, US State Department, UNHCR, Human Rights Watch, and Amnesty International, and individual articles from journalists.

11. The Judge was plainly entitled to find that the Appellant’s refusal to pay a bribe to the gangs and his reporting them to the police, places him within the category of people identified in EMAP of being in a particular social group with “a common background and shared experience”. He “cannot change the fact that he has rejected MS 13 and gone to the police. This makes him distinct from others in society who acquiesce to the gang’s activities.” These findings, which it is not argued were not open to the Judge, plainly bring the Applicant not only within the category identified in EMAP of “Individuals who hold an opinion, thought or belief relating to the gangs, their policies or methods hold a political opinion about them” but also as found by Judge Forster of “members of a particular social group”.

## Notice of Decision

12. The Judge did not make a material error of law. The decision of Judge Forster shall stand.

***Laurence Saffer***

Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

17 June 2024

## NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal’s decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

**6. The date when the decision is “sent” is that appearing on the covering letter or covering email.**