



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA025092015

THE IMMIGRATION ACTS

Heard at: Manchester
On: 11th May 2016

Decision & Reasons Promulgated
On: 23rd May 2016

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

G K + 2
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Ms G. Patel, Counsel instructed by Broudie Jackson & Canter
For the Respondent: Mr A. McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a female national of Afghanistan whose date of birth is recorded as the 1st January 1991. Her dependents are her husband and child. She has permission¹ to appeal against a determination of the First-tier Tribunal

¹ Permission was refused by Upper Tribunal Judge Renton (sitting as a Judge of the First-tier Tribunal) on the 27th August 2015 but granted upon renewed application by Upper Tribunal Judge Rintoul on the 28th September 2015.

(Judge Nicol)² to dismiss her appeal against a decision to remove her from the United Kingdom pursuant to s10 of the Immigration and Asylum Act 1999. That decision followed from the rejection of the Appellant's claim for international protection.

2. The basis of the Appellant's claim is that she is a Sikh from Afghanistan who fears persecution for reasons of her religious belief. She states that she and her family are from Jalalabad. In a series of interviews in 2014 the Appellant gave an account of suffering systemic societal discrimination, of being unable to go out for a fear of hostility from the local population and Islamic militants, and having a bomb placed outside the Gurdwara where she was staying. The Appellant claimed that the police in Jalalabad were unwilling or unable to protect her. She did not believe that she would be able to find safety in Kabul.
3. The Respondent accepted that the Appellant is a Sikh but not that she is Afghani. A language analysis had found that she was from Northern Pakistan. Although the Appellant had produced what purported to be Afghani documents the Respondent attached no weight to them because they were untranslated. The entire account of persecution and discrimination in Jalalabad was thereby rejected.
4. On appeal the Appellant gave oral evidence and was cross examined. Having heard her evidence, and that of her husband, the Tribunal accepted that she had been "credible throughout". It was expressly accepted that she was a Sikh from Jalalabad. The Tribunal did not doubt any of the Appellant's account, but found that what she described was not persecution. She had suffered no more than "minimal harassment". It was noted that by her own evidence her father and brother were able to engage in commerce. Her evidence that she stayed in the house (or Gurdwara) for most of the time was consistent with the societal norms in Afghanistan: "it is not clear that the Appellant was treated differently to any other Afghan woman, whatever their ethnic or religious background". The Tribunal notes that the Appellant's husband would be going back to Afghanistan with her. He has previously been able to travel freely between Jalalabad and Kabul. Although he claims that when returned to Afghanistan from the UK in November 2012 he was detained and suffered degrading treatment, there was no evidence to support this contention. His account lacked detail and was found not to be credible. The appeal was thereby dismissed.
5. The Appellant now appeals on the following grounds:
 - a) The Tribunal erred in failing to have regard to the Upper Tribunal's country guidance;

² Determination promulgated 29th July 2015

- b) The Tribunal misdirected itself to what level of harm would constitute persecution. The Appellant submits that being trapped in a house for fear of kidnap, beating and hostility, suffering societal discrimination and having a bomb placed outside her place of residence cumulatively amounts to persecution;
 - c) The determination does not make reasoned findings on the evidence of the Appellant's husband, who was a dependant upon her claim;
 - d) Even if the Tribunal did not accept that there was a risk of harm in Jalalabad the Tribunal was still obliged to consider whether there was a risk in Kabul, the place of proposed return.
6. The appeal was opposed on all grounds by the Respondent. In respect of the findings on persecution the Tribunal had been entitled to find that the events narrated did not disclose a risk of serious harm, particularly where the Appellant's parents and siblings all remain in Jalalabad to this day. It is true that very little has ever happened to her. It is not established on the facts that the Appellant felt impelled to stay indoors out of fear of persecution rather than because she was following the societal norms of Afghanistan where many women do not go out unaccompanied. The fact that the male members of her family – her brothers and father – are still working in the bazaar would appear to indicate that there is no risk to them there. There is no risk in Jalalabad. As for Kabul Mr McVeety pointed out that the Appellant would not be returned there alone, since her husband is dependent on her claim. Since they already have a family network in the country who allegedly assisted them in paying for the journey to the UK it is not speculation to find that they would be able to assist them if they were actually in Afghanistan. Mr McVeety agreed that the First-tier Tribunal has not directed itself to any country guidance case, but submitted that in the circumstances that would not be a material error. that is because the decision would have been the same had reference been made to the then extant decision of SL & Others (Afghanistan) CG (Returning Sikhs and Hindus) [2005] UKIAT 00137, even if it is read with the subsequent decision in DSG & Others (Afghan Sikhs: departure from Country Guidance) Afghanistan [2013] UKUT 00148 (IAC).

My Findings

Country Guidance

7. The determination makes no reference at all to the Upper Tribunal's country guidance. This is a striking omission that would in many cases constitute an error of law: see for instance *The Upper Tribunal IAC Presidential Guidance Note No 1* of 2011. I agree with Mr McVeety that the exception to this rule might be where the determination is in fact consistent with the guidance, albeit silent on citation, or where application of the guidance would have otherwise made no difference.

8. In this case the extant country guidance at the date of decision was SL (Returning Sikhs and Hindus) Afghanistan [2005] UKAIT 00137. It is difficult to see how this case would have assisted the Appellant, since its central conclusion was adverse to her claim:

There is no evidence to support the claim that the Afghan Sikh and Hindu minorities in Afghanistan are persecuted or treated in breach of their protected human rights under Article 3 of the European Convention by the State or that the degree of societal discrimination against them is such as to give rise to any such persecution or treatment of them as a class.

9. This is no doubt why the ground of appeal is more nuanced. The complaint is that the First-tier Tribunal fails to recognise that it could have *departed* from this country guidance. Reliance is placed on DSG and Others (Afghan Sikhs: Departure from Country Guidance) Afghanistan [2013] UKUT 00148 (IAC).
10. It might be thought that it would be difficult to conceive of a more pointless challenge. The Judge ignored the country guidance, and now the Appellant complains that he did not ignore it. DSG adds nothing to the Appellant's case. It turned on its facts and is authority for the uncontroversial proposition that judges are entitled depart from country guidance where there is substantial contrary evidence before them. It is not itself a country guidance case and creates no factual precedent. If any party might have cause for complaint about a failure to follow CG it should have been the Respondent, who might justifiably have argued that the failure rendered the credibility findings incomplete and unsafe. This ground does not disclose an error of law.

Persecution

11. The Tribunal has found that the Appellant was "credible throughout". I read this as an acceptance that her historical account is accepted in its entirety. Her evidence, set out in her interview and witness statement was as follows:
- She had lived in a house in the Gurdwara compound for as long as she had lived in Jalalabad, approximately 20 years. There were six or seven houses in the compound
 - She did not go out because if she heard that if she did Muslims "swore at us and beat us up"
 - As an example she said that when her brother went out people called him a "Hindu"
 - She and her mother did not leave the Gurdwara compound because they had heard that "they" take female Sikhs away
 - She would sometimes go out to travel to another Gurdwara
 - She did not personally encounter any problems with 'Talibs'

- About a year before she was interviewed [ie approximately November 2013] a bomb went off outside the house but it was a small one and it so no-one was hurt
12. Ms Patel accepted that the Appellant had not actually been insulted, taunted, beaten or kidnapped herself. She urged me to find that the Appellant had only managed to avoid such treatment by staying indoors. She pointed to the Appellant's evidence that her brothers had experienced harassment whenever they went to work, for instance by having sticks and stones thrown at them. She frequently witnessed bruises on them when they returned to the Gurdwara. Her fear was not subjective; it was based on the objective fact that those members of her family who did venture out were subject to abuse. I am bound to say that I find this latter claim difficult to reconcile with the fact that the entire family have remained in Jalalabad. Why they chose to invest money in sending the Appellant to the UK is difficult to understand if she was the only one who was not actually being harmed on a day to day basis. The evidence would also appear to be inconsistent with the general conclusions in the country guidance (for which see above), recently essentially reaffirmed in TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595 (IAC). Here the Tribunal once again concluded that the regular harassment and discrimination suffered by Afghan Sikhs does not on the whole reach levels of such severity that it can be classed as persecution. That said this was the account that was accepted by the First-tier Tribunal. Those findings have not been challenged by the Respondent and are preserved.
13. I agree with Ms Patel that there appears to be an unsustainable contradiction between the Tribunal's acceptance of those facts, and its finding at 49: "the Appellant's family seems to have managed to conduct their day to day affairs with only occasional harassment". The evidence was that the men in the family were regularly attacked when they ventured out in public. I am satisfied that this would be serious harm, and there there would appear to have been a failure of state protection. This would constitute persecution. It follows that when the Tribunal finds, at 53, that the Appellant has not suffered any more than "minimal harassment" it does so without taking into account that she managed to avoid persecution by staying indoors. I find that the First-tier Tribunal has erred in law by failing to take relevant evidence into account in its assessment of past persecution.
14. I remake the decision on the facts as found by finding that the Appellant's brothers were subject to persecution. She managed to avoid it by remaining in the Gurdwara.
15. Mr McVeety raised an interesting point in that it is the social norm in Afghanistan for women not to go out unaccompanied. This is acknowledged by the Appellant herself who states: "an Afghani woman would never be allowed out on their own" [at §6 of witness statement]. The Appellant has

shown that she managed to avoid persecution by remaining indoors: ordinarily that would engage the principles set out in HJ (Iran) and JT Cameroon v Secretary of State for the Home Department [2010] UKSC 31. She should not be expected to avoid persecution by being 'discreet'. What, however, if she would have remained indoors most of the time even absent such a threat? If in fact the social convention was that the majority of women in the area are keeping *purdah*, and that the Appellant would have obeyed such convention without complaint, it is at least arguable that her HJ claim would be defeated. It might also be argued that such social conventions amount to persecution in themselves³.

16. Unfortunately, those arguments will have to wait for another day. There is no comment at all from the Appellant on what her actions might have been, nor any expert anthropological evidence on the point. And for reasons which I set out below the debate would be moot in this case. I proceed on the basis that the Appellant was at risk of persecution in Jalalabad at the time that she left; in the absence of any durable change in circumstances I take this as an indication that such persecution would be likely to occur in the future.

The Evidence of the Appellant's Husband & Internal Relocation

17. These two grounds are interconnected to the extent that the Appellant cannot succeed unless she makes both grounds out. That is because it was the evidence of her husband that she depended upon to show that Kabul would not be a safe or reasonable place of internal relocation for the family.
18. The gentleman in question, Mr AS, first arrived in the United Kingdom in September 2011 and claimed asylum. The Home Office had rejected his claim as not credible and in a determination promulgated on the 12th January 2012 the First-tier Tribunal (Judge RBL Prior) had agreed. The Tribunal found numerous discrepancies in the evidence. The account was internally and externally inconsistent and AS had further damaged his credibility by claiming to be a minor when he was not. The appeal was dismissed. I am told that he appealed, first to the Upper Tribunal and then to the Court of Appeal. Mr McVeety's record shows that prior to his removal he lodged a challenge by way of judicial review. All of these attempts to overturn the decision of Judge Prior proved futile and he was removed in April of 2012.
19. I am given to understand that AS re-entered the United Kingdom on the 15th August 2014 accompanied by the Appellant. He did not claim asylum in his own right, but rather relied upon the claim made by his wife. Of this history the First-tier Tribunal commented "AS clearly has a preference to live in the United Kingdom". AS gave evidence before the First-tier Tribunal. He relied on his witness statement dated 14th April 2015. He claimed that after he was

³ See the discussion at paragraph 92 of TG and Others

returned to Afghanistan he was detained and ill treated for one week in Kabul. Upon his release he stayed in a Gurdwara in Kabul. He considered the situation there to be worse than that in Jalalabad and so returned there, intending to marry the Appellant.

20. The First-tier Tribunal noted the evidence of AS. At paragraph 52 it makes the following findings:

“He states that when he was returned before, he was imprisoned and suffered degrading treatment but there is not any evidence to support this. He does not indicate any long term consequences or that he required any medical treatment. On release, he does not state that this was subject to any conditions or ongoing restrictions. He was able to travel freely and moved from Kabul to Jalalabad. He does not refer to anything happening to his because he was a Sikh. For example he does not say whether he attempted to find work but was prevented from doing so because of his religion. I do not find him to be a credible witness and there is nothing before me that persuades me, even to the lower standard of proof, that the Appellant could not return to Afghanistan with AS”.

At paragraph 57 it adds:

“I find that his account lacks significant supporting detail and is not credible”

21. Ms Patel submits that these findings were cursory and inadequate. This was a witness who had appeared before the Tribunal and had given evidence and there should have been clear findings about that evidence. There was no reference to the previous determination and as such the determination failed to have regard to the principles set down in Devaseelan v SSHD [2002] UKIAT 702.
22. There is no merit in this ground. The evidence of AS is set out in his witness statement. I find that the Tribunal was perfectly entitled to find it to be lacking in significant detail:

“I was imprisoned in Kabul on return for one week. When I arrived in Afghanistan I was detained in a place but I was transferred to another prison. I do not know the place or the location....during imprisonment I was beaten and ill treated. The authorities removed my clothes in prison. I found this to be extremely humiliating”

The Tribunal was also entitled to conclude that AS had not claimed to have suffered any of this ill treatment because he is Sikh. It is nowhere stated in his witness statement that his claimed detention had anything to do with his faith.

Had this evidence been given orally I would have expected this to have been brought to my attention.

23. The Devaseelan point is again hard to fathom. Had the Tribunal expressly directed itself to the findings of Judge Prior that would have placed AS at an even greater disadvantage, since his credibility as a witness was comprehensively rejected in a determination that was upheld all the way to the Court of Appeal.
24. I am satisfied that in the circumstances the findings are sustainable. The evidence before the Tribunal came from a witness who had already been found not to be credible. In those circumstances it was incumbent upon him to produce evidence capable of justifying departure from the decision of Judge Prior. He chose not to do so. He did not claim asylum in his own right (thus avoiding a rigorous interview) and in giving evidence before the First-tier Tribunal stated his account in the briefest possible terms, giving no detail about the circumstances of his claimed detention and ill treatment. His assessment that “the situation is now worse for Sikhs in Kabul” is un-particularised and makes no reference to any objective, or indeed subjective, evidence that this is the case. There was no error in the manner in which the Tribunal dealt with the evidence of AS.
25. The final ground concerns whether the Appellant could safely navigate her way back from Kabul to Jalalabad. The ground is framed in this way because the Tribunal had not accepted that the Appellant faced persecution in Jalalabad, but before me Ms Patel redrew the ground as submissions on internal flight.
26. The most recent country guidance, TG and Ors, upholds the general conclusions reached in SL:

Members of the Sikh and Hindu communities in Afghanistan do not face a real risk of persecution or ill-treatment such as to entitle them to a grant of international protection on the basis of their ethnic or religious identity, per se. Neither can it be said that the cumulative impact of discrimination suffered by the Sikh and Hindu communities in general reaches the threshold of persecution.

The factors to be taken into account in assessing internal flight are the same as those relevant to consideration of persecution:

A consideration of whether an individual member of the Sikh and Hindu communities is at risk real of persecution upon return to Afghanistan is fact-sensitive. All the relevant circumstances must be considered but careful attention should be paid to the following:

- a. *women are particularly vulnerable in the absence of appropriate protection from a male member of the family;*

- b. likely financial circumstances and ability to access basic accommodation bearing in mind*
 - *Muslims are generally unlikely to employ a member of the Sikh and Hindu communities*
 - *such individuals may face difficulties (including threats, extortion, seizure of land and acts of violence) in retaining property and / or pursuing their remaining traditional pursuit, that of a shopkeeper / trader*
 - *the traditional source of support for such individuals, the Gurdwara is much less able to provide adequate support;*
- c. the level of religious devotion and the practical accessibility to a suitable place of religious worship in light of declining numbers and the evidence that some have been subjected to harm and threats to harm whilst accessing the Gurdwara;*
- d. access to appropriate education for children in light of discrimination against Sikh and Hindu children and the shortage of adequate education facilities for them.*

27. The Tribunal finds that there are functioning schools for Sikh children in Kabul [at 94] and that there is nothing to prevent individuals establishing themselves in business if they have the resources to do so [at 110]. The Appellant will be returned to Kabul with her husband and child. It is her evidence that her family remain in Jalalabad and remain in employment. The community in Jalalabad are said to have contributed to the cost of her flight, and that of her husband, to Europe. I find that it can be properly inferred from this that the community would be willing to assist if necessary should the Appellant and her husband resettle closer to home: see finding at paragraph 57 of the determination.

28. There is no credible evidence that the Appellant or her husband face a risk of persecution in Kabul. The Appellant is not a lone woman. The family will have the benefit of resources donated by family members still in Afghanistan. It is open to them to seek employment, set up their own business or simply to rely on those funds. The Appellant's daughter will be able to attend school in Kabul. She will benefit from proximity to her extended family. On the basis of the evidence before me, it would not be unduly harsh to expect the Appellant to live with her husband in Kabul.

Conclusion

29. The First-tier Tribunal erred in its assessment of what amounted to persecution. The decision is however maintained. That is because the Appellant has not shown that it would be unduly harsh for her to live in Kabul with her husband.

Decisions

30. The determination of the First-tier Tribunal is upheld.
31. Having regard to the fact that this is a protection claim I am prepared to make the following direction for anonymity, pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders.

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

Upper Tribunal Judge Bruce
12th May 2016