



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/00626/2016

THE IMMIGRATION ACTS

Heard at Field House
On 20 June 2017

Decision & Reasons Promulgated
On 07 July 2017

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

T K B
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Samra, Solicitor from Harbans Singh & Co (Soho Road)
Solicitors

For the Respondent: Mr P Armstrong, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. I make this order because this appeal arises from a protection claim and asylum seekers are, generally, entitled to privacy.
2. This is an appeal brought with permission of Upper Tribunal Judge Finch against the decision of the First-tier Tribunal to dismiss the appellant's appeal against the decision of the Secretary of State that she is not a refugee or otherwise entitled to international protection.

3. There are some unusual features in this case and I begin by considering the appellant's immigration history.
4. The appellant is a national of Afghanistan. She was born in January 1949. She entered the United Kingdom in April 2013 with her husband using a family visit visa.
5. During the currency of that leave she applied for leave to remain outside the Rules and the application was refused in September 2013. She appealed and the appeal was heard and dismissed in a decision promulgated in April 2014. Her appeal rights were exhausted in May 2014.
6. On 15 October 2014 she asked for an appointment to claim asylum and was given an appointment when she made her claim on 23 October 2014. Her husband was identified as her dependant. On 4 December 2015 her asylum claim was refused as "clearly unfounded" and she was told of that decision in January 2016. She was dissatisfied with that decision and sought judicial review. Eventually the decision that the application was clearly unfounded was withdrawn. As a result of the withdrawal of the certificate the decision of 4 December 2015 (communicated on 7 January 2016) became appealable but the respondent gave further reasons in a decision letter dated 22 April 2016. The appeal before the First-tier Tribunal Judge was an appeal against the decision for the reasons set out in that letter.
7. I begin by considering the reasons in the letter. The letter includes a column identifying the appellant's nationality and states: "Afghanistan but removable to India also".
8. The letter notes that the appellant said that she feared return to Afghanistan because she would face mistreatment because she follows the Sikh religion.
9. She outlined various significant events that had happened to her in Afghanistan. She said that somewhere around 1990 the local temple that she attended was attacked by Muslim gunmen and she was shot in the leg. Other people were killed during the same attack but the police arrived and killed the gunmen.
10. On a date that she could not recall during the war her husband was kidnapped in Afghanistan by the Mujahideen but was released the following day. About six or seven days later her son was kidnapped, severely beaten and released after two or three days on payment of a ransom.
11. On a date she could not recall she left Afghanistan for India but gave inconsistent answers indicating that she had left Afghanistan for India to see her children or that her children accompanied her to India. She also claimed that she had left Afghanistan because she was afraid after she had been shot at in the temple.
12. Significantly, she said that she was given leave to remain in India which she renewed every three months. She remained in India for two or three years before returning to Afghanistan in the year 2000 to see her sons who had previously returned to Afghanistan.
13. She said she claimed asylum in India in 2000. On an unknown date she returned to India after two or two and a half years in Afghanistan to protect her daughters from

attempted kidnap because of the general security situation. Her sons travelled to the United Kingdom.

14. She claimed that she feared harm from the Taliban or the Mujahideen because of her religion and the general poor security situation in Afghanistan. The refusal letter shows that the respondent, correctly, corrected herself that a pre-requisite of a person being recognised as a refugee is that she is "outside their country of nationality (or country of former habitual residence if they are stateless) and are unable or, owing to a fear of persecution, unwilling to return to it before they can qualify for international protection as a refugee ...".
15. The respondent acknowledged that the applicant had previously submitted a passport identifying her as a national of Afghanistan and accepted that she is a national of Afghanistan as claimed.
16. The respondent accepted that the applicant follows the Sikh religion. The respondent declined to decide if the appellant had been shot in a Sikh temple as she claimed and found her evidence too vague to accept that her husband and sons had been kidnapped.
17. At paragraph 23 the respondent said:

"You have stated that you claimed asylum in India in 2000 (AIR q132-133). You have provided no supporting evidence of this application. However, by your own account you returned to Afghanistan in the year 2000 (AIR q20). Therefore, even if it were to be accepted that you had claimed asylum in India, which it is not, it is considered that this claim has been invalidated, and any subsequent status you may have been granted as a refugee, was revoked on account of your actions in re-availing yourself of the protection of Afghanistan".
18. The Secretary of State then noted that the appellant had shown that she had leave to remain in India where she was a long term resident and had an Indian residency book. She said she had two daughters settled in India even though they were Afghan nationals.
19. Her Afghanistan passport had an exit visa from India and also a return visa valid for a single entry until 30 June 2014. That date had clearly passed.
20. At the hearing of an appeal against an earlier refusal of asylum the Immigration Judge found that the appellant was entitled to re-enter India and held that:

"They are persons of Indian origin who have every right to a card issued to such persons in accordance with the Indian Nationality Law regulations as known in the public domain. This would be almost made certain by their life there for fifteen years".
21. It will be appreciated that when that decision was made in April 2014 the appellant had shown she had a return visa valid until 30 June 2014.
22. The Reasons for Refusal Letter then referred to the case of **D (Tamil) [2002] UKIAT 00702** which is perhaps better known as "**Devaseelan**".
23. The Secretary of State then referred to the reported decision of **ST (Ethnic Eritrean - nationality - return) Ethiopia CG [2011] UKUT 00215 (IAC)** which summarised other case law and included the observation that a "claimant must demonstrate that he or she has done all that would be reasonably expected to facilitate return as a national of [*in that case*] Ethiopia".

24. The Secretary of State then said at paragraph 29:

“Following the principles of the above case, taking into account your previous lengthy period of right to reside in India, it is considered that the burden of proof is on you to demonstrate that you are not entitled to return to India and that you have taken all reasonable steps to facilitate your return to India”.

25. The letter then informed the reader that:

“it is considered that you are able to obtain a legal right to re-enter and reside in India”.

26. The letter then looked at the risks the appellant might have in Afghanistan and showed that the respondent did not believe that she had been shot at or that her son and husband had been kidnapped as alleged or at all.

27. The letter then referred to the guidance given in **TG and Others (Afghan Sikhs persecuted) (CG) [2015] UKUT 595 (IAC)** where the Upper Tribunal found that some members of the Sikh and Hindu communities in Afghanistan continue to suffer harassment at the hands of Muslim zealots but that members of the Sikh and Hindu communities in Afghanistan do not generally face a real risk of persecution or ill-treatment. However the same decision noted that “women are particularly vulnerable in the absence of appropriate protection from a male member of the family” and that a Muslim would be unlikely to employ a member of the Sikh or Hindu communities. Additionally, the letter acknowledged that the difficulties facing Sikh and Hindu and as the community Afghanistan reduced in number the Gurdwara was less able to provide adequate support.

28. At paragraph 29 of the decision the respondent said:

“Following the principles of the above cases, taking into account your previous lengthy period of a right to reside in India, it is considered that the burden of proof is on you to demonstrate that you are not entitled to return to India and that you have taken all reasonable steps to facilitate your return to India.

30 Based on the findings of the Immigration Judge, and the above case law, it is considered that you are able to obtain the legal right to re-enter and reside in India”.

29. The First-tier Tribunal Judge decided that the appellant could be returned safely to Afghanistan but also that the appellant could be returned to India. At paragraph 26 the judge said:

“Judge Kanagaratnam also made findings about the appellant’s ability to live in India. I remind myself that the appellant and her husband left Afghanistan in 2000 and lived in India, lawfully, until they came to the United Kingdom in 2014. They had previously spent time in India before 2000. They own property in India, which the appellant told me was still available to her and was currently locked up. The appellant has two daughters in India. She is still in contact with both of them.

27 Judge Kanagaratnam found, at paragraph 11 of his decision that the appellant (and her husband) were likely to be able to return to India even though their visa had expired on 30 June 2006. The appellant has not successfully challenged this finding, which was the basis of Judge Kanagaratnam’s rejection of the appellant’s claim that the appellant’s removal from the United Kingdom would breach the Human Rights Convention”.

30. Presently I am concerned with the question of whether the appellant could be returned to India.

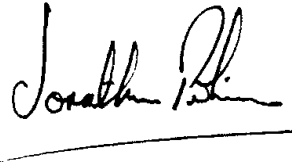
31. I have read the decision of Judge Kanagaratnam. It was certainly his view that the appellant could return to India but I do not agree that he found that it was irrelevant that the appellant at the time of his decision still had leave to return. I do not understand the chronology because Judge Kanagaratnam said at paragraph 11 of his decision:

“The period of stay in India is until 30 June 2006. There is no evidence before me to establish that the appellants do not have the possibility of returning to India a prospect which they claim to have now lost. They are persons of Indian origin who have every right to a card issued to such persons in accordance with the Indian Nationality Law regulations as known in the public domain. This would be almost made certain by their life there for fifteen years. For all these reasons I find that the removal of the appellants from the United Kingdom would not cause the United Kingdom to be in breach of its obligations under the European Convention of Human Rights”.

32. The respondent directed herself correctly about the need for a refugee to be outside her country of nationality or country of habitual residence if she had lost her nationality. I struggle to see why the Secretary of State, notwithstanding Judge Kanagaratnam’s observations, considered the possibility of returning the appellant to India. She is not a national of India. I am not aware of any principle of international law that requires a potential refugee to exclude the possibility of her being a national of a country where she happened to live for a time when considering a protection case. The decision in ST considered the judgments in MA (Ethiopia) [2009] EWCA Civ 289 but that concerned a case where a person was a national of a country that had divided. It does not illuminate an approach to take when a person has happened to live in a country for a time. The plain fact is that the appellant is not a national of India and has not lost her Afghani nationality. I can see no basis on which she can be returned to India and that part of the appeal is essentially a red herring. The judge was wrong to say that the appellant could be returned to India.
33. This of course is not the end of the matter. There was also a finding that the appellant could be returned to Afghanistan. The difficulties facing Sikh and Hindu communities in Afghanistan is something that has taxed the Tribunal for many years. The most recent consideration was in the case of TG and Others (Afghan Sikhs persecuted) Afghanistan (CG) [2015] UKUT 00595 (IAC). This case recognised that there needs to be an individual assessment in any case involving a Sikh from Afghanistan and particular consideration needs to be given to the plight of lone women. Here the First-tier Tribunal Judge was satisfied the appellant would not be returned as a lone woman but with her husband, and was satisfied that the appellant could raise capital by selling her property in India. In other words, she would be neither alone nor penniless. Nobody would expect a 68 year old woman from Afghanistan who has lived in the United Kingdom for some fifteen years to approach returning there with any enthusiasm. Clearly it would be difficult for her but the evidence does not support a conclusion that she would be persecuted or that her human rights would be contravened by reason of her returning to her country of nationality. Here the First-tier Tribunal Judge, albeit in a rather brisk way, has considered the facts appropriately in the light of clear country guidance and nothing was placed before the First-tier Tribunal Judge to show that a different conclusion should have been reached and nothing was put before me to show that the judge’s conclusion was wrong.

34. The judge clearly dismissed the appeal “under the Refugee Convention and Articles 2, 3 and 8 of the Human Rights Convention”. For all practical purposes the decision on refugee, article 2 and article 3 grounds will hang together. Article 8 can raise separate questions but there is no evidence that there were weighty “private and family life” matters that require detailed consideration. Clearly the appellant’s status in the United Kingdom has been precarious. She has not established a right to remain.
35. I have reflected a little on this determination because it concerns me that so much time has been given to the possibility of returning the appellant to India which, in my judgment, is not an option in this case. It is my considered view that my conclusion that removal to India is not an option is the right conclusion and attention ought to have been focused on the problems of returning the appellant to Afghanistan.
36. For the reasons outlined above I am satisfied that the First-tier Tribunal did a satisfactory job in that part of the decision and reached a conclusion that was open for the reasons given.
37. It follows therefore that I find no material error and I dismiss the appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal

A handwritten signature in black ink, appearing to read 'Jonathan Perkins', written over a horizontal line.

Dated 6 July 2017