



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

Appeal Number: AA/10308/2014

THE IMMIGRATION ACTS

**Heard at North Shields
On 28 January 2016
Prepared on 29 January 2016**

**Decision & Reasons Promulgated
On 5 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

**M. B.
(ANONYMITY DIRECTION MADE)**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Selway, Counsel instructed by Brar & Co Solicitors

For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Afghanistan, who entered the UK illegally with his wife and children. He was refused asylum, and a decision was made to remove him from the UK on 14 November 2014.
2. The Appellant duly appealed against those immigration decisions and his appeal was heard by a Tribunal panel of Judges Webb and Fisher, and dismissed on all grounds in a decision promulgated on 9 June 2015.

3. The Appellant's application to the First Tier Tribunal for permission to appeal was granted by First Tier Tribunal Judge Page on 22 June 2015.
4. The Respondent filed no substantive Rule 24 response, because she had mislaid her file. Neither party applied to introduce further evidence. Thus the matter comes before me.

The grounds of appeal

5. The Appellant's grounds are drafted in intemperate language. Mr Selway, who was also their author, made no apology for that, although it is inappropriate, unnecessary, and to be deplored.
6. Mr Selway began by arguing that the Tribunal had failed to consider, and apply, the decision in DSG & Others (Afghan Sikhs; departure from CG) Afghanistan [2013] UKUT 148, which sanctioned the departure by the First Tier Tribunal from the guidance to be found in SL and Others (Returning Sikhs and Hindus) Afghanistan CG [2005] UKAIT 137, on the basis of the changed situation in Afghanistan for Sikhs in the intervening eight years. He then conceded however that the Tribunal had shown that the guidance DSG was in mind, because express reference had been made to it in paragraphs 13-16 of the decision. There is simply no merit in the suggestion that the Tribunal ignored DSG.
7. I turn then to the argument that the Tribunal's findings of primary fact should have led them to the conclusion that the family had experienced past persecution. As put, Mr Selway's argument was that the family had not simply experienced discrimination and harassment from some members of the general population. That argument was however no more than a disagreement with the Tribunal's conclusion, which had been drawn after a consideration of the guidance in both DSG and SL, and after consideration of the evidence that not all of the family's neighbours were ill disposed towards them.
8. Where Mr Selway was on stronger ground was in his argument that the behaviour of one particular family of neighbours, non state agents, had crossed the line of mere discrimination and harassment, and was properly to be viewed as past persecution motivated by their knowledge of the religion of the Appellant's family. The active members of this family were a "Commander" and his son (What he was said to be a commander of was never identified in the evidence). It was not in issue before the Tribunal that the son had raped the Appellant's wife, and when the decision is read as a whole it is perfectly clear that the Tribunal accepted the Respondent's concession in this respect. The Tribunal considered however that this was an isolated criminal act, no doubt given the evidence that there was no repetition of this conduct - which finding was certainly well open to them on the evidence, since no other incident of sexual violence against any member of the family was asserted by the Appellant. The Tribunal also accepted that this incident was far more serious than any of the other incidents of harassment that had been experienced. What was called for

was therefore a consideration of whether this was simply a criminal act resulting simply from uncontrolled lust, or whether it was an act of persecution, resulting in part from the knowledge of this lady's religion, and either the belief that it was acceptable to behave in such a way to a Sikh woman, or in the belief that because the victim was a Sikh he had no fear of retribution. That does not appear to have occurred, and to that extent the decision does disclose an error of law in the conclusion that there was no past persecution.

9. The Tribunal did however approach their decision in the alternative at paragraph 17. The assumption underlying paragraph 17 is that the acts of this one family of neighbours did amount to past persecution, so that a consideration was required of the ability of the family to relocate. The evidence showed only that that this one family were a group of non state agents, and it did not establish that they had any reach beyond Jalalabad itself, and this was therefore the Tribunal's finding. Whilst Mr Selway did not accept that proposition, he accepted that the evidence did not explain what the head of this family had been a commander of, and that the evidence did not show one way or the other what his reach was. I am satisfied that he was unable to identify any arguable error of law in the Tribunal's finding on this family's reach, and that it must stand.
10. The Tribunal therefore turned to the question of whether the Appellant and his family could be expected to relocate upon return to Afghanistan, and correctly identified that only Kabul was argued by the Respondent to be a possible destination.
11. The evidence that had originally been placed before the Tribunal was limited by Mr Selway's decision (no doubt for sound professional reasons) not to rely upon, and thus to place no weight upon, the content of a report from J Hassan Zadeh of 17 December 2014 [ApB p13]. Mr Zadeh had not attended the hearing. Both the Tribunal [18], and the Respondent's presenting officer at the hearing, separately recorded Mr Selway's decision in this respect, and I have no doubt that it was made and expressed to the Tribunal at the time. It is not enough to argue now, as at one point before me he sought to do, that despite his decision the Tribunal should have considered the content of that report for themselves.
12. Using the guidance to be found in both DSG and SL together with the quotations from the Country Information report upon Afghanistan relied upon by the Respondent the Tribunal therefore considered the position of Sikh families in Kabul. They noted the existence of a Sikh community, a privately run Sikh school, and two active Gurdwaras. They noted the ability of the Appellant and his family to travel in safety from Jalalabad to Kabul in 2012 where they had been able to celebrate their religion with other Sikh families at festivals, without interference. They considered that the family could reasonably be expected to relocate there, and that the Commandant and his son would have no further interest in them there.

13. Mr Selway's challenge to this approach was wholehearted – it defied practical common sense he argued. The Sikh community was dwindling, there were only about 300 Sikh and Hindu families left in Kabul, so that therefore only about 60-70 Sikh children left there, and there was now only one Gurdwara. If the family had been subjected to harassment and discrimination from the general population in Jalalabad on account of their religion, then it should be presumed that this would also occur in Kabul. The difficulty that this challenge faced was that it was not based upon the evidence that was before the Tribunal, or, the guidance in DSG.
14. Instead Mr Selway prayed in aid the decision in TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 595, which was not promulgated until November 2015, and which could not therefore have assisted the Tribunal. The analysis of the evidence contained therein, and the guidance offered, falls well short however of supporting either Mr Selway's proposition that no Sikh may safely return to Afghanistan, or, that no Sikh can reasonably be expected to relocate to Kabul from Jalalabad. Some members of the Afghan community continue to suffer harassment at the hands of muslim zealots, but not all, and the members of that community do not qualify simply on the grounds of their religion for international protection. The cumulative effect of the discrimination that community may suffer does not reach the threshold for persecution. That guidance is entirely consistent with the approach taken by the Tribunal in this appeal.
15. Having considered for myself the guidance to be found in TG upon the risks faced by those who return, it is plain that many of the issues raised for consideration upon the evidence as part of the overall assessment of whether relocation would be possible, were simply never addressed in the Appellant's evidence before the Tribunal, and/or that the arguments now relied upon have no adequate foundation in the evidence.
16. Thus the Appellant's wife would not be returning as a sole woman, without the protection of a male member of the family. She would have the protection of her husband, the Appellant.
17. Moreover the evidence did not establish that the Appellant and his family were without means, and without the ability to gain support from either their own extended family, the Sikh community in the UK, or the Sikh community in Kabul. This was an issue that was simply not addressed in the witness statements. If they returned voluntarily they would have the ability to access the financial support package available to those who do, and they cannot be heard to say that they would refuse to do so, and would therefore be unable to access such support. In this respect I must also apply the guidance in AN & SS (Tamils – Colombo – risk) Sri Lanka CG [2008] UKAIT 00063 when the Tribunal concluded it was appropriate to take into account the availability of the financial support then provided through the Voluntary Returns Programme;
 - "117. Much has been made of the undue harshness which AN will face as a single mother without accommodation or employment and without

friends or family to turn to in Colombo, but this is to leave out of account what even Dr Smith acknowledges to be the very generous support package offered by the IOM to voluntary returnees. After "*smoothing the re-entry process*" the IOM provides "*a comprehensive package of support for five years after arrival*", which includes "*five years shelter guaranteed*." We do not think it is open to the appellant to say that, if she loses her appeal, she will not take advantage of this package, and to argue from that refusal that she will face destitution in Colombo which, accordingly, is not a place to which she can reasonably be expected to relocate."

18. The evidence also failed to establish that there was no functioning Gurdwara in Kabul where the family could worship in safety, and obtain education for their children.

Conclusion

19. In the circumstances I am not satisfied that the challenges advanced in the grounds of appeal are made out. I am not satisfied that the Appellant has established a material error of law in the Tribunal's decision that requires the decision to be set aside and remade.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 9 June 2015 did not involve the making of an error of law in the decision to dismiss the appeal that requires that decision to be set aside and remade. The decision to dismiss the appeal is accordingly confirmed.

Direction regarding anonymity - Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Deputy Upper Tribunal Judge JM Holmes
Dated 29 January 2016