



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

Appeal Number: UI-2021-000846  
PA/00003/2021

**THE IMMIGRATION ACTS**

**Heard at Cardiff Civil Justice Decision & Reasons Promulgated  
Centre  
On 9 February 2023 On 19 March 2023**

**Before**

**UPPER TRIBUNAL JUDGE GRUBB  
DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS**

**Between**

**N A H G  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms A Williams, Counsel instructed by Turpin & Miller LLP  
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) we 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 and a failure to comply with this direction could lead to contempt of court proceedings.

2. This is the continuation of an appeal by the Appellant against the decision of the First-tier Tribunal (Judge Solly) in which the Judge dismissed the appeal of the Appellant, a citizen of El Salvador, against the Secretary of State's decision to refuse his claim for international protection.
3. At a hearing on 22 April 2022 Upper Tribunal Judge Grubb decided that the First-tier Tribunal erred in law in dismissing the appeal and set aside the decision of the First-tier Tribunal to be remade by the Upper Tribunal. At a further hearing on 4 August 2022 Judge Grubb directed that the final hearing of this appeal be adjourned to await the outcome of the decision in EMAP (Gang violence - Convention reason) El Salvador CG [2022] UKUT 00335 (IAC)
4. The primary reason that the decision was set aside was because the First-tier Tribunal Judge, having made an adverse credibility finding, had failed to consider the risk to the Appellant arising from non-gang related tattoos. Further the Judge had erred in reaching an adverse finding in relation to Article 15(c) of the Qualification Directive. The appeal was retained in the Upper Tribunal in order to remake the decision in respect of:
  - (a) the claim based upon risk, if any, to the appellant arising from non-gang related tattoos;
  - (b) the claim under Article 15(c) of the Qualification Directive; and
  - (c) Article 8 of the ECHR in the light of any evidence of new circumstances pertaining to the appellant's family life in the UK.
5. At the resumed hearing before us Ms Williams appeared for the Appellant and Ms Rushforth represented the Secretary of State. No additional documents were submitted. Ms Rushforth confirmed that the Respondent had reconsidered her position in relation to Article 8 and granted leave to remain on this basis so that only the protection appeal remained.

## **Submissions**

6. For the Appellant Ms Williams said the decision in EMAP was not directly relevant but the reports on country background referred to in EMAP reflect this Appellant's experts report. The background and current position in EMAP is consistent with Dr Wiltberger's report (page 13 of the Addendum bundle). EMAP concluded that the major gangs in El Salvador are political activists. EMAP does not deal with risk from non-gang related tattoos. The two different approaches to 'particular social group, conjunctive and disjunctive, are discussed in EMAP. This Appellant falls into a particular social group based upon his tattoos using the disjunctive approach and as this is a pre-Nationality and Borders Act 2022 case the disjunctive approach can be followed. Non-gang related tattoos form an innate characteristic. The tattoos are apparent in the photographs in the Appellant's bundle. It was never contended that these were gang related.

Ms Williams referred us to evidence on the attitude to tattoos at pages 42 and 44 of the Appellant's bundle and to the Home Office CPIN on gangs from February 2020 quoting from UNHCR 2016 Eligibility Guidelines. The constant variable amongst murdered and disappeared deportees is tattoos according to the Human Rights Watch report whether or not those tattoos are gang related.

7. Dr Wiltberger's report reveals stigmatisation from society for those who have tattoos. There is no challenge to his expertise. The Appellant is likely to be profiled as a suspected gang member and the report refers to the treatment that can be expected. There are exacerbating factors including the increased risk to persons returned. The nature of risk is detailed in the report and it also shows that "retaliatorily and extra judicial killings and torture" of suspected gang members are condoned by the public.
8. There has been a state of emergency in El Salvador since March 2022. With an associated increase in risk and increase in arbitrary arrests after fragile truce. There have been round ups of people from poor socio-economic backgrounds and grounds for arrest include having tattoos or simply looking like criminals. Between March-June 2022 over 40,000 people were arrested. A tattoo, said Ms Williams, is an innate characteristic. Removal of a tattoo is likely to leave a mark. There is risk from both gangs and the authorities.
9. The judge did not engage with the argument put forward in respect of article 15(c). EMAP says gangs are political actors. There are two rival gangs in armed conflict and there is also conflict with the government. We were referred to the Elgafaji sliding scale. There is armed conflict and the Appellant has aggravating factors making it more likely that he will be targeted.
10. For the Respondent Ms Rushforth said that people with non-gang related tattoos do not fall into a particular social group. Tattoos are not immutable or innate characteristics. Tattoos although permanent could be removed. Those with tattoos are not an established group with distinct characteristics. The Appellant does not meet the first or second limb using the approach in EMAP. It is noted that tattoos are deeply stigmatised but there is no evidence on prevalence of tattoos so the Appellant cannot show having them sets him apart. Background information says lots of people have tattoos. He had tattoos long ago and has not suffered as a result. He lived without problems. If there is risk the Appellant can avoid it by having tattoos removed or hidden. We were asked to take judicial notice of the fact that it is possible to have tattoos removed.
11. The Article 15(c) test is a high one. The only countries to have been considered to pass such a test have been Libya, Syria and part of Iraq. The conflict in El Salvador is insufficient for general Art 15(c) risk. Last March there were two to three days of reported indiscriminate violence. This is not enough to show generalised risk. The test is not met.

12. We reserved our decision.

## **Discussion**

13. The Appellant is a 24-year-old citizen of El Salvador who arrived in the United Kingdom in 2019 and claimed asylum. His asylum claim was refused and dismissed on appeal to the First-tier Tribunal. At a hearing on 22 April 2022 in the Upper Tribunal it was found that the First-tier Tribunal had erred on the law and the decision was set aside but the credibility findings made by the First-tier Tribunal were maintained. The Article 8 aspect of the appeal has since been conceded by the Respondent so, bearing in mind the adverse credibility findings are retained the only matter for us to decide in relation to the asylum appeal is whether there is a reasonable likelihood that the Appellant's non -gang related tattoos will cause him to face persecution on return and, if not, whether the general level of indiscriminate violence in El Salvador is such that he would face serious harm simply by virtue of being in that country.
14. The fact that the Appellant has tattoos and that they are not gang related is accepted. The Appellant's tattoos are extensive and are clear for us to see in photographic evidence. The tattoos extend to the Appellant's arms and hands and so are clearly visible even when the Appellant is fully clothed. As such it is obvious to the casual observer that the Appellant is a man with tattoos. Ms Rushforth, without submitting any evidence of the means or the results, asks us to take judicial notice of the fact that tattoos can be removed. We have no judicial experience or knowledge of the removal of tattoos and as such we can only take the Appellant as he is and as we see him. A man with extensive tattoos.
15. So far as the risk of harm faced by a person with tattoos is concerned Ms Rushforth asks us to accept that as there is no evidence of the prevalence of tattoos it cannot be taken that a person with tattoos is set apart. Whereas there is indeed no evidence as to the prevalence of tattoos the submission that a person with tattoos is not set apart is directly contrary to the expert evidence from Dr Wiltberger submitted on behalf of the Appellant and which was not challenged.

*62. Individuals who have tattoos (even if they are cosmetic tattoos, unrelated to recognizable gang insignia) are among those most likely to be profiled as gang members, and consequently arbitrarily detained and subjected to human rights violations, torture, and extrajudicial murder. Police officials and military involved with domestic policing routinely profile individuals and look check under their clothing for tattoos as grounds for arbitrary detention. These profiling- based enforcement practices have a long tradition*

*in El Salvador following the initial implementation of Mano Dura approaches in the early 2000s.<sup>45</sup> With rampant police corruption and disregard for the human rights of those presumed to be gang members, the conditions are set for enforcement personnel to intentionally misinterpret and misregister non-gang related cosmetic tattoos to make allegations of gang membership as a basis for arrest. This problem is aggravated and enabled through the recent implementation of arrest quotas and the lifting of constitutional rights under the State of Exception.*

16. Dr Wiltberger's report goes on to refer to the increased danger for those who are returned to El Salvador from abroad as would be the case for this Appellant.

*64. Those returned to El Salvador after removal proceedings abroad are often suspected of criminal activity by locals and by authorities in areas of reception, including gang membership and activities, regardless of whether or not they committed a crime abroad. The generalized stereotype in El Salvador that removed individuals are likely gang members is linked to the history of mass deportation of gang members from the US in the 1990s, which contributed to the spread of the major gangs throughout El Salvador and the Northern Triangle....*

17. It is apparent from the report that mere suspicion of gang membership is enough to result in extremely harsh consequences and this again is highlighted in the report.

*66. Human rights abuses are widespread in holding facilities where those detained are held after being arrested for suspected gang affiliation, often without an evidentiary basis. The National Civilian Police has long been known for using torture against suspected gang members. Suspected gang members have been beaten, suffocated, deafened, hung upside-down, raped, and have become victims of other torture tactics...*

18. It is clear that the authorities in El Salvador are agents of persecution and the country guidance case of EMAP holds that the major gangs are also agents of persecution. In these circumstances whether the Appellant faces serious harm from the police, the military or from gang members is immaterial. EMAP also concludes that individuals who hold an opinion, thought or belief relating to the gangs their policies or methods holds a political opinion about them. This must also follow through to those perceived to hold such an opinion. If the Appellant is targeted in the way suggested above, because he is profiled as a gang member, that would in our judgement be because of an imputed political opinion. In our judgement the Appellant's tattoos also amount to an innate characteristic

and whether it be through political opinion or particular social group a 'Convention reason' is made out. The treatment that he would be likely to face amounts to persecution.

19. Dr Wiltberger's report does not conflict in any material way with the experts' reports referred to in EMAP or indeed with the Respondent's country of origin information. All of the information before us demonstrates the dire situation that exists in El Salvador and Dr Wiltberger clearly expresses how the Appellant is likely to be specifically affected.

### **Decision**

20. It really is not necessary for us to take matters much further. In our judgement there is a reasonable likelihood that the Appellant as a man with extensive tattoos will be subject to persecution on account of his perceived political opinion and membership of a particular social group upon return to El Salvador. The asylum appeal is therefore allowed.
21. The Appellant is a refugee and as such is not entitled to humanitarian protection and in such circumstances there is no need to consider the claim in respect of Article 15(c).

### **Conclusion**

22. The decision of the First-tier Tribunal involved the making of a material error of law and has been set aside.
23. We remake the decision and we allow the Appellant's appeal on asylum grounds.

Signed:



**Date: 10 March 2023**

**J F W Phillips**  
**Deputy Judge of the Upper Tribunal**