



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/04919/2013
AA/04920/2013; AA/04921/2013; AA/04922/2013

THE IMMIGRATION ACTS

Heard at Field House
On 1st June 2016

Decision Promulgated
On 7th June 2016

Before

Upper Tribunal Judge Southern

Between

GS (1)

SK (2)

JK (3)

KS (4)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms T. Lay of counsel, instructed by Legal Justice, solicitors

For the Respondent: Mr S. Kotas, Senior Home Office Presenting Officer

DECISION

1. The appellants have been granted permission to appeal against a decision of First-tier Tribunal Judge Reed who, by a decision dated 24 June 2013, dismissed their appeal against the immigration decisions that accompanied the decision of the Secretary of State, made on 17 May 2013, to refuse their asylum and human rights

claim. Although permission to appeal was granted as long ago as 15 August 2013, the journey of this appeal through the Upper Tribunal has been regrettably delayed pending fresh country guidance relevant to the issues arising in this appeal, now published as *TG and others (Afghan Sikhs persecuted) Afghanistan* [2015] UKUT 595 (IAC).

2. The appeal to the Upper Tribunal came eventually before Upper Tribunal Judge Plimmer on 24 August 2015, although the fresh country guidance had still not by then become available. Judge Plimmer, who made an anonymity order that remains in place, found that the First-tier Tribunal Judge had made an error of law material to the outcome of the appeal and so she set aside his decision and adjourned the appeal to be resumed once fresh country guidance, the publication of which was thought to be imminent, was available. It is helpful to set out first her summary of the issues before her:

“This is a matter that has previously been considered by First-tier Tribunal Judge Reed. He dismissed the appellant’s appeal in a decision dated 24 June 2013. Judge Reed did not accept the appellant’s claim to have been specifically targeted whilst in Afghanistan. The Judge went on to consider the general risk for Sikhs in Afghanistan but concluded that he was not minded to depart from **SL and others (returning Sikhs and Hindus) Afghanistan CG** [2005] UKIAT 00137. The appeal was therefore dismissed.

In a decision dated 15 August 2013 Upper Tribunal Judge Rintoul considered it arguable that Judge Reed failed to give sufficient weight to the material contained in **DSG (Afghan Sikhs: departure from CG) Afghanistan** [2013] UKUT 148 (IAC).

The matter was then stayed in order to await the promulgation of a CG case on Sikhs in Afghanistan, which was heard in March 2014. That decision is now understood to be imminently due for promulgation after a further hearing held in August 2015. Both representatives however agree that it is appropriate for me to consider whether or not the decision contains an error of law in advance of the promulgation of the CG decision.”

3. As can be seen from Judge Plimmer’s decision, which is annexed below, before the First-tier Tribunal (which, incidentally, is focussed upon the claim of the first appellant but plainly addresses the claims brought by each of the appellants) the appellants pursued two grounds of appeal. First, they asserted that the judge erred in law in rejecting as untrue their claim to have been specifically and individually targeted by men working for a powerful war lord identified as “Mohammed Khwaja Nabi” because his reasoning for reaching that adverse credibility finding was said to be legally insufficient. The second ground was summarised by Judge Plimmer as a complaint that the Judge erred in law in requiring further fresh evidence to support the submission that *SL* should not be followed when that very material is contained within the decision of *DSG*.
4. Judge Plimmer accepted that the second ground was made out and on that basis set aside the decision to be re-made once the fresh country guidance was available.

Should it be necessary for me to do so, I record that this error of law applies also to the decisions to dismiss the appeals of the second, third and fourth appellants so that those decisions are to be remade also. However, Judge Plimmer did not accept that the adverse credibility findings disclosed legal error and so she directed that the appeal was to be re-determined on the basis of the facts in relation to the circumstances of the appellants as they were found to be by the First-tier Tribunal Judge. That meant that the account offered by the first and second appellants relating to claimed adverse attention from men associated with a local war lord is to be regarded as untrue.

5. Today, Mr Lay seeks to reopen those credibility issues. That is because, he submits, it can now be seen that the judge was simply wrong to doubt the existence of a powerful war lord named "Khuja Nabi", submitting that the fact of the differences between how that name is spelt in the written and oral evidence before the First-tier Tribunal and how it is spelt in Dr Giustozzi's two reports is immaterial.
6. Dr Giustozzi gave evidence before the Tribunal in *TG & others*. He provided a report to the Tribunal, an extract of which was reproduced at paragraph 36 of the country guidance judgment, with emphasis added:

"There are plenty of criminal gangs in Afghanistan and the most active and famous among them operate in and around Kabul and have often been targeting Sikhs. The network of former militia commanders in control of Parwan is known as the 'Parwan Mafia' which rotates around characters such as the former Minister of Interior, Zarar Moqbel Ahmad, Abdul Basir Salangi (Chief of Police of Kabul in 2003), Ayub Salangi (former Chief of Police of Kabul and currently Deputy Minister of Interior), Amanullah Guzar (former Chief of Police of Kabul), Haji Almas (Member of Parliament) and Maulana Sayyidkhel (former Chief of Police of Parwan and Kunduz, now dead). **Through a cousin of Zarar, Khuja Nabi, the network maintains contact with two of the most important criminal gangs in Kabul, those led by Rais Khodaidad and Habib Estalifi, a fact which allows the network to carry out targeted assassination and other operations against rivals and enemies.** In Nangarhar province one of the main sources of criminal violence have been the militias of Hazarat Ali. Attacks took place wherever Sikh or Hindu communities existed in Afghanistan, including Kabul, where a commander of Jamiat-i-Islami, Rahim, was even sentenced to death for his crimes against Sikhs and others, but managed to evade execution due to his connections. Rahim is the only known case of somebody having been prosecuted for an attack on Sikhs."

7. The judge, who heard oral evidence from the first and second appellants, gave a number of reasons for rejecting the account of harassment by men associated with a war lord named Nabi. It was not just that there was no documentary evidence offered of the existence of this person, which the judge found not credible if he were in fact a powerful and dangerous war lord. Quite apart from this, the judge did not accept to be credible that ruthless men associated with such a powerful man, able to act with impunity in taking money from whomever they chose and, literally, getting away with murder, would be deterred from entering the appellants' home just because they shouted at them, as the appellants had described in their

evidence. Also, for similar reasons, the judge did not accept to be true the appellants' evidence of Nabi having gone to the police to file a complaint against the first appellant in order to have him arrested. That was because a powerful war lord who could have his enemies killed with impunity, would not need to have resort to the police in order to have an enemy or opponent removed.

8. The judge was reinforced in rejecting as untrue the claimed persecutory harassment at the hands of Nabi's men by the implausible chronology of events asserted in the appellants' evidence. The event that led to the decision to leave Afghanistan was said to be the murder by Nabi's men of the first appellant's brother in a botched kidnap attempt. This took place, according to the appellants, in late February or early March 2013, approximately 18 months before they finally departed from Afghanistan. It was claimed that Nabi filed a police complaint against the first appellant in response to him having reported to police the shooting of his brother. However, this was said not to have been done until 30 May 2013. Quite apart from the fact that it was not found to be credible that a powerful war lord would seek to protect himself against a vulnerable individual by filing against him a false police complaint, the judge found lacking in all credibility that he would wait so long to do so, if he was motivated to do so.
9. The judge gave further reasons still for rejecting the appellants' factual account as untrue. The first appellant sought to rely upon a letter from the Gurdwara in Kabul responding to an enquiry about the whereabouts of his father, the response being that the family was no longer in Afghanistan. But as the first appellant had sold the family home to fund the journey to the United Kingdom, he already knew that his father would no longer be in Afghanistan and so he had no reason to make such an enquiry of the Gurdwara in Kabul. Indeed, the evidence of the first and second appellants is that they all travelled together to Pakistan, the plan being that the agent who arranged their journey would arrange for his other relatives to follow him to the United Kingdom. At question 5 of the asylum interview GS confirmed that his father was then in Lahore. Therefore, the judge found that the letter from the Gurdwara, which referred also to having seen a copy of the police complaint made by Nabi, was "contrived merely to assist the appellants in the appeal".
10. The First-tier Tribunal judge was plainly entitled to find the account of persecutory harassment by Nabi's men to be untrue. That was a rational conclusion open to the judge on the evidence in respect of which he gave clear and legally sufficient reasons. Mr Lay submits that, even accepting that those findings were open to the judge who dismissed the appeal, the evidence provided by Dr Giustozzi, that became available only after the decisions of both Judge Reed and Judge Plimmer, "directly addresses the lacuna in the evidence which led to the appellants' appeals being dismissed" so that the Upper Tribunal is now entitled to revisit those credibility findings.
11. It is, in my judgment, inconceivable that Judge Reed would have reached any different conclusion even if he had the benefit of knowing what is now said by Dr

Giustozzi in his reports about a war lord with a name similar to that identified by the appellants. Even if Mohammad Khwaja Nabi (the person identified in the appellants' evidence before the First-tier Tribunal) and Khuja Nabi (the person referred to by Dr Giustozzi) are accepted to be one and the same, the account of persecution or harassment by men claiming to act in his name is lacking in all credibility, as the judge has found. The more one examines that account the more it becomes little short of fanciful. In his original witness statement the first appellant set out an account of the asserted visit to his shop by Nabi's men:

“On the day when Khwaja's Nabi's men came to my shop, I was told by my father and brother that they demanded huge sums of money. My father questioned them as to why they were harassing them and asking for money. In response he was told that they would leave us alone if we change our religion to Islam. Before leaving, my brother was pushed to the wall and warned him that we i.e. my father, brother and I will not get away with this. They further warned: “you don't realise but you are messing with Khwaja Nabi's people and you will repent this!”

From which it seems that this group of ruthless armed men, who had a reputation of acting with complete impunity and had arrived to demand money from these defenceless Sikh traders occupying it, left the shop empty handed after the appellant's father had simply refused the demand. It is entirely unsurprising that the judge did not accept that to be a truthful account of an event that had in fact occurred.

12. It follows that there is no reason to revisit or reopen the decision of Judge Plimmer that the findings of fact made by Judge Reed are to stand.
13. In order to inform the remaking of the decision in these appeals I have heard oral evidence from the first three appellants and received submissions from both representatives.

Oral evidence of Mr GS

14. GS adopted his “consolidated statement” and gave oral evidence about his circumstances in the United Kingdom and how they would be should he return to Afghanistan with his family. He said he had no family members or other relatives remaining in Afghanistan, not even distant relatives. He had only lived in Parwan. In Afghanistan he and his family had lived with his own parents and a brother in the family home that had been owned for generations by his family. He rented a shop elsewhere in Parwan that had been acquired by his father when he was about 10 years old. In 2012 they left Afghanistan and after a stay of 1 ½ months or so in Pakistan he, his wife and two children travelled to the United Kingdom, their journey being arranged by the Muslim man to whom the family home had been transferred in consideration for having done so. GS said that the house was worth about \$ US 100,000, although had he tried to sell the house himself, he would only have realised half that sum because a Sikh trying to sell property was exploited by the Muslim community who would not pay what the property was worth. \$ US

100,000 was the cost of having an agent arranging for him and his children and his parents and brother to travel to the United Kingdom but his parents and brother, who were supposed to follow, never arrived from Pakistan and he now does not know where they are.

15. On arrival in the United Kingdom he and his family first lived in Doncaster but then moved to Heston where he and his family live with a another family whose hospitality has accommodated them without payment and enabled them to live adequately on NASS support. He has a wide range of relatives living in the United Kingdom. Initially, his oral evidence was that he cannot look to any of those relatives for financial assistance should he return to Afghanistan because all were in receipt of benefits and so could not assist, but went on to agree that at least one relative was in employment, that being his brother in law who worked in an off licence. He said that he has no money left from living and working in Afghanistan. When he gave up his shop he simply surrendered the lease to the landlord, who he described as a "good man" and gave up also the remaining stock for no payment.
16. GS gave evidence concerning arrangements with his landlord in Afghanistan which I found to be wholly lacking in credibility. Asked why, especially as he regarded his landlord as a good man, he would not on return be able to re-open his shop, he said that his landlord had died and his sons now controlled the property. He said that his landlord's children, who are "connected with the police" would want to run the shop themselves and so he would be unable to recover it. When asked how he knew this, as he had said that he had no contact with anyone in Parwan, he said that his landlord had died not after he had left Afghanistan, as I had understood his account to be when explaining how he surrendered without payment to his landlord the stock remaining in the shop, but while they were still living in Afghanistan. However, he offered no explanation as to why, if that were so, those sons of the Landlord, if they had wanted to run the shop themselves, had chosen instead to allow him to remain until he decided to vacate the shop.
17. This evidence of GS is of interest for another reason also. As he does not claim to have experienced any problems at all from his former landlord, that demonstrates that it was possible for him to secure and retain commercial premises from a non-Sikh landlord and that the arrangement came to an end not because of any pressure to leave but because the appellant chose to give up possession. That does not establish that upon return he would be unable to find another like-minded landlord from whom to rent property, even if, as the country guidance indicates, many landlords would refuse to rent their properties to a Sikh tenant.
18. His daughter was 11 years old when they arrived in Doncaster. He described how she had first attended primary school and then commenced her secondary education before they moved to London since when she has been at school there. She quickly mastered the English language. She is happy and doing well whereas she had not been able to go to school in Afghanistan and her education could not continue should she return there.

19. GS said that if he had to return to Afghanistan he would have no home and would not be able to re-establish the business he had previously run because those who now own it will want to run the shop themselves. He will have no access to remittances from relatives in the United Kingdom and so he and his family would be destitute.
20. Having heard GS give oral evidence I have no doubt at all that little reliance can be placed upon his account of events either here or in Afghanistan. I am not satisfied that he has given an accurate account of the circumstances of the relatives he has who are now living in the United Kingdom. Having said initially that they "are all on benefits" he conceded, as he had no option but to, given the documentary evidence available, that one at least was in stable employment, although the level of his income is reflected in the fact that he is in receipt also of working tax credit. In one sense, of course, that relative also is "on benefits" but in the context of the question being answered this was a reply designed, in my judgement, to disguise the fact that he at least was in employment. The fact that a friend, not a relative, has provided GS and his family with free accommodation since they moved to London is such as to evidence that the Sikh community is both willing and able to provide support for GS and his family. There is no reason at all to suppose that they would not continue to do so should he return to Afghanistan, especially as it is clear also that channels of communication remain open through the Gurdwara. The appellant said that the congregation of the Gurdwara he and his family attend each week is between 4,000-6,000.

Oral evidence of Mrs SK

21. SK also adopted her witness statement, the content of which I have had regard to. She explained that she had lived in Kabul until married to the first appellant in 2001 when she moved to live with him in Parwan. She has no family or other relatives remaining in Kabul or elsewhere in Afghanistan. She said that most of those relatives have also moved to the United Kingdom although some have moved elsewhere on leaving Afghanistan. In particular her mother and brother are here. There are a number of aunts, uncles and cousins here.
22. She described how in Parawan she was "not permitted" to leave the house. The children did not leave the house either. She said that she "could not go out". This was an embellishment of the true position because as her evidence was developed it became clear that she went to the Sikh Temple each month and to the doctor when necessary. In cross examination she said that when she went out to the Sikh Temple or to the shops she went out with "full veil". She spoke of visits from other Sikh families but these were said to be rare.
23. SK said that since coming to the United Kingdom "I have realised what life is". In Parwan neither her son nor her daughter had been able to go to school and so received no education. She said, as did her husband, that should they return they

would have no money and none of her relatives here had the resources to provide financial support because they were all on benefits. Again, that was evidence that was not completely truthful because, as she accepted in cross examination, her brother works in a shop. As her evidence has been demonstrated to be inaccurate in respect of that individual I cannot accept as reliable her evidence concerning her other relatives and so their economic circumstances are, at best, unknown and unsubstantiated. Considering SK's evidence in the round, I do not accept that she has given a truthful account of the economic circumstances of the wide range of relatives to whom she can look for support, by way of financial remittances, should she return to Afghanistan.

24. I have no doubt at all that in her oral evidence, which of course is to be considered in the context of the evidence as a whole, including her own witness statements, the account given by SK of the difficulties actually experienced was an exaggeration. She said that her children were at risk should they leave the house. She said also "when we went out the Muslims would come and beat us up". I am entirely satisfied that in her evidence SK was describing that which she thought might happen to Sikhs in Afghanistan, not what had actually happened to her and her children.

Oral evidence of JK

25. JK, who is now 14 years old, gave evidence in a fluent, confident and coherent manner. Unlike her parents, she required no interpreter and her command of the English language is complete. I found her to be an impressive witness and I have no hesitation in accepting as true all that she said about that which she herself had experienced, as opposed to what she had been told by others. She described how, soon after arriving in the United Kingdom with her family, speaking only Punjabi, she attended first a primary school in Doncaster and then a secondary school. She is now in year 9 of a secondary school in London. She had not attended any school nor received any formal education in Afghanistan and her first few weeks at school her were, unsurprisingly, difficult.
26. JK said that unlike in Afghanistan where "no one taught me anything", she said that "obviously" she had a better future in the United Kingdom as here she will get an education and is very happy. She said that she does not like to talk about life in Afghanistan because it makes her feel depressed and upset. In Afghanistan she was not allowed to leave the house, save for rarely going to the Gurdwara or to visit the doctor, as it was a risk to go out. Conversely, here she is happy and has lots of friends.

Submissions

27. In his skeleton argument, Mr Lay sets out the basis upon which he submitted the appellants should each succeed in their appeals, recognising that different issues arise in respect of each appellant:

- a. Even if the historic account is not accepted, the appellants still face a real risk of persecution and/or Article 3 ECHR breach if returned to Afghanistan owing to conditions (including and/or especially for Sikhs) prevailing in the country as of 2016;
 - b. In the alternative, the family would plainly face “very significant obstacles to integration” in Parwan and/or Kabul given present country conditions and therefore rule 276ADE(vi) is made out;
 - c. The family has been in the UK since March 2013 and removal would be a breach of Article 8 ECHR, having due regard to the best interests of the children, the network of extended family support they enjoy in the UK and the conditions in Afghanistan prevailing for Afghan Sikhs in general.
28. In his oral submissions and in discussion following the oral evidence, the case being advanced on behalf of the appellants became more nuanced. In respect of the protection claim, Mr Lay focussed upon the position of the children, and upon the elder daughter in particular. Realistically, he accepted that in the light of the rejection of the claim of targeted persecution and in the light of the country guidance, it was not possible to identify an arguable basis upon which the first and second appellants could qualify for asylum. He recognised also that, again realistically, it would be very difficult indeed to establish in respect of a person who could not qualify for asylum that, again given the country guidance to be applied, such a person could establish on the basis of country conditions that there were very significant obstacles to integration on return. In Mr Lay’s submission the appellants should, at the very least, succeed to the extent that both children should be recognised as refugees, and their parents should succeed under 276ADE and on the basis that there would be an impermissible infringement of rights protected by article 8 of the ECHR if the parents were not granted leave to remain with their children in the United Kingdom.
29. Mr Lay submits there is real significance in the fact that in respect of the appellants with whose claim the country guidance case of *TG & others* was concerned, the Secretary of State conceded that their claims under Article 8 should succeed.
30. Mr Lay submitted that the evidence demonstrated that it was reasonably likely that on return to Parwan the family would not have the resources to pay for the children to be educated in a special school where, as Sikh children, they would be able to avoid the risks identified in the country guidance. In *TG & others* a distinction was drawn between a family that had access to support from family members and one that did not. In support of his submission that the children should be recognised as refugees he referred to paragraphs 110-111 of *TG & others* which, in the context of this particular appeal is of particular significance and so I reproduce those two paragraphs in full:

“A family without adequate resources is unlikely to be able to pay for private education which may be relevant when considering the situation of Sikh and Hindu children in Afghanistan whom it is proposed to return if receiving such education is demonstrated to be fundamental to that person's identity. There is also evidence that a Muslim is unlikely to employ a member of the Sikh or Hindu community in place of a Muslim, out of fear of potential reprisal or loss of business, indicating difficulties in securing an income with which to fund accommodation or essentials such as food, heating, clothing. The evidence we have been able to consider indicates that there is nothing in the law, the attitude of the Afghan government, or in theory preventing a member of either of these faith groups returned to Afghanistan from being able to set up their own businesses but whether they are able to do so will depend upon the availability of adequate funding, their ability to secure business premises in the light of possible hostility or opposition from Muslim traders who may see them as competition or not wish to rent premises out to them, making it difficult for them to pursue what has now become the remaining traditional trade of shopkeeper/trader. Whether an individual is in such a position is fact specific and they will have to satisfy the Tribunal that they are without economic means especially if they have paid a considerable sum of money to come to the United Kingdom, that they will not be able to re-establish themselves economically, and the impact upon family members as a result. Such individuals may also be required to provide appropriate evidence to show that there are no alternatives such as being supported by NGOs or through the Gurdwara and that any impact upon them, if destitution is alleged, is such that the threshold of Article 3 ECHR will be breached.

In relation to families with children it may be possible to establish that it is not in the best interests of such children to be returned, even if the threshold of Article 3 is not breached, if the degree of hardship and destitution is such that it leads to unjustifiably harsh consequences on return for such family members. As with all cases any assessment of the best interests of children will have to be balanced against the public interest if it is a consideration of a private life argument.”

31. For the respondent, Mr Kotas submitted that application to the facts of this appeal delivered only one answer, which is that the appeals should not succeed. He drew upon the findings of the country guidance case of *TG & others* in support. At paragraph 81:

“We find... that there is no clear evidence of official state sponsored persecution to the extent that there may have been with previous governments in Afghanistan”

At paragraph 83:

“Notwithstanding the evidence of incidents of continuing hostility against some members of the Sikh and Hindu community, we do not find it established on the evidence that merely by reason of being a Sikh or Hindu in Afghanistan there is a real risk of serious harm from non-state actors in Afghanistan even to the lower standard of proof applicable to appeals of this nature...

...We also note that there have been some limited returns from India who wish to conduct business activities in Afghanistan. This lends support to our view that

hostilities against members of the Sikh and Hindu communities have not escalated and in fact have reduced in frequency.”

And at paragraph 89:

“It is clear that a Hindu or Sikh Afghan male is able to go about his day-to-day business although he may from time to time be the subject to verbal abuse and harassment. If he has a business and property there is a risk of being subjected to demands for money by way of extortion by corrupt individuals and in extreme circumstances may be subjected to further more serious threats or acts of violence. Such incidents are rare now as the most valuable properties are seen to have already been taken away from Sikhs. Whether such events or combination of these events and other forms of discrimination amount to persecution such as to entitle an individual to a grant of international protection is fact sensitive, and will depend upon the individual's particular characteristics, wealth and background.

Mr Kotas did not seek to dispute that the female members of the family would face certain restrictions in Afghanistan such as being unable to leave the home unaccompanied or “properly attired” but pointed to paragraph 92 of the country guidance where it was noted that such was required of Muslim women as well. SK would not, of course, be returning as a lone woman, with the attendant risks associated with that status, but with the protection of her husband.

32. Mr Kotas accepted that if the children succeed in their asylum claim then their parents should succeed to the extent that there would be an impermissible infringement of article 8 of the ECHR if they could not remain with them in the United Kingdom even though they could not succeed on any basis if their claims are considered in isolation.

Discussion

33. In reaching these findings of fact, set out above, I have had regard to all of the documentary evidence relied upon, particularly the recent report provided by Dr Giustozzi, dated 10 April 2016. At paragraph 10 of that report Dr Giustozzi concludes that, in view of the evidence of the existence of Khwaja Nabi:

“[GS’s] claims of having been targeted for extortion by Khwaja Nabi are therefore plausible. “

However, in taking to himself (which he should not have done) the assessment of the credibility of GS’s claim he appears to have had no regard whatsoever to the reasons given by the respondent in refusing the claim or the judge in dismissing the appeal, even though he claimed, at paragraph 2 of his report, to have read both the refusal letter and the decision of the judge.

34. This is particularly unfortunate because he has been subject to this criticism twice before. At paragraph 175 of *AK (Article 15(c) Afghanistan CG [2012] UKUT 00163(IAC)* the Upper Tribunal observed:

“At para 76 of *GS* the Tribunal noted that his report for that appeal was of limited value “because it was prepared on the assumption that the appellant’s fear of Gul Karim [a warlord] and land grabs was correct”. It is somewhat unfortunate to find that Dr Giustozzi’s report prepared for this appeal makes a similar misplaced assumption in respect of the appellant’s claimed fear of a different warlord. Having noted that paras 4-18 of his report (and several other passages) appear to address aspects of the appellant’s account that had previously been rejected, we asked to see the letter written by Blakemores formally instructing him. It is clear from this letter that its author sought Dr Giustozzi’s opinion not only on the country guidance issues the Tribunal had identified (to consider the current position with regard to Article 15(c) and whether Afghanistan had changed since *GS*) but also the appellant’s original account. That is an unfortunate blemish on the firm’s otherwise excellent preparation for and handling of this appeal and in our view it largely excuses Dr Giustozzi’s faithful attempt to respond. That said, we concur with Mr Blundell that the fact that Dr Giustozzi devoted space to the appellant’s account does not suggest that he had carried out in full the reading of all the case documents sent to him which he said he had done (see para 2 of his report), since those documents included the First-tier Tribunal decision and the subsequent Upper Tribunal decision stating that the findings of fact of the First-tier Tribunal Judge were to stand.”

35. The respondent does not suggest that country conditions for Afghan Sikhs has improved since the evidence was examined by the Tribunal in the recent country guidance case. The appellants’ solicitors have commissioned for this appeal the fresh report from Dr Giustozzi to which I have just referred. This report, which runs to some 36 pages, is dated 10 April 2016. It is hard, however, to see how this takes us any further at all. As far as I can tell, the report is founded upon documentary evidence that pre-dated the decision in *TG & others* save for one single reference source, that being identified in footnotes as “interview with Avtar Singh, Kabul, February 2016”. It is clear that Dr Giustozzi placed significant reliance upon this source of information as it features in no fewer than 10 footnotes. Yet we do not have any details of that interview, its context or any transcript of it. We can see from other footnotes that Avtar Singh has been described as “leader of the Sikh community in Kabul” but we do not know who carried out this interview, whether a recording or contemporaneous note was taken of it and whether a transcript was prepared or published.
36. These claims for international protection are to be assessed, therefore, on the basis that their individual facts disclose nothing in addition to the fact that this is a family of Sikhs who disposed of all they owned in Parwan in 2012 in order to fund their journey to the United Kingdom, and that the two children, one of whom is a girl, did not have access to any education before they left. It does not appear to be in dispute that the decision not to send the children to school was founded upon a reasonably held fear that if they were sent to school they would face, on account of

being Sikh children, harassment, discrimination and other ill-treatment. If it is necessary for me to do so, I record that this is not a case where children were kept away from school in order to work in a family business. This chimes with the country guidance given in *TG and others* at paragraph 94:

“In relation to Sikh and Hindu children a number of areas of concern arise from the evidence we have been asked to consider. The evidence indicates that there have been occasions of Hindu and Sikh families not sending their children to school in Afghanistan, especially girls, as a result of the fear of harassment and ill-treatment which is corroborated by the evidence. Within the state system where children of all denominations are taught there is evidence of requirements to learn and recite the Koran, discrimination, and lack of adequate education facilities. In areas where numbers warrant, such as Kabul, special schools have been set up to provide education for children by Sikh teachers and some children are taught within the Gurdwara as a result. Such education is only provided however up to and including primary level with the requirement that at secondary level children will be taught within the state system where they become exposed to problems referred to in the evidence unless an individual's family has the means to pay them to be educated privately. If credible evidence is provided of a real risk of such ill-treatment and harassment to a child on return sufficient to prevent them receiving a proper education, which is shown to be a fundamental element of their personal identity, that they wish to pursue, rather than a child not being further educated as a result of the traditional belief that they will continue within a family business and therefore do not require to be further educated or for some other reason, then this may amount to such serious discrimination either on its own or cumulatively with other forms of discrimination such as to cross the threshold of persecution. However, this is a fact sensitive issue that must be considered in each case.”

37. The fact that the eldest child was not sent to a special school for Sikh children in Afghanistan before the family departed in 2012 provides support for the claim that there were then insufficient financial resources to do so. This enables the appellants to reasonably submit that, even if some form of accommodation and financial support can be obtained and provided after the family return to Afghanistan, as I have found to be the case, it is not reasonably likely that those resources will extend to cover the cost of private education for the children. Therefore, adopting the vocabulary of paragraph 94 of the current country guidance, this will, in my judgment, amount to such serious discrimination either on its own or cumulatively with other forms of discrimination such as to cross the threshold of persecution. As that persecution is for a reason recognised by the Refugee Convention and, applying the guidance at paragraph 90 of the country guidance and so recognising that, at least at local level, a sufficiency of protection is not available from the authorities, it follows that the two children are entitled to be recognised as refugees and so, to that extent, their appeals must be allowed.
38. As I have found that the cumulative effect of discriminatory disqualification from any access to education, taken together with the serious restriction upon their ability to engage in normal activities outside the family home has crossed the threshold into persecution, the serious harm that in this case gives rise to the

children's entitlement to be recognised as refugees is sufficient also to require that the children's appeal succeeds under article 3. Given that the children succeed in the asylum appeal, it is not necessary to address their claims under article 8 of the ECHR.

39. I address next the position of their parents, the first and second appellants. Mr Kotas is plainly correct to concede that the parents must succeed under article 8 simply on the basis that their children are to be recognised as refugees. However, in respect of the other grounds pursued, considered in isolation from the outcome of this appeal for their children, they have not established that they are entitled to succeed.
40. Given the facts as found considered in the light of current country guidance the parents do not have a well-founded fear of persecution upon return simply on the basis of being Sikhs returning to the city they left in 2012 where the first appellant had lived all his life. That is because the first and second appellants have chosen to put forward only an account of difficulties that has been found to be untrue. Once that is set aside one is left only with the fact that the first appellant had lived and worked in Parwan with his family without experiencing any significant difficulties, even if he found commercial success in business increasingly difficult. I have accepted that the family home was made over to the agent who arranged their journey to the United Kingdom but, for the reasons given above, it has not been established that the first appellant would not be able on return to recommence some form of business activity, funded if necessary by financial support from the friends and relatives who would, I find as a fact do whatever they could to support the family after they had returned to Afghanistan. Thus the asserted return to destitution is not established.
41. For the same reasons the first and second appellants do not face a real risk of being subjected to treatment such as to bring about an infringement of article 3 of the ECHR and nor would they face the very significant obstacles to integration demanded by paragraph 276ADE(vi).

Summary of decision:

42. The appeals of the third and fourth appellants, JK and KS are allowed on asylum grounds and on human rights grounds.
43. The appeals of the first and second appellants, GS and SK, are dismissed on asylum grounds but allowed on human rights grounds limited to article 8 of the ECHR.

Signed



Date: 6 June 2016
Upper Tribunal Judge Southern

ANNEX

Error of law decision made by Upper Tribunal Judge Plimmer



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/04919/2013

THE IMMIGRATION ACTS

Heard at Field House
On 24 August 2015

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

GS
ANONYMITY DIRECTION MADE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Lay (Counsel)
For the SSHD: Mr Tarlow (Home Office Presenting Officer)

DECISION AND DIRECTIONS

1. This decision refers to matters relevant to the appellant's asylum claim and I have anonymised it. The appellant is a citizen of Afghanistan. He arrived in the UK on 27 March 2013 with his family members and applied for asylum on the basis of claimed ill-treatment as a Sikh in Afghanistan.

Procedural history

2. This is a matter that has previously been considered by First-tier Tribunal Judge Reed. He dismissed the appellant's appeal in a decision dated 24 June 2013. Judge Reed did not accept the appellant's claim to have been specifically targeted whilst in Afghanistan. The Judge went on to consider the general risk for Sikhs in Afghanistan but concluded that he was not minded to depart from **SL and others (returning Sikhs and Hindus) Afghanistan CG [2005] UKIAT 00137**. The appeal was therefore dismissed.
3. In a decision dated 15 August 2013 Upper Tribunal Judge Rintoul considered it arguable that Judge Reed failed to give sufficient weight to the material contained in **DSG (Afghan Sikhs: departure from CG) Afghanistan [2013] UKUT 148 (IAC)**.
4. The matter was then stayed in order to await the promulgation of a CG case on Sikhs in Afghanistan, which was heard in March 2014. That decision is now understood to be imminently due for promulgation after a further hearing held in August 2015. Both representatives however agree that it is appropriate for me to consider whether or not the decision contains an error of law in advance of the promulgation of the CG decision.

Hearing

5. Mr Lay relied upon a skeleton argument to support his two main submissions. First, Judge Reed erred in law in providing insufficient reasoning for rejecting the credibility of the appellant's claim. Second, the Judge erred in law in requiring further fresh evidence to support the submission that **SL** should not be followed when that very material is contained within the decision of **DSG**.
6. Mr Tarlow invited me to uphold the decision for the reasons set out therein. After hearing submissions, I reserved my decision, which I now provide with reasons.

Error of law

7. I turn to Mr Lay's first submission: the Judge's credibility findings are irrational and insufficiently reasoned. The Judge was entitled to find for the reasons he provided that the appellant has not suffered in Afghanistan in the specific manner that he has claimed. The Judge was concerned that he was

not taken to any background material to support the power said to be wielded by a particular individual [26(ii)]. The Judge was entitled to express his concern about the absence of this evidence, in circumstances where it was claimed that the individual was not just powerful in the appellant's home area but that his influence extended to the government in Kabul. The Judge was also entitled to regard certain aspects of the appellant's account as implausible [26(iv) and (v)].

8. Mr Lay asked me to find that Judge Reed made his credibility findings without properly directing himself to the relevant background evidence. I do not accept this. The Judge expressly directed himself to the background evidence as clearly demonstrating that Sikhs suffer harassment and discrimination and there have been attacks on them [28] and had earlier summarised in some detail the available background evidence [23-24]. The Judge was therefore aware that the appellant's claims were broadly consistent with the background evidence.
9. I now turn to Mr Lay's second submission: the Judge erred in law in simply following **SL** without considering **DSG**. Judge Reed was clearly aware of **DSG** and referred to it twice [20 and 28]. However, it is very difficult to follow the Judge's reasoning that he had not been provided with sufficient fresh evidence to cause him to depart from **SL** [28]. The important point accepted by the Tribunal in **DSG** is that the Tribunal's figures for the number of Sikhs in Afghanistan was wrong and this impacted on the assessment of general risk. The Tribunal in **DSG** considered that "*this has clear implications for other cases involving claimed risk on return to Afghanistan for Hindus and Sikhs, in the period between now and such time as further country guidance on the subject can be issued*". In these circumstances Judge Reed was obliged to consider whether a returning Sikh with this appellant's characteristics (and those of his family members) may be at risk on the basis of the material available to him. This included the information contained in **DSG** which strongly supported a need to consider all the evidence available, rather than simply following **SL**. To this limited extent, I accept that the decision contains an error of law.
10. Mr Lay submitted that this error tainted the Judge's consideration of credibility. I do not accept this. It is very clear that Judge Reed was aware of the general background evidence and his credibility findings cannot be said to have ignored this. Mr Lay also submitted that Judge Reed demonstrated an 'unevidenced and irrational' evaluation of the degree of impunity which a local powerbroker could be said to hold against Sikhs. Mr Lay was concerned that such an assessment would not have happened if the Judge properly understood the importance of the evidence referred to in **DSG**. Mr Lay has misunderstood the Judge's concern at [26(ii)]. The Judge did not doubt the degree of impunity a local power broker could have against Sikhs. Indeed the Judge understood that there had been attacks on Sikhs [23, 24 and

29]. The Judge was concerned that there was insufficient evidence that the powerbroker in fact had the power the appellant claimed he had. This is distinct from doubting that a powerful man may be able to wield that power over Sikhs.

Remittal

11. Mr Lay asked me to remit the appeal to the First-tier Tribunal, even if I was against him on ground 1. I have had regard to para 7.2 of the *Senior President's Practice Statements* and the nature and extent of the factual findings required in remaking the decision. I have decided that the credibility findings shall stand. I have decided that this is not an appropriate case to remit to the First-tier Tribunal and the Upper Tribunal is suitable to remake the decision with those credibility findings in mind. Both representatives agreed that this should only be done after the promulgation of the imminent CG decision and I have given directions to that effect.

Decision

12. The decision of the First-tier Tribunal involved the making of an error of law. The decision to follow **SL** cannot stand and is set aside.
13. The appeal shall be remade by the Upper Tribunal on the basis of the credibility findings made by the First-tier Tribunal Judge and in light of the imminent CG case.

Directions

- (1) Within 21 days of the promulgation of the new CG case on returned Sikhs to Afghanistan the appellant's representatives shall file and serve a document setting out its position with cross-referenced to that case.
- (2) Within 21 days of receipt of those submissions the SSHD shall file and serve its position cross-referenced to the CG case.
- (3) The appeal shall be listed on the first available date after 1 November 2015.

Signed:

Ms M. Plimmer
Deputy Judge of the Upper Tribunal

Date:
24 August 2015