



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

Appeal Number: PA/04364/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 26 April 2019**

**Decision & Reasons Promulgated
On 13 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

**M A K C
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss F Shaw of Counsel instructed by Legal Justice Solicitors

For the Respondent: Mrs L Kenny, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against a decision of Judge of the First-tier Tribunal M A Khan who in a decision promulgated on 5 February 2019 dismissed her appeal against a decision of the Secretary of State, to refuse to grant asylum, made on 15 September 2017.
2. The appellant entered Britain on 14 September 2017 and claimed asylum. Her application was refused. Her claim was that she was a Sikh from Afghanistan and that the family had been harassed there and in particular by a Muslim man named BS who had threatened her father and demanded

money from him. They had beaten up the appellant's father and had killed her mother and the local Gurdawara had made arrangements for the appellant, her father and brother to go to India. They had entered India in 2014. While in India the appellant's father had arranged a marriage for her with another Afghani Sikh (SC) who had discretionary leave to remain in Britain.

3. The appellant claimed that she, with the help of an agent, had entered Britain but that her father and her brother had to stay behind on the route when they were separated as the agent could not take them all at the same time. The appellant had travelled with her young daughter who had been born on 29 March 2017 and therefore was under 6 months old when she arrived.
4. The Secretary of State did not accept that the appellant was a Sikh, and furthermore did not accept that the appellant's relationship with her husband was genuine and subsisting, and furthermore concluded that she would not face persecution if returned to Afghanistan as it was pointed out that the threats that had been made had been made to her father and not to her. Indeed, the Secretary of State did not accept that the appellant would be returning to Afghanistan as a lone female with a dependent child as it was not accepted that the appellant's brother and father had fled Afghanistan, nor was it accepted that the appellant's mother had been killed as a result of the threats that she and her family had experienced. It was stated it was considered that she could return to her family in Kabul and that they would be able to provide her with male protection and financial support.
5. Prior to the hearing in the First-tier Tribunal directions were given by Judge Seelhoff to ascertain the status of the appellant's husband. He directed that there be evidence regarding the rationale for the grant of leave to the appellant's husband and an indication of whether it was accepted there were significant obstacles to his integration on return and an indication of whether the appellant's husband and his brother, with whom he had travelled to Britain, were accepted as Sikhs from Afghanistan.
6. The respondent wrote to the Tribunal on 28 December 2018 giving details of the immigration history of HL the brother of the appellant's husband, on whom the appellant's husband was dependent. It was stated that they had both been granted discretionary leave as part of a review completed by the Older Live Cases Unit (OLCU) which was a unit which sought to review cases under exceptional circumstances when an asylum or human rights claim has been refused, appeal rights had been exhausted and no further submission existed. In granting such discretionary leave it was stated that the terms of paragraph 353B had been taken into consideration and therefore the Secretary of State had taken into account the character, conduct and associations, including any criminal records relating to the appellant's husband, and compliance with other grants of leave as well as the length of time in Britain accrued for reasons beyond

the migrant's control after their human rights or asylum claim had been submitted or refused. The letter however did state:-

“It has not at any time been accepted by the SSHD that there are significant obstacles for Mr. HLC or for Mr. SC to return to Afghanistan.

It was accepted that Mr. HLC was an Afghan national and a Sikh”.

The Hearing of the Appeal

7. Judge Khan found that the appellant was a Sikh and by implication that her marriage was genuine and subsisting. He noted the appellant's evidence that her husband had set up a business in Britain and that they did not have any relatives left in Afghanistan, there was no-one there to return to, and moreover that her husband could not set up a business in Afghanistan because they were at risk there because of their religion. She had stated that there was nothing she could do as she had young children and would be a lone woman in Afghanistan (the appellant had a second child born on 2 May 2018 by the date of the hearing). The judge noted that the appellant's husband had been granted discretionary leave in 2015 to 2016 and 2016 to 2017 and that his current leave would expire in November 2019. He noted evidence that they had married in a Gurdawara in India while the appellant's husband had been on a visit there.
8. The judge did not find that the appellant's fears of BS were credible and did not accept that her mother had been killed. He considered that she had made up the evidence regarding the death of her mother, reaching that conclusion having referred to the fact that the appellant had said that she was aged 17 when she had left Afghanistan which would mean that she had left in 2012 but had then stated that they had left Afghanistan in 2014. The judge stated that had her mother been killed the appellant would have been aware of her age when that had happened. Moreover, the judge did not accept the appellant's claim that the Indian authorities had told her, her father and her brother that they would have to leave India. He did not accept the appellant's evidence that her husband had gone to India and had met her by chance and that it was not until after he had returned to Britain that the family had been told to go back to Afghanistan by the Indian authorities and her father had arranged for them to travel 6,000 miles to Britain without her husband knowing about her travels. He stated that he found the appellant's story utterly incredible. He stated he did not believe anything the appellant had to say about a threat to her life in Afghanistan or that she was told to return to Afghanistan by the Indian authorities. He placed weight on Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. He placed weight on the fact that the appellant had not provided evidence to show what her husband's immigration status was.
9. In paragraph 53 the judge briefly mentioned two expert reports by Professor Magnus Marsden and Dr Jasit Singh which he stated were a

general nature of the situation in Afghanistan not specifically related to the appellant's claim. Professor Marsden had stated that there are about 150 Hindu and Sikh families in Kabul. He stated that she had failed to establish she would be persecuted in Afghanistan or that there was a real risk of persecution on return to the country of origin and therefore the Secretary of State would not be in breach of the Refugee Convention if the appellant were returned to Afghanistan. He found, in effect, that she was of no interest to anyone there.

10. In considering the issue of the appellant's rights under the ECHR the judge referred to Section 117B and appeared to dismiss her application merely by considering the factors set out therein.
11. The grounds of appeal on which Miss Shaw relied argued that the judge had made various errors of fact which included the assertion that the appellant's husband had been aware that she would come to Britain, but more importantly, that the judge had not applied the country guidance case of **TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595 (IAC)** and had failed to take into account the material evidence and to properly consider "the issue of the appellant's wife's ability to practise her religion freely in Afghanistan" (sic). Moreover, it was argued that he had failed to properly consider the background material before him.
12. Having referred to the findings in relation to Sikh women in Afghanistan the grounds went on to refer to considerable evidence from UNHCR regarding to the circumstances in Kabul for civilians and the UNHCR guidelines for assessing the international protection needs of asylum seekers from Afghanistan. It was also asserted that the judge could, in any event, depart from existing country guidance if there was credible fresh evidence, and in that regard referred to the evidence from UNHCR in the bundle. The grounds also refer to the deprivation of education or employment and say that the judge should not properly consider the issues of Article 8 of the ECHR.
13. At the hearing of the appeal before me Miss Shaw referred to the grounds of appeal stating that the judge had based his conclusions on the assumption that the appellant's husband would return to Kabul when in fact it was unlikely that he would leave as he was on a route to settlement. That, she stated, had not been considered by the judge in the First-tier. Moreover, she argued that the judge had been wrong to find that the appellant would be of no interest to anyone in Afghanistan, pointing out that she would be a lone woman travelling with two very young children aged 2 and just under 1 year and that this was something which would mean that it would be difficult for her to reintegrate into Afghanistan. He had erred, moreover, by not considering the background evidence.
14. In reply, Miss Kenny stated that the judge's findings were sufficiently reasoned. With regard to the fact that he had not considered the terms of

the judgment in **TG**, that was not material. **TG** had emphasised that each case was fact-sensitive and the judge had properly considered that the appellant would not be at risk on return. In any event, she stated that the appellant and her husband could return to Afghanistan as a family unit, obtain accommodation, and indeed the appellant's brother-in-law had had a business there and her husband would be able to access employment. She accepted there were no specific findings regarding the appellant's father but stated that it was clear that the appellant could not meet the threshold for showing that she would face persecution on return. The children were young and therefore no Section 55 issues would arise. It was likely, she argued, that the family had had a business in Afghanistan previously.

15. She pointed to the fact that that letter of refusal had not accepted that the appellant's father had left Afghanistan.

Discussion

16. I consider there were material errors of law in the decision of the Judge. I note that he made no clear finding regarding the appellant's father, but the Secretary of State appeared to consider that the appellant's father would be in Afghanistan. That, however, does not sit easily with the belief that the appellant's marriage had been arranged by her father and her uncle in India which would imply that her father was in India then. Moreover, I consider it an error of law for the judge not to have engaged with, or appeared to apply the provisions of the relevant country guidance case to this appellant's circumstances. As Miss Kenny argued, every case is case sensitive and I consider that clear and reasoned findings as to what the appellant would return to in Afghanistan are required, and indeed for that it was necessary for the judge to have engaged with the very considerable background evidence before him, and indeed the expert reports to which he makes too brief reference. I further consider that the judge erred in making the bold assertion that the appellant would be returning to Afghanistan with her husband and children. The reality is that her husband does have leave to remain and may well be on a route to indefinite leave. If that is the case the judge is in error to consider that the appellant would be returning to Afghanistan with her husband. There appears to be nothing before him to indicate that, and indeed the appellant's husband was not asked why he could not return to Afghanistan, but in any event, findings need to be made as to whether or not the appellant's husband could return to Afghanistan with her and what would be available for the family there.
17. I consider that these are material errors of law in the decision of the Immigration Judge and in these circumstances I set aside his decision and direct that the appeal proceed to a further hearing on all issues. I would emphasise that in particular there needs to be a detailed assessment of the appellant's rights under Article 8 of the ECHR given that she has two young children. I do not consider that the judge was correct merely to

confine his consideration of the appellant's rights under Article 8 to an application for various factors set out in Section 117B.

Notice of Decision

The decision of the First-tier Judge is set aside.

Directions.

1. This appeal will proceed to a hearing afresh at Hatton Cross.
2. A Pushtu interpreter is required.
3. Time estimate - three hours.

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

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.

Signed: 

Date: 5 May 2019

Deputy Upper Tribunal Judge McGeachy