



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

Appeal Number: PA/01141/2016

**THE IMMIGRATION ACTS**

**Heard at Liverpool**

**On 19<sup>th</sup> April 2017**

**Decision & Reasons  
Promulgated**

**On 05<sup>th</sup> September 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**SSK  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr. S Chaudhry, Boudie Jackson Canter (Manchester)

For the Respondent: Mr. G Harrison, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Malik promulgated on 23<sup>rd</sup> November 2016. The underlying decision that was the subject of the appeal before the First-tier Tribunal ("FtT") was the

decision of the respondent dated 18<sup>th</sup> January 2016 to refuse the appellant's protection claim.

2. An anonymity order was made by the FtT. As the case involves protection issues, and children, it is appropriate to continue that order, pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269). I also make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.
3. The appellant is an Afghan national. The appellant's claim is based on his fear that if returned to Afghanistan he, his wife and children, would face mistreatment due to their religion. The appellant fears the Taliban. In her decision of 18<sup>th</sup> January 2016, the respondent accepted that the appellant is an Afghan national and of the Sikh faith. The respondent rejected the appellant's account of the disappearance of his brother, and of the attempted kidnap of the appellant by Taliban.
4. At the hearing before the FtT, the appellant gave evidence and he was cross examined. A summary of the appellant's claim is set out at paragraph [8] of the decision of the FtT. At paragraphs [9] to [16] the Judge sets out the appellant's evidence in chief. The evidence that he gave when cross-examined is set out at paragraphs [17] to [21] of the Judge's decision. The Judge notes that the respondent has accepted that the appellant is from Afghanistan and a follower of the Sikh faith, at paragraph [25] of her decision. The Judge's findings are to be found at paragraph 26 of her decision. The Judge found the appellant's account to lack credibility. The Judge rejected the appellant's account of the disappearance of his brother and of the appellant being targeted by the Taliban, both in Kandahar and in Kabul. At paragraph [26(v)], the Judge

found that the appellant's parents have not fled Afghanistan as claimed, but remain there.

5. Notwithstanding the adverse credibility findings, the Judge went on to consider the risk on return by reference to the Country Guidance decision of **TG and Others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595**. The Judge found;

- a. The appellant would have access to the shop, land and house that the family own in Afghanistan. The appellant's parents are still in Afghanistan, and would be able to assist him and his family on return. The assets could be used should the appellant wish to relocate to another part of the country and restart a business, in addition to whatever limited support may be available from the Gudwara; [28]
- b. There is no evidence that the appellant and his family could not worship at the Gudwara in Kabul, where the appellant claims he took sanctuary. There are government sponsored schools for Sikh children in Kabul and Nangarhar where they can get elementary education and there is nothing to suggest the appellant would not be able to secure places for his children on return to Kabul.

6. The Judge concludes at paragraph [30]:

*"In the circumstances of his case, there is no evidence to suggest the appellant, his wife and children have previously encountered persecution or ill-treatment due to their religion, such that the Convention is engaged, other than the claimed events, which for the reasons given above I find not to be credible; nor are they unable to relocate due any medical conditions and having endured the appellant claims an extensive journey to the UK, there are no reasons before me to suggest they could not relocate to Kabul - they having on the appellant's account already done so before coming to the UK - where there is a Sikh community and where they can utilise the resources they have left behind in Afghanistan to re-establish themselves.*

*For these reasons I find it would not be unreasonable nor unduly harsh to expect them to do so.”*

7. The appellant advances two grounds of appeal. First, the Judge failed to have proper regard to the evidence as to the appellant’s parents, and apply the guidance set out in the Country Guidance decision of **TG and Others**. Second, the Judge failed to have regard to the guidance set out in the Country Guidance decision of **TG and Others** when considering whether the appellant’s children would have access to any form of education upon return. The Judge presumes that the children can be admitted to one of two schools in Kabul, without properly considering the discrimination that the appellant’s children would face.
8. Permission to appeal was granted by FtT Judge Shimmin on 19<sup>th</sup> December 2016. In doing so, the Judge noted it is arguable that the Judge erred in law in making adverse credibility findings which do not take full consideration of the background evidence/country guidance for Sikhs in Afghanistan, the Judge has made findings which are not supported by the evidence, and the Judge has erred in failing to make a full assessment in respect of the appellant’s two children and the country information on children, their schooling and armed conflict. The matter comes before me to consider whether the decision of the FtT involved the making of a material error of law, and if so, to remake the decision.
9. In the grounds of appeal the appellant contends that the FtT Judge has presumed that the appellant’s parents are still in Afghanistan and failed to have due regard to appellant’s evidence that he has lost contact with his family. Before me, Mr Chaudhry initially submitted the Judge has given no reasons for her assumption that the appellant’s parents remain in Afghanistan. I referred him to paragraph [26(v)] of the decision in which the Judge sets out her reasons for her finding that the appellant’s parents have not fled Afghanistan as claimed, but remain there. Mr Chaudhry, rightly in my judgment, accepted that the Judge has provided adequate reasons for her finding.

10. However, Mr Chaudhry submits that in reaching her credibility findings, the Judge failed to consider whether the appellant's account is consistent with the objective evidence as to the treatments of Sikhs in Afghanistan and their declining numbers. He submits that these are matters that infect the Judge's credibility findings generally, and her application of the guidance in **TG and Others**. The appellant submits that at paragraph [89] of **TG and Others**, the Upper Tribunal recognised that if a Hindu or Sikh 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, the person may be subjected to further, more serious threats or acts of violence. Although the Tribunal noted that such incidents are rare now, that is because the most valuable properties are seen to have already been taken away from Sikhs.
11. He submits that notwithstanding the adverse credibility findings made, in determining the risk upon return, a fact sensitive assessment is required. He submits that the Judge failed to properly carry out a fact sensitive assessment as to whether it is reasonable to expect the appellant to relocate elsewhere in Afghanistan by reference to the factors identified in **TG and others**.
12. Mr Chaudhry submits the appellant would have no independent income, and has a wife and two children to support, both of whom are at a vulnerable age. He submits that although the Judge notes at paragraph [29] of her decision, the objective evidence that there are very few Sikh or Hindus educated, because bullying is high against Sikh/Hindu children, the Judge simply concludes that there is no evidence to suggest the appellant would not be able to secure places for his children on return to Kabul. He submits that that is to ignore the fact that the appellant is from Kandahar and in order for his children to access education, even if that were possible, would mean that the family would have to internally relocate to Kabul. He submits the Judge failed to consider the likely financial circumstances of the appellant on return, his ability to access

basic accommodation, and whether the appellant will be able to access appropriate education for his children in light of the discrimination faced and shortage of adequate education facilities.

13. The respondent has filed a rule 24 response dated 26<sup>th</sup> January 2017 in which the respondent submitted that the appeal is opposed. Before me, Mr Harrison relied upon the Rule 24 response and submits that the Judge has made explicit findings before addressing the country guidance and applying that guidance to the facts as found by the Judge. He submits that the Judge has provided adequate reasons for the findings made by her, and those findings were open to her on the evidence. He submits that the Judge has set out why she finds the appellants claim to be incredible, and it was open to the Judge to find that the appellant would have assets and property available to him on return to Afghanistan. The appellant has previously been able, on his own account, to access support from a Gudwara in Kabul, and there is no reason to believe that he could not seek short term support from there, in the future.

#### Error of Law

14. The FtT Judge made adverse credibility findings against the appellant. It appears from the decision of the FtT that the appellant's claim was internally consistent. The Judge does not identify internal inconsistencies in the accounts given by the appellant, but rejects the account because she did not consider the account given to be credible, that is, the account is implausible. However, there are various caveats to be considered before a claim is so rejected. It is well established that repressive regimes may act in a way that is unpredictable and so whether an account is implausible can often be assessed by reference to what is available by way of objective evidence and in particular, country guidance decisions.
15. In **TG and others**, the Upper Tribunal noted that some members of the Sikh and Hindu communities in Afghanistan continue to suffer

harassment at the hands of Muslim zealots. At paragraphs [87] to [89], the Upper Tribunal state:

*“87. We accept that some members of the Sikh and Hindu community in Afghanistan may continue to suffer harassment and discrimination at the hand of Muslim zealots. Such acts include name calling, spitting, the throwing of stones and rocks, threats and acts of violence. On occasions in the past, such acts have been far more serious and included abductions for ransom or to forced conversion to Islam, seizure of land properties and killings.*

*88. The frustration felt by members of these religious minority groups, according to the evidence, appears to be based upon a combination of a weariness of discrimination and lack of economic opportunities. Such anxiety was said to be increasing in light of the prospect of the withdrawal of foreign troops from Afghanistan by the end of 2014 [Appendix A. Item 2]. An article written on 15 April 2009, five years ago, records complaints by members of the Sikh community that despite the guarantee for the safeguarding of their religious and social rights in the Afghan constitution and laws the behaviour of their Muslim countrymen is not satisfactory [Appendix A. Item 34]. A named Sikh woman who is also a member of the AIHRC maintains that it is due to these reasons that the migration of Afghan Sikhs and Hindus abroad has not yet stopped. This feeling is reinforced by a recorded comment made by Avtar Singh, stated to be a well-known Sikh figure in Afghanistan and a member of the Afghan Senate (Misharano Jirha) who noted that although in the recent years the social life of Sikhs and Hindus has improved there still remain numerous problems for these religious minorities and that Sikh religious sites which have been destroyed during the civil war had not yet been restored or reconstructed [Appendix A. Item 34].*

*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."*

16. The Upper Tribunal in **TG and others** noted, at [89], that for a Sikh Afghan male that 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. In reaching her credibility findings, and whether the account advanced by the appellant is plausible, the Judge does not appear to have considered whether the background material is capable of lending any support to what appears to have been an internally consistent account. In my judgement, the failure to consider whether the account given by the appellant is plausible by reference to known objective material, discloses an error of law that is material to the outcome of the appeal. It may be that there are internal inconsistencies in the account advanced by the appellant but if that was the basis of the adverse credibility findings, that is not apparent from a careful reading of the decision. I do not know whether reference to the objective material would have made any difference to the credibility findings made by the Judge.
17. In any event, it has been accepted that the appellant is an Afghan Sikh and the question is whether he, his wife and their children would face a real risk of persecution in their home area, and if so whether it would be unduly harsh to expect him and his family to relocate within Afghanistan. Assuming for a moment that the decision of the FtT should be read such that having rejected the appellant's account as being incredible, the FtT Judge found that the appellant and his family could return to Kandahar, at paragraphs [28] to [29] of her decision, the FtT Judge appears to conflate the circumstances as they will be upon return to Kandahar, with



what might be possible if the appellant and his family were to relocate to Kabul.

18. At paragraph [28] of her decision, the Judge appears to proceed upon the basis that the appellant, his wife and their children would not face a real risk of persecution in their home area. That is Kandahar. She reaches that conclusion following the adverse credibility findings that she has made, and on the basis that the shop, house and land that the appellant's father owns, remain in Afghanistan. The Judge concludes that the appellant's parents, who she found are still in Afghanistan would be able to assist the appellant and his family on return. She noted that the assets could be used, should the appellant wish to relocate to another part of the country. Paragraph [29] the Judge's assessment of the appellant's ability to worship at a Gudwara, and the children's access to education is based entirely upon what is available in Kabul, rather than Kandahar. From a careful reading of the Judge's findings and conclusions, in my judgement the Judge did not adequately address the two separate issues. That is, whether the appellant and his family would face a real risk of persecution in their home area, and if so whether it would be unduly harsh to expect him and his family to relocate within Afghanistan. In **TG and others**, the Upper Tribunal confirmed that whether it is reasonable to expect a member of the Sikh or Hindu communities to relocate is a fact sensitive assessment requiring a number of relevant factors to be considered. The Tribunal noted that given their particular circumstances and the declining numbers, the practicability of settling elsewhere for members of the Sikh and Hindu communities must be carefully considered, and that those without access to an independent income are unlikely to be able to reasonably relocate because of depleted support mechanisms. In my judgement, the careful assessment urged, has not been carried out by the FtT.
19. It follows that the decision of the FtT must be set aside. As to the disposal of the appeal, Mr Harrison submits that as the credibility of the

appellant is something that is at the heart of this appeal, the appropriate course is to remit the matter back to the FtT for hearing *de novo*. I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having taken into account paragraph 7.2 of the Senior President's Practice Statement of 25<sup>th</sup> September 2012. In my view, the nature and extent of any judicial fact-finding necessary will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

### **Notice of Decision**

20. The appeal is allowed and the appeal is remitted the FtT for a fresh hearing of the appeal with no findings preserved.
21. I have made an anonymity direction.

Signed

Date

28<sup>th</sup> July 2017

**Deputy Upper Tribunal Judge Mandalia**

### **TO THE RESPONDENT**

#### **FEE AWARD**

There can be no fee award.

Signed

**Deputy Upper Tribunal Judge Mandalia**