



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: PA/00038/2018  
PA/00043/2018

THE IMMIGRATION ACTS

Heard at Field House  
On 22 June 2018

Decision & Reasons Promulgated  
On 2 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR J S S  
MRS S K S

(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Ms Z. Kiss, Home Office Presenting Officer

For the Respondents: Mr R. Halim, Counsel, instructed by Bhogal Partners Solicitors

DECISION AND REASONS

1. The Respondents, to whom I will refer as the Claimants, are claimed nationals of Afghanistan, of the Sikh religion. Their dates of birth are respectively 6 September 1949 and 15 July 1952 although the second Claimant's date of birth had been recorded differently in the past.
2. They arrived in the United Kingdom on 20 August 2002 and claimed asylum on the same day, based on a fear of persecution due to their religion as Afghan Sikhs. These applications were refused by the Secretary of State on 31 August 2002 and their appeals against the refusal of asylum were dismissed in a decision promulgated on 31 October 2002. Further submissions in support of an application for a fresh claim

were made in 2014 and refused on 16 June 2015 and a judicial review of that application was unsuccessful.

3. However, submissions in support of a fresh claim were ultimately considered by the Secretary of State and refused in a decision dated 1 December 2017. The Claimants appealed and their appeals came before First-tier Tribunal Judge Sweet for hearing on 31 January 2018. In a Decision and Reasons promulgated on 7 February 2018, the judge allowed their appeals on asylum grounds and with reference to Articles 2, 3 and 8 of the ECHR.
4. The Secretary of State sought permission to appeal to the Upper Tribunal on the following bases:
  - (1) That the judge had erred materially in fact in finding that the Claimants' son, D, had been granted asylum, having been accepted as Afghan when in fact he obtained ELR (exceptional leave to remain). Given that D is the only son who has been DNA-tested to prove the relationship and given there is no acceptance of his nationality this reflects directly on the claimants' claimed Afghan nationality and the judge consequently erred;
  - (2) The judge failed to resolve the conflicts in evidence, i.e. the second Claimant's date of birth, and the fact that the documentation now relied upon and the witnesses now relied upon could have been submitted at an earlier stage.
  - (3) The judge erred in at [64] in finding there was no onus on the Claimants to establish that they were not Indian citizens but merely that they were Afghan nationals and reliance was placed on the jurisprudence set out in MA (Disputed Nationality) Ethiopia [2008] UKAIT 00032 at [16], which provides that the burden of proof is on the claimant to prove his nationality (or lack of it). Reference was also made to MW (Nationality; Art 4 QD; duty to substantiate) Eritrea [2016] UKUT 00453 (IAC), which found that an applicant who denies he is a national of a country where he could obtain protection can be expected to take reasonable steps to establish he is not such a national.
  - (4) It was submitted that the judge further erred in his interpretation of the case law of TG (Afghanistan) CG [2015] UKUT 595 (IAC) at [67] in that he failed to consider their particular circumstances or provide reasons for concluding that the claimants would be at risk on return; and
  - (5) in allowing the appeal predominantly on the basis of the evidence provided by the witnesses, in light of the fact, following Devaseelan, that there had been previous adverse credibility findings and that the new oral evidence of witnesses was insufficient to overturn those credibility findings.
5. Permission to appeal was granted by First-tier Tribunal Judge Pickup in a decision dated 27 April 2018 in the following terms:

*"I am not satisfied that the error as to the son's refugee status was material or that it was necessary to resolve every conflict of evidence. However, it is arguable that following MA (Disputed Nationality) Ethiopia [2008] UKAIT 00032 the judge erred in holding that there was no burden of proof on the Appellants to establish that they were not Indian citizens. An applicant who denies that he is a national of a country where he could obtain protection can be expected to take reasonable steps to establish that he is not such a national. This is potentially material error of law. All grounds may be argued."*

6. The Claimants' solicitors served a Rule 24 response in time on 24 May 2018, opposing the appeal. In particular, in relation to the purported error by the First-tier Tribunal Judge in concluding that there was no burden upon the claimants to establish that they were not Indian nationals, it was contended that the Secretary of State should not be permitted to raise this ground since (a) at the outset of the First tier Tribunal proceedings, the Claimants' counsel canvassed concerns that the Presenting Officer was seeking to advance for the first time that the Respondents were joint Afghan-Indian nationals. It was contended that such a new argument would prejudice the claimants since their case had been prepared on the basis that if they could prove they were Afghan nationals that would dispose of the suggestion that they were Indian nationals. In those circumstances the claimants' counsel suggested that if the Presenting Officer was intending to pursue the joint nationality issue the matter should be adjourned to enable the Respondents to engage with the evidential requirements set out in MA (Disputed Nationality) Ethiopia [2008] UKAIT 00032 and (b) the Presenting Officer then confirmed he would not be pursuing the joint nationality argument and the hearing proceeded on that basis.
7. The Rule 24 response recognised that the Decision and Reasons of the First-tier Tribunal Judge does not reflect the preliminary discussions to which he referred and the Tribunal was invited to examine the Record of Proceedings and the Claimants' solicitor's attendance note which was provided. This is handwritten and a little difficult to follow but does appear to at least record that there were discussions on the issue of nationality.
8. Prior to the hearing a witness statement by Mr Lemer, counsel for the Claimants at the First tier Tribunal hearing, dated 22 June 2018 was served, which states, *inter alia*, as follows:
  - "2. In particular, it was apparent from the Respondent's refusal letter that it was the Respondent's belief that the Appellants were Indian and not Afghan nationals.
  3. Prior to the hearing commencing, as is my usual practice, I spoke to the Respondent's Presenting Officer and provided him with my skeleton argument. I specifically remember asking the Presenting Officer whether he proposed to maintain the Respondent's position that the Appellants were Indian nationals and not Afghan nationals, in light of the very large number of witnesses who had provided evidence, and were attending court, in order to corroborate the Appellants' account of having lived in Afghanistan. The Presenting Officer confirmed that he would be doing so and that even if the Appellants were able to

*demonstrate that they were Afghan nationals it did not prevent him arguing that they were also nationals of India. I pointed out to him that the dual nationality point had not previously formed part of the Respondent's case and that if that was what he wished to advance I would need to ask for the appeals to be adjourned to allow for the provision of evidence to address the issue. We did not discuss the matter further at that point.*

4. *The case was subsequently called on before First-tier Tribunal Judge Sweet. Before any evidence was called the judge asked the parties to confirm what they thought the issues were. During the course of the subsequent discussion I pointed out that if the Respondent were to pursue the dual nationality point the Appellants would need to ask for an adjournment to provide evidence to address the matter. At that point the Respondent's representative confirmed that he would no longer be pursuing the dual nationality issue. The case proceeded on that basis."*

9. Counsel also makes reference to his counsel's notebook with an extract in relation to submissions, submitting:

*"It is clear from that contemporaneous note that my closing submissions were made on the premise that the Respondent was not pursuing the joint nationality point (referred to in the note at 'not pursuing joint nat point ... binary issue - either Afghan or Indian')."*

#### *Hearing*

10. At the outset of the hearing before me, Ms Kiss for the Secretary of State handed up the minute drafted by the Presenting Officer at the First-tier Tribunal hearing, Mr Daniel Allen, dated 1 February 2018, i.e. the day following the appeal hearing. Having read and heard submissions from both parties in respect of this minute it does not particularly assist, in that there is no record of a discussion concerning dual nationality. The Secretary of State's position as set out in the minute is that the Indian passports upon which the claimants travelled to the UK were genuine and that the documents relating to Afghanistan do not determine the question of the Claimants' real nationality.
11. I also located and had copied for the parties the First-tier Tribunal Judge's Record of Proceedings, where there is no record of any preliminary discussions. However, it is clear from the record of the submissions and particularly those on the part of the Secretary of State that the case was run on the basis that the Claimants had Indian nationality.
12. Mr Lemer was present and willing to give evidence to the Upper Tribunal in line with his witness statement dated 20 June 2018. Miss Kiss did not seek to cross-examine Mr Lemer on the basis that she accepted that what he had said in his statement was what he genuinely believed. However, she submitted that he may have been mistaken. She sought to adjourn the hearing in order to get further information from the Presenting Officer, Mr Allen, as he was not available either yesterday or today but would apparently be available on Monday.

13. Mr Halim for the Claimants opposed the adjournment application on the basis that if Mr Lemer's evidence is accepted, and there is no reason not to accept it, then his recollection must also be accepted and this is that there was a concession made on the part of the Secretary of State. The appeal had been made by the Secretary of State and the Rule 24 response had been served on the Secretary of State on 24 May 2018. The Secretary of State had therefore had a month to assemble her case but has not done so apart from to produce the minute today.
14. In any event, if the Presenting Officer had proceeded with the dual nationality point the hearing would not have gone ahead before First-tier Tribunal Judge Sweet because Mr Lemer made clear that time would be needed by way of an adjournment if the dual nationality point were to have been argued. Therefore the very fact that the appeal proceeded means that the dual nationality point was conceded.
15. I refused the request for an adjournment on the basis that the rule 24 response was filed on 24 May 2018 and the Secretary of State was thus properly on notice from that time of the dispute as to the joint nationality argument. In any event, the rule 24 response did not raise new issues but was responding to the Secretary of State's grounds of appeal. In light of the overriding objective, the interests of fairness pointed to continuing with the appeal. Having confirmed with Ms Kiss that she was not intending to cross-examine Mr Lemer, I released him in order for him to attend a pre-existing appointment.
16. I then heard submissions from both parties in relation to the substantive matters raised in the grounds of appeal. Ms Kiss' primary oral submission was that the judge had failed to properly implement and follow the decision in Devaseelan [2002] UKIAT 00702 in that there had been two previous determinations where the Appellants had been found not to be credible. She drew my attention to [64] of Judge Sweet's decision where he had accepted that there were a number of aspects of the evidence provided by the Claimants which were unsatisfactory and that they had provided little evidence in their Home Office interviews and yet had on the basis of only a few questions been accepted by the Afghan Embassy as Afghan nationals. She sought to rely on [39](4) of Devaseelan, which provides that new evidence should be considered with scepticism. She submitted that the evidence from a number of witnesses had not been recorded in great detail and that when the case was considered as a whole the judge had erred in allowing the appeal. She asked me to find an error of law and to have the appeal reconsidered.
17. In his submissions, Mr Halim reminded me that the issue is whether there is an error of law in the decision of the First-tier Tribunal. He submitted that it is useful as a starting point to have in mind what the Tribunal said when granting permission to appeal, which was specifically in relation to the issue of the nationality of the claimants, which in light of the preliminary submissions was not now being pursued or pursued with much vigour by the Secretary of State. However, that had been the mainstay of the Secretary of State's case.
18. Mr Halim submitted that the Secretary of State was essentially attempting to rerun his case below, having lost, and the grounds of appeal amounted to nothing more

than a disagreement with the findings made the First-tier Tribunal Judge. He submitted the critical passage is [66] where the judge expressly directed himself in respect of Devaseelan (op cit) stating:

*"I must take the earlier Tribunal decisions as a starting point. However, there has now been provided further evidence which leads me to the conclusion that the Appellants are indeed Afghan nationals. While I am not wholly persuaded by the Afghanistan Embassy letter as I do not know what questions or evidence were provided by the Appellants before the letter was issued, I found the new oral evidence from family and friends as to the Appellants' nationality to be cogent. I also noted that D (who had an Afghan ID card) was accepted to be Afghan in the Home Office document of 1 August 2001. I have also noted the Appellants' own ID cards and military service document, whenever those documents arrived in the UK."*

19. Mr Halim reminded me that the judge had not, as he put it, given the Claimants a clean bill of health at [64], noting, as their Counsel accepted, there were a number of aspects of the evidence provided which are unsatisfactory. He submitted that the judge had weighed up all the evidence including parts of the evidence that were not persuasive or satisfactory, that the judge had conducted a balancing exercise and the fact that there were elements which were not persuasive or satisfactory was indicative of the fact that he had considered the case very carefully in the round and he had provided a salient basis for departing from the previous findings. The evidence that the judge relied on had not been before the previous Tribunal Judges. In particular, the evidence not only of family members who had been accepted as Afghan Sikhs but also members of the Afghan Sikh community in the UK and also those who had known the Claimants whilst living in Afghanistan.
20. In relation to D and his nationality, Mr Halim submitted there was nothing to this ground of appeal as the Secretary of State would not have granted D exceptional leave to remain in 2001 if she were not satisfied that he was Afghan, given the policy relating to Afghan nationals which was extant at that time. In any event, the Claimants' son SSS was granted refugee status on the basis that he is a Sikh from Afghanistan. His evidence was not disputed nor the fact that he attended the Afghan Embassy with his parents.
21. Mr Halim submitted that it is clear that the judge came to a sustainable view. Having weighed up each piece of evidence and considered it holistically, the judge provided a proper basis for departing from the previous findings of the First-tier Tribunal Judges. Whilst Ms Kiss today was suggesting that the previous appeal determinations should essentially be read in, this does not make good the Secretary of State's case that Judge Sweet misdirected himself. He had adequate regard to the shortcomings and the strengths of the appeals and was entitled to take into account an abundance of evidence that had not been before any judge before. Mr Halim submitted there was no proper basis to interfere with the judge's findings and conclusions.
22. In reply briefly Ms Kiss sought to rely on all the grounds of appeal as written, albeit she had only highlighted the most pertinent.

## Findings

23. I find no error of law in the decision of First-tier Tribunal Judge Sweet. In relation to the “*dual nationality*” ground upon which permission to appeal was expressly granted it is clear that contrary to the assertions at [5] of the grounds of appeal, the Secretary of State’s case was not at the hearing before the First tier Tribunal put on the basis that the Claimants were dual nationals. That being the case, there was no error of law in the First-tier Tribunal Judge’s approach to whether or not they had discharged the burden of showing that they are nationals of Afghanistan.
24. In relation to the Devaseelan point it is clear and I accept the submissions of Mr Halim that the judge expressly directed himself in light of the decision in Devaseelan at [66] of his decision and clearly had regard to the earlier Tribunal decisions. His finding that there was new evidence which persuaded him to depart from the findings as to the Claimants’ nationality made in those earlier decisions is sustainable in light of that evidence and in accordance with the guidance given by the Tribunal in Devaseelan.
25. In relation to the first ground of appeal in relation to the Claimants’ son D., I accept Mr Halim’s submission that the grant of exceptional leave to remain to D in 2001 was clearly predicated on the fact that he is a national of Afghanistan.
26. The only outstanding ground is in relation to the assertion that the judge had failed to resolve conflicts of evidence. However, that is not the case upon a close consideration of his decision and reasons. At [64] the judge expressly directed himself that there were a number of aspects of the evidence which were unsatisfactory but he gave reasons for concluding in light of the evidence before him, which, when considered holistically, was cogent, to support the contention that the Claimants are indeed nationals of Afghanistan of the Sikh religion. That finding had been based, as indicated, not only on the evidence from family members but also members of the community, both those who knew the claimants when they lived in Afghanistan, for example SSK, who says he used to play with the first Appellant as a child in the street, and MSC, who has known the Appellants for more than 25 years, but also PSC, who did not know the Claimants in Afghanistan but has known them for fifteen years in the UK through the Afghan Sikh community.
27. The Judge was entitled to take account of the fact that two of the Claimants’ sons reside in the UK, having been accepted as Afghan nationals by the Secretary of State, and also the documentary evidence including the first Appellant’s military service certificate, which clearly indicated that he is a national of Afghanistan.
28. In those circumstances the judge’s findings as to the nationality of the Claimants are clearly sustainable. I further find that the judge was entitled at [67] to allow the appeal in light of the country guidance decision in TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595 (IAC) and the Secretary of State’s Afghan Sikh policy, bearing in mind the gender of the second Claimant; the fact that

they have resided in the United Kingdom for more than fifteen years and from the judge's record of the evidence, that their five children are all in the United Kingdom and they have no accommodation in Kabul, the first Appellant having sold the house and no support network there.

29. In conclusion, the judge gave detailed and sustainable reasons for allowing the Claimants' appeal. I find no error of law in his decision, which is upheld with the effect that the claimants are entitled to protection on the basis that they are Sikhs from Afghanistan.

### **Notice of Decision**

The appeal by the Secretary of State is dismissed.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

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

Signed: *Rebecca Chapman*

Date: 27 June 2018

Deputy Upper Tribunal Judge Chapman