



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

Mx M (gender identity – HJ (Iran) - terminology) El Salvador [2020] UKUT 00313 (IAC)

THE IMMIGRATION ACTS

**Heard at: Manchester CJC
on: 30th September 2020**

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Mx M

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Wood, Immigration Advice Service

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

Decision makers should where possible apply the guidance in the Equal Treatment Bench Book and use gender terminology which respects the chosen identity of claimants before them.

The principles in HJ (Iran) are concerned with the protection of innate characteristics. As such they are to be applied in claims relating to gender identity.

DECISION AND REASONS

1. The Appellant is a national of El Salvador born in 1991.
2. The Appellant identifies as non-binary. Having had regard to Chapter 12 of the Equal Treatment Bench Book I began the hearing by asking the Appellant what form of address they would like to be used. The Appellant requested that I use the gender pronoun 'Mx'. I have amended the file accordingly and have used gender-neutral terms throughout my decision.
3. The Appellant appeals with permission against the decision of the First-tier Tribunal to dismiss their appeal on protection grounds.

Basis of the Protection Claim

4. Although today the Appellant identifies as non-binary, when living in El Salvador they considered themselves a homosexual man. The basis of the claim is that they would, for reason of their membership of a particular social group (LGBTI), face a real risk of persecution in El Salvador. They averred that they had been subjected to persecution in the past, by the police and the general public, and that they would be again. They further claimed that their appearance was such that they would be identifiable as/perceived to be gay or transgender and as such would be reasonably likely to face violent attack at the hands of virulently homo/trans-phobic gangs which the police would, or could, do nothing to protect them against.

Case History and the Respondent's Refusal

5. The 'reasons for refusal' letter is dated the 27th November 2019. The circumstances in which this decision arose were that the Appellant had made further submissions following an earlier refusal of protection. The original claim had been lodged on the 9th October 2017. It had been refused and the Appellant's first appeal was dismissed by the First-tier Tribunal on the 17th January 2019. Further submissions were lodged on the 27th September 2019 which the Respondent deemed to have a "realistic prospect of success" before a properly directed Tribunal and so, in accordance with paragraph 353 of the Immigration Rules, issued a 'fresh claim' refusal, attracting a second right of appeal. The Respondent accepted that the Appellant was a member of a particular social group but refused protection on the grounds that the Appellant could receive a 'sufficiency of protection' from the Salvadoran State.

The First-tier Tribunal Decision

6. The First-tier Tribunal directed itself to the principles set out in the Devaseelan (Second Appeals - ECHR - Extra-territorial effect) Sri Lanka [2002] UKIAT

00702*. The effect of that decision was that the Tribunal was bound to take the earlier findings, made by the First-tier Tribunal in 2019, as its starting point. In 2019 the Tribunal had concluded that the Appellant had not demonstrated that they were at risk of persecution. Even if they had, as claimed, been beaten up and spat on by the police in 2013 this incident had not been repeated; having urine and rubbish thrown at them in the street amounted to no more than discrimination; the evidence did not suggest that the Appellant had faced systematic discrimination at the hands of the state; healthcare professionals and police officers receive specialist human rights training; it had not been established that the violence/ “particularly high murder rate” in El Salvador included a disproportionate number of gay victims.

7. In 2020 the Tribunal heard evidence from the Appellant and concluded that the evidence was as it had been in 2019. Before they left El Salvador the Appellant had endured daily discrimination including having rubbish, drinks cans and on one occasion a bag of urine thrown at them. The Appellant had relied on their change in appearance and identity since the decision in 2019. The Appellant now wore their hair long and dyed blond and, it was submitted, this would attract a far higher level of animosity from homophobic elements within Salvadoran society. The First-tier Tribunal did not find this element of the claim to be made out. The Tribunal accepted that the Appellant has in this country been actively involved in numerous LGBTI events and organisations. It was not however satisfied that these matters would put them at risk because no one in El Salvador would know about these activities.
8. In respect of the Appellant’s personal circumstances the Tribunal was provided with evidence that their mental health had deteriorated and they were now receiving counselling and anti-depressants. The Tribunal concluded that since the Appellant’s conditions fell short of meeting the high threshold necessary to engage Article 3 ECHR, these matters did not represent a change in circumstance which would permit departure from the 2019 decision of the First-tier Tribunal.
9. Turning to the objective country background material the Tribunal noted a Human Rights Watch report dealing with the position of Salvadoreans deported from the United States. The report stated that LGBT individuals face ‘specific threats’ upon return. Such individuals face rejection from their families and so receive no support during the integration process. Gangs target LGBT people, subjecting them to sexual violence and extortion. Several LGBT returnees reported being beaten or sexually assaulted by the police. Of this information the Tribunal concluded:

“In our view that section of the report did not paint a different picture of the conditions in El Salvador than that portrayed in the objective evidence that was before [the First-tier Tribunal in 2019]. The same can be said for the Country Report on Human Rights Practices in El Salvador dated 13th March 2019. The objective

evidence confirms that El Salvador has a problem with violent crime but it was not suggested to us that the conditions were sufficiently severe to engage article 15(c)¹.

On that basis the appeal was dismissed.

Errors of Law: Discussion and Findings

10. This is a claim raising a fear of persecution for reasons of membership of a particular social group. That group is defined by the Appellant's sexual orientation and gender identity. As such decision makers are bound to apply the principles set out by the House of Lords in HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31.

11. At paragraph 82 of HJ (Iran) Lord Rodger sets out the legal framework for enquiry to be applied to such claims:

82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.

If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".

If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so. If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures eg, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay. If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect - his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state

¹ Article 15 (c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted: 'the Qualification Directive'.

gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.

12. To date these principles have not been applied in this case. HJ is neither cited nor applied in the Respondent's refusal letter. Nor does it feature in the reasoning of either of the First-tier Tribunal's decisions. It is the framework that I now apply when considering whether the 2020 decision of the First-tier Tribunal is flawed for any error of law.

Q1: Is the Appellant a member of a particular social group?

13. Lord Rodger's first question is this:

"When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay or that he would be treated as gay by potential persecutors in his country of nationality".

14. In this case the Respondent accepted, as long ago as 2018, that the Appellant identified as, and in El Salvador was treated as, a gay man. That was not however, the extent of the evidence. This was a fresh claim. That claim was based largely on the fact that since the Appellant had come to live in the United Kingdom they had, with the assistance of a specialist support group in Liverpool, further explored their identity. They had changed their appearance and feared that they would in El Salvador be seen as a transgender woman. By the date of the appeal before the First-tier Tribunal the Appellant expressly identified as non-binary. The First-tier Tribunal does not appear to have doubted that assertion, but nowhere is it positively recognised as a factor relevant to either the procedural disposal of the appeal, or the question of risk.

15. In procedural terms the failure to make a positive finding on the Appellant's identity meant that they were throughout the First-tier Tribunal decision referred to as 'he'. As the *Equal Treatment Bench Book* notes: "it is important to respect a person's gender identity by using appropriate terms of address, names and pronouns. Everyone is entitled to respect for their gender identity, private life and personal dignity". The Bench Book goes on to observe: "it should be possible to recognise a person's gender identity and their present name for nearly all court and tribunal purposes, regardless of whether they have obtained legal recognition of their gender by way of a Gender Recognition Certificate" (Chapter 12, March 2020 revision). This guidance is consonant with that given to Home Office caseowners. In the June 2011 Asylum Policy Instruction *Gender Identity Issues in the Asylum Claim* decision makers are advised:

"As with anyone who lives by a name other than their birth name, a transgender applicant should be given respect and referred to by their chosen name. If in any doubt, an applicant should be asked which personal pronoun and salutation he or she would like used".

16. There will no doubt be cases where there might be justification for not following this guidance: a case where, for instance a claim to be transgender has been expressly rejected as false. Decision makers should however where possible apply the guidance in the Equal Treatment Bench Book and use gender terminology which respects the chosen identity of claimants before them. There was no reason not to do so here, where the self-identification of the Appellant was neither challenged nor doubted.
17. In terms of the substantive protection issue it is not clear the extent to which the First-tier Tribunal understood how the claim advanced before it had evolved. In 2019 the Tribunal's focus had been the treatment that the Appellant had endured as a gay man living in El Salvador between 2011 (when they came out) and 2016 (when they left). Today the claim was not simply that the Appellant was homosexual, it was that in the relative safety of the United Kingdom their whole identity had fundamentally changed. This is acknowledged by the First-tier Tribunal at its §42 where it records the evidence of specialist psychotherapist Lucy Martin that the Appellant now identifies as non-binary, but nowhere is that matter considered, nor finding made. At §37 the Tribunal appears to reduce this evidence, concerned as it is with the core of the Appellant's identity as a human being, to this:

“The factors that are different relate to the Appellant's change of appearance, his style of dress, his dyed hair...”

18. Had the Tribunal squarely confronted the evidence of the Appellant's changed identity, and made findings on it from the outset, it would have been far better placed to answer the remaining questions posed by Lord Rodger in HJ (Iran). The Appellant was no longer a gay man but was now a member of the wider LGBTI community.

Q2. Do members of this particular social group face persecution in El Salvador if they live openly?

19. The short answer reached by the First-tier Tribunal was no. As I have already identified, that finding is already in some difficulty given that the Tribunal had not accurately identified the parameters of the social group it was considering. I am however satisfied that in reaching that conclusion the Tribunal erred in three other discrete respects.
20. The first is in its failure to consider all of the relevant evidence. There was a good deal of country background material before the First-tier Tribunal detailing the treatment of LGBTI individuals in El Salvador. There was specific evidence relating to the ill-treatment of those who were perceived to be transgender women. Mr Wood submits, with justification, that none of that evidence is addressed in the decision. In particular Mr Wood complains that the UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of*

Asylum Seekers from El Salvador, which he had placed at the centre of his submissions before the First-tier Tribunal, do not feature at all in the Tribunal's reasoning. Mr Wood relies upon Court of Appeal authority to the effect that the views expressed by UNHCR will "typically command very considerable respect": see for instance HF (Iraq) v Secretary of State for the Home Department [2013] EWCA Civ 1276. He submits that in light of that it was incumbent upon the Tribunal to at least consider that material, highlights of which include:

"Discrimination against individuals of diverse sexual orientation and/or gender identities is reportedly widespread in El-Salvador and such persons have consistently been targeted for attacks and murder by gangs and other sectors of society, including by the police and other public authorities....As noted above, the Salvadorian gangs are reported to possess a strong macho ethos, which reportedly expresses itself on an everyday basis through their virulent hatred and ill-treatment of persons based on their sexual orientation and/or gender identity "

21. The second error is perversity. Although that is a high test, I am satisfied that it is here made out. At its §44 the Tribunal summarises the evidence contained in the one country background report to receive mention in the decision, the February 2020 Human Rights Watch publication *Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse*. The Tribunal begins by cautioning itself that the report does not "correlate well" with the Appellant's case since the Appellant is not a deportee from America. I find it hard to understand why this distinction is made. Although the Appellant is not facing 'deportation' as we would understand that term of art, and they are obviously not in the United States, the focus of the report is on persons who are returning to the country after having sought refuge abroad, the precise situation that the Tribunal was being asked to consider. As to what conditions they might face, the Tribunal summarised the evidence in the report as follows:

"LGBT people who are deported from the United States to El Salvador are likely to face 'specific threats'. Research had found that LGBT people in El Salvador are often rejected by their families meaning there would be no family support during the reintegration process and that gangs had targeted LGBT people on the basis of their sexual orientation, subjected some to sexual violence and extorting others due to their perceived vulnerability. Several LGBT Salvadoreans had also reported being beaten or sexually assaulted by the police".

22. From this evidence, the Tribunal concludes that LGBTI individuals do not face a risk of persecution in El Salvador. Without more detailed explanation I am at a loss to understand how that evidence was logically capable of underpinning that conclusion. The evidence was capable of being read to mean that *some* LGBTI people might escape serious harm; it did not support the conclusion that LGBTI people are as a general matter safe from persecution. I should add that the passage cited by the Tribunal is incomplete. The rest of it reads:

"In January 2019, Camila Díaz Cordova, a transgender woman deported from the United States, was beaten to death. In July, the FGR charged three police officers with her kidnapping and aggravated homicide. The case remained open at the

time of writing. Within the span of one month in late 2019, three transgender women and one gay man were murdered in El Salvador in circumstances that led activists to suspect they were hate crimes”.

23. The third error is in the approach taken to the Appellant’s lived experience. In their evidence the Appellant narrates daily abuse which included having rubbish – including drinks cans and on one occasion a bag of urine – thrown at them. Such assaults would also be accompanied by verbal homophobic abuse. In 2013 the Appellant was subjected to an assault by five police officers in San Salvador. The officers stopped the Appellant in the street to ask why their hair was blond. When the Appellant replied “because I like it” the officers pushed them up against a wall and for a period of about five minutes “slapped and punched” the Appellant whilst subjected them to homophobic insults and spitting on them.
24. The 2019 Tribunal’s global conclusion about all of that, endorsed by the 2020 Tribunal, was this: “even at its highest, I consider these incidents, whilst undoubtedly unpleasant, amount to discrimination rather than persecution”. Although this is not a point raised in the grounds, I am satisfied that this amounts to a misdirection and a *Robinson* obvious² error of law.
25. Article 9 of the Qualification Directive defines as a minimum standard an ‘act of persecution’ as follows:
 1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:
 - (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
 - (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).
 2. Acts of persecution as qualified in paragraph 1, can, *inter alia*, take the form of:
 - (a) acts of physical or mental violence, including acts of sexual violence;
 - (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
 - (c) prosecution or punishment, which is disproportionate or discriminatory;
 - (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
 - (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);
 - (f) acts of a gender-specific or child-specific nature.

² R v Secretary of State for the Home Department (ex parte Robinson) [1997] 3 WLR 1162

3. In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.

26. Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is one of the non-derogable rights referenced at Article 9(1)(a):

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

27. In HJ (Iran) Lord Hope noted that 'persecution' has been recognised as a strong word. It will not cover each and any harm experienced by individuals seeking protection; it would not for instance include the disapproval of family members or wider society. The harm feared must be of sufficient severity, and there must be a nexus to one or more of the core rights protected by the Refugee Convention. To this end the Supreme Court endorsed Professor Hathaway's oft-cited formulation:

"In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community."³

28. Lord Hope further cites with approval the dicta of the High Court of Australia in Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473 in which McHugh and Kirby JJ say [at §40]:

"Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to state sponsored or condoned discrimination in social life and employment. Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it."

29. Applying this guidance to the findings of the First-tier Tribunal I consider first the incident involving five police officers. Five men surround one person. The men are in uniform and are – I assume in the context of El Salvador – armed. They hold a considerable amount of power over the individual concerned. There are reports of men like that beating, sexually assaulting or even killing individuals like the Appellant. The Appellant is taunted, pushed, slapped, punched and spat upon in an assault lasting approximately five minutes before being left lying in the street. The sole reason advanced by the First-tier Tribunal for its conclusion that this did not amount to persecution is that the Appellant did not go through a similar experience again. This allusion to a lack of persistence does not amount to an analysis of the event itself. Article 9 (1)(a) of the Qualification Directive provides that an act of persecution is one sufficiently serious by its repetition *or* "nature", the signatory states here recognising that a single violation of a non-derogable right can be sufficient, and that repetition is

³ *The Law of Refugee Status* (1991) p 112. The same passage is approved by Lord Bingham in Sepeet and Bulbul v Secretary of State for the Home Department [2003] UKHL 15 and by Lord Hope of Craighead in Horvath v Secretary of State for the Home Department [2001] UKHL.

not necessary: this recalls Professor Hathaway's 'hierarchy' of rights, to which I return below. Article 9 (2) elaborates that an act constituting a severe violation of basic human rights can include (but not be limited to):

“(a) acts of physical or mental violence, including acts of sexual violence;
(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner”

30. The Appellant does not claim to have sustained any serious injury during this assault, but it was a physical assault, by the police, motivated by nothing other than homophobia. Five minutes is a long time to be beaten. I do not doubt that it was for the Appellant a terrifying experience and one capable of reaching the minimum standard of qualification set out in Article 9(2)(a). To be surrounded by men in authority, taunted, physically attacked and *spat* upon was surely an exercise in humiliation designed to punish the Appellant for nothing more than being who they are. The power imbalance between perpetrators and victim, and the nature of the assault, made it of sufficient severity to constitute “inhuman and degrading treatment” contrary to Article 3 ECHR, a non-derogable core entitlement.
31. The other aspect of the historical claim advanced by the Appellant is that on a daily basis, over a number of years, they were subjected to abuse by people in the local community which included the throwing of projectiles. Both the 2019 and 2020 Tribunals appear to have proceeded on the assumption that this behaviour was not capable of constituting serious harm. I am satisfied that for two reasons this finding is flawed.
32. The first is that neither Tribunal explored in any detail the incident described by the Appellant where they were hit by a bag of urine – by any estimation, and for any victim, surely an act of inhuman and degrading treatment. Nor was any particular attention paid to the evidence that the projectiles very often included cans of drink, sometimes partially or entirely full: to be hit by even a half-full can of drink is a physical assault capable of causing bruising or cuts.
33. The second difficulty with this finding is that no consideration has been given to whether the events described are capable of constituting ‘acts of persecution’ within the meaning of Article 9(1): were they sufficiently serious by their *repetition* and *accumulation* to constitute a severe violation of a basic human right. In *The Law of Refugee Status* Professor Hathaway suggests that ‘serious harms’ can be placed in a hierarchy. The most serious violations – extrajudicial killing or torture, from which there can be no derogation – will always attract the protection of the Convention. Violations of lesser magnitude – for instance an interference with cultural rights – would only attract protection where it could be shown that by their systemic application the violations, considered cumulatively, amounted to serious harm for the individual concerned. It is here that the nexus to the Convention ground becomes relevant. If an individual has to suffer the daily degradation of telling his children that there is no food to put on the table, this is not a matter covered by the Convention: as hard as that

might be to bear for the individual concerned it is a matter outwith the bounds of refugee protection. Where however the harm feared is expressly inflicted in order to punish or prevent the individual from exercising a core entitlement – here ‘membership’ of the LGBTI community – then a causal nexus can be established.

34. Where such abuse is occasional, it may reasonably be described as harassment. Where however this is inflicted on a *daily* basis, *every time* the Appellant leaves the house, with the direct intention of “*pursuing with malignancy or injurious action*” - the dictionary definition preferred by Nolan J in R v Immigration Appeal Tribunal, Ex parte Jonah [1985] Imm AR 7 - then it may legitimately be held to constitute persecution of the type conceived by Article 9(1)(b) of the QD. In this case the harm inflicted ranged on a daily basis from verbal abuse to the degrading physical ill-treatment of being showered with rubbish or urine. It is inflicted for no reason other than the Appellant’s perceived sexuality/gender identity. In those circumstances it cannot automatically be reduced to “discrimination” or “harassment”. I am satisfied that it reaches the threshold in Article 9. As the Australian High Court expressed it in App S395/2002, it is harm of such intensity and duration that the person experiencing it cannot reasonably be expected to tolerate it. LGBT people should not be expected to “tolerate” being abused and having rubbish thrown at them every single day of their lives.

Q3. How would the Appellant behave if returned home?

Q4. If he chooses to live discreetly is any part of that decision informed by a fear of persecution?

35. The third and fourth questions posed by Lord Rodger were the subject of the controversy that led to the decision in HJ (Iran): whether gay claimants could reasonably be expected to behave “discreetly” in order to avoid persecution. The answer, held the court, was that the enquiry is a mixed question of law and fact. Signatory states cannot abdicate their responsibility to offer protection by telling the putative refugee to give up the very rights that the Convention exists to uphold. On the other hand a claimant who would choose to conceal their protected characteristic for reasons entirely unrelated to fear, and thereby secure their own safety, will not be entitled to protection.
36. Neither of these questions receive a particularly clear answer from the First-tier Tribunal. It appears to be assumed that the Appellant would be ‘out’ if returned to El Salvador. This was no doubt based on the accepted evidence that they had to some degree been ‘out’ in the past, although the Appellant’s more nuanced evidence on this matter is not expressly considered:

“I have not even been able to conduct a relationship in public, or even hold the hand of my partner in public, for fear of repercussion from the public”.

Nor can either question have been sensibly answered in the absence of a proper analysis of the risk of harm to LGBTI individuals. In respect of how the Appellant might manifest their identity if returned the First-tier Tribunal recognises that in this country they could fairly be described as an LGBTI activist, but fails to consider any of the following matters: whether the Appellant could continue in that work if returned home, whether they might elect not to do so, and if that was their decision, whether it would be a choice made out of fear of persecution. The reasoning on this activism appears to be confined to the commentary at the Tribunal's §40 that the Appellant's work here would not become known to people in El Salvador. That was, with respect, not the only matter that needed to be considered. It was incumbent upon the Tribunal to consider whether the Appellant's political work – ie his active involvement in numerous LGBTI events and organisations – fell at the core or the margin of their right to identify as gay/trans/non-binary.

37. For all of the foregoing reasons I set the decision of the First-tier Tribunal aside.

The Re-Made Decision

38. In my risk assessment I follow the framework set out by Lord Rodger in HJ (Iran).

39. I am satisfied that the Appellant is a member of a particular social group. At the time that the Appellant was refused protection the Respondent had accepted this, defining the group as 'homosexual men'. As I set out above, the Appellant's identity had by the time of the First-tier Tribunal hearing evolved so that they considered themselves 'non-binary', that is to say they consider themselves to fall outwith the fixed gender binary of female-male; shortly before the final hearing before me Mr Wood confirmed that this remains the case, but that his client would also be happy with the terms 'she' or 'her'. Regardless of what label we, or Salvadorans, might affix to the Appellant I am satisfied that for the purpose of this risk assessment their identity is visibly 'other'. When the Appellant arrived in this country they wore their hair short and dark; today it is long and platinum blond. They will appear, and will be perceived, to be a transgender woman.

40. Applying HJ (Iran) the next question I must ask myself is this: do members of this particular social group face persecution in El Salvador if they live openly?

41. In considering this matter I have the benefit of a new Country Policy and Information Note (CPIN) entitled *Gangs: El Salvador*. This document was published in February 2020 in the hiatus between the First-tier Tribunal hearing and its decision being promulgated. Both parties agreed that it should be admitted into evidence upon remaking and having regard to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, I do so. It is important for two reasons. In broad brush strokes the decisions below were built on two

premises: that the harm endured by LGBTI people in El Salvador amounted only to discrimination, and that sufficient protection was offered by the state. The CPIN now contains material contrary to both of those conclusions.

42. First, the CPIN sets out evidence from multiple respected sources that as well as suffering significant levels of discrimination LGBTI people are also subject to serious harm in El Salvador [at section 10.7]. I note that the sources emphasise that transgender women are particularly at risk:

10.7.1 The IRBC IGMR on women and sexual minorities of September 2016 based on a range of sources noted:

‘Several interlocutors indicated that LGBTI persons in El Salvador are discriminated against, ill-treated, marginalized,[...] and persecuted.[...] The Salvadoran Red Cross indicated that social violence affects the LGBTI population. The LGBTI Justice Clinic (Asistencia Legal para la Diversidad Sexual/LGBTI, ALDES) stated that due to marginalization and discrimination, which includes family members and the society at large, LGBTI persons face obstacles when trying to access education at schools, employment, and health care. They also face obstacles accessing housing as landlords refuse to rent them a place.[...] The Among Friends Association noted that in order to secure employment, LGBTI individuals must hide their gender identity or sexual orientation. The Organization for the Promotion and Defense of Human Rights of LGBTI Persons (Organización para la Promoción y Defensa de los DDHH de la Población LGBTI, COMCAVIS-TRANS) similarly stated that transgender persons are four times more discriminated than women, and they also face problems when trying to access education, banking and credit, and employment in the private and public sectors. Employment for transgendered persons is limited, and is usually in sex work, and as street vendors and hairdressers. In 2015, three LGBTI persons committed suicide because of lack of family or state support. **LGBTI persons are also the object of police ill-treatment and harassment, extortion, physical violence, sexual violence, and physical and psychological violence. They are also forced by gangs to smuggle illegal goods and drugs into prisons...**’

...

10.7.3 The UNSR for IDPs noted in her report of April 2018 that:

‘**Members of the lesbian, gay, bisexual, transgender and intersex community, particularly transgender women, are highly vulnerable to violence and hate crimes... Under such a threat of violence, many members of the community have been displaced internally, often on several occasions. The Special Rapporteur met transgender women who described threats, assassination attempts and intimidation by gangs, as well as by members of the police and military, and discrimination and abuse by all authorities.** In one municipality, social media disseminated a message from a gang stating that every transgender person would be killed, leaving 14 people having to seek safety in San Salvador or abroad.

10.7.4 The IDMC report 2018, based on a range of sources, noted

‘The rights of lesbian, gay, bisexual and trans (LGBT) people are not respected, and the community is deeply affected by stigma and violence. Discrimination and exclusion limits their access to education, work and career opportunities. There is no comprehensive legislation to protect the LGBT community, nor any legal obligation for state actors not to discriminate against it. **Anyone who does not appear to fit patriarchal gender norms is targeted, but most criminal attacks on**

LGBT people are against trans women, who live “a life of abuse that is a continuum of violence”.

10.7.5 IDMC report 2018 also noted:

‘LGBT people flee violence perpetrated by their families, gangs and the security forces. Trans women in particular suffer intersectional persecution, a situation that “the state promotes with its silence”.[...] The violence meted out by criminal gangs tends to be either because of their sexual orientation or gender identity, or general criminal violence used to force their collaboration. ‘LGBT people are not recruited into gangs, but may be made to collaborate in other ways. They may be forced to smuggle goods into prison, store weapons or drugs, undertake other criminal activities or give up a proportion of their earnings. If they refuse, they may receive death threats or be assaulted, which in turn may lead to their displacement.[...] ‘Displacement can also be provoked if a gang does not want LGBT people living in their territory.’

10.7.6 Human Rights Watch noted in its report covering events in 2019 that **‘LGBT individuals remain targets of homophobic and transphobic violence by police, gangs, and others.’**

43. This evidence, from *inter alia* the Immigration and Refugee Board of Canada, the United Nations Special Rapporteur and the Internal Displacement Monitoring Centre at the University of London, is accepted by the Respondent to demonstrate that LGBTI people, and specifically trans people, are particularly at risk of violence in El Salvador [at 2.4.8]:

“LGBTI persons, particularly trans persons, are vulnerable to discrimination, violence and hate crimes from state actors and society generally. Gangs are also reported to coerce LGBTI persons to assist them to carry out their criminal activities and subject them to violence”.

44. In respect of whether the El Salvadoran government can offer a sufficiency of protection to persons targeted by gangs, the CPIN concludes that as a *general* matter, it cannot [at 2.5.13]:

In general, given the weaknesses in the criminal justice system and the size, capability and influence of the main gangs, while the state is likely to be willing it is unlikely to be able to provide effective protection. However, each case will need to be considered on its facts, taking into account the nature, capability and intent of the gang and the profile of person in fear of harm.

45. As to the specific measures implemented to protect the LGBTI community, considered by the First-tier Tribunal to defeat the Appellant’s claim, the CPIN highlights this evidence:

10.7.2 The USSD human rights report 2018 states that:

‘The law prohibits discrimination based on sexual orientation or gender identity, which also applies to discrimination in housing, employment, nationality, and access to government services. Gender identity and sexual orientation are included in the criminal code provisions covering hate crimes, along with race and political affiliation. **NGOs reported that public officials, including police, engaged in violence and discrimination against sexual minorities.** Persons from the lesbian,

gay, bisexual, transgender, and intersex (LGBTI) community stated that the PNC, and the Attorney General's Office harassed transgender and gay individuals when they reported cases of violence against LGBTI persons, including by conducting strip searches.'

10.7.3 The UNSR for IDPs noted in her report of April 2018 that:

'While some bodies, including the Counsel General's Office, have reportedly shown greater openness to lesbian, gay, bisexual, transgender and intersex issues and concerns and a willingness to act, to date no specific protection mechanisms exist. Representatives noted that many in the lesbian, gay, bisexual, transgender and intersex community lack the resources to live in safer neighbourhoods and have no choice but to live in poorer gang affected localities. Transgender people sometimes seek relative safety by living together and establishing coping strategies. While no verified data exists, one community member stated that they had documented "between 600 and 700 homicide cases" against members of the lesbian, gay, bisexual, transgender and intersex community with over 500 transgender women killed. According to them, no cases have gone to court, no one has been prosecuted and few cases have been investigated. One case that was brought to court related to a gay man who was killed while visiting from the United States.'

46. All of that is consonant with the UNHCR guidelines and the Human Rights Watch report which I refer to above. In light of that uncontested background material I accept the Respondent's view that whilst there are as a matter of law in El Salvador measures in place to protect citizens from violence, the weaknesses in the criminal justice system are such that the state is in general unlikely to be able to provide effective protection where individuals are facing violence from gangs. Those gangs are, in the estimation of the UNCHR, virulently homo and trans-phobic. Transwomen, or those perceived to be transwomen, are particularly vulnerable. Although the sources cited do not offer any explanation as to why that might be, one obvious explanation could be that unlike gay men who can try and 'pass' for straight, many transwomen are, like the Appellant, visibly different. As researchers at the University of London put it, in the violent and macho culture of El Salvadoran gangs, "anyone who does not appear to fit patriarchal gender norms is targeted...most criminal attacks on LGBT people are against transwomen, who live "a life of abuse that is a continuum of violence". I further note that the Appellant's account of being subject to homophobic assault by the police is entirely consistent with the information reproduced in the CPIN.
47. Having had regard to that country background evidence I am satisfied that a transwoman, or someone perceived as such, who tries to live openly in El Salvador would face persecution which may include murder, rape and other sexual violence, physical assault and coercion into criminal activities. Although the state - or more accurately elements of the state - may be willing to combat such harms the weakness of the criminal justice system, including homo and transphobic attitudes by police officers, are such that there is unlikely to be a 'sufficiency of protection' in practice.

48. As to the final stage of my enquiry – how the Appellant would live if returned home and why- I have had regard to the following evidence. From the Appellant I have the asylum interview record, two witness statements, and an interview that the Appellant conducted ‘Jack All Productions’ for the purpose of a documentary video in June 2019. I also have written evidence from Shereen Cowley and Mr Mohammad Taher. Ms Cowley and Mr Taher both have long standing involvement with the Liverpool Asylum and Refugee LGBTQ+ Support Network, she as a support worker with ‘Many Hands, One Heart’ , he as a community development worker with Merseycare NHS Trust. They have both known the Appellant since 2017, and both have, on different occasions, attended appeal hearings with the Appellant.

49. What emerges from that evidence is a complex, and appropriately non-binary, picture.

50. Whilst living in El Salvador it would appear that the Appellant was prepared to push some boundaries. It was their dyed blond hair (still at that stage short) which led to the attack by the police in 2013. It was their decisions to live with their partner, and to use “feminine accessories” which led to the daily ritual of being showered with rubbish, pelted with cans and homophobic abuse. It was this ill-treatment which led them to modify their behaviour, for instance deciding not to hold hands with male partners in public.

51. In their witness statement the Appellant explains how having left El Salvador their desire to live openly has solidified:

“Being here in the UK allows me to be the real me. I am able to dress how I want to; I am able to talk about my relationships openly and honestly. I am able to have my sexual health checked regularly and live openly without fear of being targeted or abused because of the way I dress and I would be able to have a family of my own.

Whilst I have been here in the UK I have grown in confidence and been able to express who I truly am without having to hide it from the public... here I am able to develop a sense of identity and self-worth. I now feel I can walk on the streets with pride and without any fear. I feel I have evolved into the real me and finally found myself”

52. Mr Taher and Ms Cowley both confirm that the Appellant has been heavily involved in various LGBTI activities in Liverpool, including an event to mark the International Day Against Homophobia, Bi-phobia and Transphobia, Liverpool Pride, and various campaigning/arts events. The Appellant has twice spoken to large conferences of social workers about their experiences, and they helped to organise and perform at celebrations to mark Refugee Week in Liverpool. Mr Taher commends the Appellant’s “strong leadership” for LGBT+ asylum seekers in Liverpool over the past two years. The Appellant has worked alongside voluntary groups, the council, social workers and the police to increase understanding of the challenges faced by this group.

53. Whilst this evidence, and past behaviour, would tend to suggest that the Appellant may be willing to live 'openly' if returned to El Salvador, the Appellant dispels any such notion:

"I refuse to change myself I am who I am I would rather take my life here in the UK and die with dignity than go back to El Salvador where I will be without liberty, forced to hide who I am in fear of being mistreated, and ashamed to be the real me. In El Salvador I will have to hide everything about who I am. In the UK I have been involved in many public activities where I have not had to hide my sexual orientation; I could never do this in El Salvador.

I feel really anxious because with my current appearance I feel scared to go back to El Salvador..."

54. So although the Appellant did live, to some extent, openly as a gay man in El Salvador, and lives very openly and actively as a non-binary individual here, it is apparent that they are extremely frightened about continuing this should they be asked to return home: that this is so is further attested to by the various medical professionals who confirm that the Appellant suffers from depression and anxiety about their future. I bear in mind that the Appellant has already left El Salvador once because they could not tolerate the treatment that they endured there; now that they believe themselves to be far more vulnerable to attack it seems likely to me that they would feel compelled to modify their behaviour, including their political and social activism, to live 'discreetly'. Having had regard to the country background evidence, and the evidence personally relating to the Appellant, I am satisfied that they would do so for no reason other than a fear of persecution. There is for instance no suggestion that the Appellant would do so because they are by nature a private person. It follows that applying the principles in HJ (Iran) the appeal must be allowed.

Anonymity Order

55. This appeal concerns a claim for protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

"Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decisions

56. The determination of the First-tier Tribunal contains material errors of law and it is set aside.

57. I remake the decision by allowing the appeal on protection and human rights grounds.

58. There is an order for anonymity.

Upper Tribunal Judge Bruce
30th September 2020