



Upper Tribunal

(Immigration and Asylum Chamber) Appeal number: PA/12083/2019 (P)

THE IMMIGRATION ACTS

**Heard Remotely at Manchester Decision & Reasons Promulgated
CJC**

On 7 September 2020

On 2 September 2020

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AS

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the appellant: Mr C Howells, Senior Presenting Officer

For the Respondent: Ms S Khan of counsel, instructed by Legal Justice Solicitors

DECISION AND REASONS (P)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was

not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. Whilst this appeal has been brought by the Secretary of State, to avoid confusion I have referred below to the parties as they were before the First-tier Tribunal.
2. The Secretary of State has appealed with permission against the decision of the First-tier Tribunal promulgated 20.4.20, allowing on both asylum and human rights grounds the appellant's appeal against the respondent's decision of 21.11.19 to refuse his further submissions made on 3.9.19.
3. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions made to me and the grounds of application for permission to appeal to the Upper Tribunal.
4. The appellant is a Afghan national of Sikh faith and ethnic background, with date of birth given as 20.1.92, who first arrived in the UK in 2011 before returning to Afghanistan after his asylum appeal was dismissed and he became appeal rights exhausted (ARE) on 11.9.12. It is not clear when he returned but he made a claim in 2014 as a dependent on his wife's asylum claim, rejected in 2015. It is relevant that there were previous adverse credibility findings made against the appellant. Further submissions were made in 2018, also rejected. The current appeal arises out of the yet further submissions made on 3.9.19.
5. In brief findings, the First-tier Tribunal Judge concluded at [29] of the decision that it was reasonably likely that the appellant and his wife and their children would suffer such a severe level of discrimination that would amount to persecution. At [30] of the decision the judge accepted the evidence that the appellant and his family are in poor financial circumstances and would not have the ability to access basic accommodation on return and would not be able to obtain employment. At [31] the judge was satisfied that the appellant had no close family members in Afghanistan and, therefore, could not access family support. At [32] the judge found that whilst the Gurdwara had previously offered the appellant protection, that support was not now available. At [33] the judge found it reasonably likely that on return the appellant would be subjected to harm and threats whilst accessing a Gurdwara. At [34] the judge found that the appellant's children would be unlikely to be able to access educational facilities in Afghanistan. At [35] the judge found that the Afghan government is increasingly less able to provide protection to its citizens and in particular there was little will at local level to protect members of the Sikh and Hindu communities, "and therefore the Appellant and his family are to the lower standard at risk of persecution on the basis of their religion and ethnicity."

6. No reasoning was provided for also allowing the appeal on human rights grounds.
7. In summary, the grounds assert that (1) the judge erred in giving insufficient reasons on what elements of the appellant's case amounted to a real risk of persecution. The Country Guidance cases of TG and others (Afghan Sikhs persecuted) CG [2015] UKUT 595 (IAC) and ASN and others v The Netherlands 68377/17 (Judgement: Prohibition of torture: Fourth Section) [2020] ECHR 177 are relied on by the respondent, on the basis that they establish that Sikhs in Afghanistan are not persecuted per se. It is argued (2) that the judge both failed to take account of this case law and objective evidence, and failed to give sufficient reasons why, in the appellant's particular case, his treatment amounted to persecution. It is further argued (3) that there was a procedural irregularity in that the judge had made up his mind about the case in advance of the evidence and submissions by indicating his 'preliminary view.' It is also argued (4) that the judge failed to explain why he departed from the findings of the previous appeal tribunal decision and failed to apply Devaseelan (Second Appeals - ECHR - Extra-territorial Effect) Sri Lanka [2002] UKAIT 00702.
8. Permission to appeal was granted by the First-tier Tribunal on 21.5.20, on the basis that it was arguable that the judge *"failed to make adequate findings of fact in the light of (ASN) and failed to give adequate reasons as to why the appellant was at risk of persecution. It is also arguable that the Judge failed to address the previous decisions of the Tribunal. Whilst ground 3 is less arguable I do not refuse permission."*
9. The findings and conclusions were certainly brief, comprising just 7 short paragraphs taking up less than a page, but that fact alone does not demonstrate any error of law. However, it must be clear from the decision what the judge has found and why. In other words, the findings must be supported by cogent reasoning, no matter how brief, and open to the judge on the evidence. Put another way, the losing party must be able to clearly discern from the written decision why he has lost.
10. For the reasons set out below, I find such error of law in the making of the decision of the First-tier Tribunal as to require the decision to be set aside and remade.
11. In his submissions, Mr Howells addressed grounds 4, 1 and 2, the last two of which overlap. He accepted that ground 3 was weak and did not pursue it. Ms Khan submitted that although brief the decision was sustainable and disclosed no error of law.
12. Whilst I accept Ms Khan's submission that the decision discloses that the judge was aware of the previous decisions, I can find no reasoning justifying not taking the adverse credibility findings as a starting point. I take into account Ms Khan's submission that TG post-dated the earlier Tribunal decisions, so that different criteria may apply. However, there were significant adverse credibility findings such that it was not accepted

that the appellant had no friends or family in Afghanistan and the claimed incident of 2007 was rejected. There is no evidence that the judge has applied the Devaseelan (Second Appeals - ECHR - Extra-territorial Effect) Sri Lanka [2002] UKAIT 00702 principle or explained why he departed from those findings as a starting point. I am satisfied that this amounts to an error of law.

13. Whilst the judge accepted the evidence of the appellant and his wife that they had suffered harassment in Afghanistan and account was said to have been taken of the current situation and the dwindling number of Sikhs, the finding that it was reasonably likely that on return they would suffer such a severe level of discrimination so as to amount to persecution appears entirely unreasoned. Given that the Country Guidance and country background evidence was to the effect that there is no widespread persecution of Sikhs per se in Afghanistan, it was all the more incumbent on the judge to explain why with reference to the particular facts of the appellant's case his treatment on return would reasonably likely amount to persecution.
14. The Country Guidance held that Sikhs 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 Upper Tribunal held that a consideration of whether an individual member of the Sikh or Hindu communities is at real risk of persecution on return is fact-sensitive, requiring consideration of all the relevant circumstances with "careful attention" paid to the four considerations set out in the headnote.
15. Ms Khan argued that the judge had taken account of TG, referenced throughout the findings, and had applied the considerations from the headnote of that case to the appellant's circumstances as given in evidence and accepted by the judge. Whilst the judge has briefly referenced employment, language, family members, and education, I cannot discern from the decision adequate reasoning justifying a finding of risk on return for this appellant. The judge has implicitly referenced the appellant's evidence but it is not clear what was found. Merely stating that the appellant's evidence was credible and consistent with TG's guidance is insufficient.
16. The grounds and grant of permission also referred to ASN, where the European court has recently held that in general Afghan Sikhs are not at risk on return and that the general security situation, at least in Kabul, did not establish a risk of ill-treatment arising from mere presence. The ECHR found that there would need to be special distinguishing features in order to establish risk on return, which should be subjected to a detailed credibility assessment. Whilst, as Ms Khan pointed out, this decision was only promulgated on 25.2.20, after the appeal hearing, it was before the decision of the First-tier Tribunal was promulgated. However, I accept Ms

Khan's submission that it was not binding on the Tribunal and no error can arise in not referring to it.

17. However the CPIN of May 2019, which was put before the Tribunal, made the same points as taken in ASN and should have been addressed by the judge. The CPIN provided information that the Afghan authorities provide Sikhs with police protection during funeral services; that they are free to build places of worship; and that the Afghan Ministry of Hajj and Religious Affairs is making efforts to provide free water, electricity, and repair services for some Sikh temples. There is also at least one school for Sikh children open in Kabul. Further, according to the Sikh member of the lower house of the Afghan Assembly, the majority of the Muslim population is very supportive of the Sikh community, they have a positive relationship, and Sikhs are able to practice their religion publicly. This CPIN was quoted and relied on in the ECHR decision referred to above, leading the European Court to conclude that it was not persuaded that the situation of Sikhs in Afghanistan is such that they can be said to be members of a group that is systematically exposed to a practice of ill-treatment.
18. In summary, the judge should have provided adequate reasoning for finding risk on application of the Country Guidance of TG, indicating the particular features of the appellant and his family in a fact-sensitive assessment. Even if this could be said to have been covered by the brief findings, I am satisfied that the judge should have provided reasoning to distinguish or depart from the more recent country background information.
19. In the circumstances and for the reasons set out above, I find such material error of law in the decision of the First-tier Tribunal that it must be set aside.
20. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal. As Mr Howells pointed out, a rehearing of the appeal will require considerable oral evidence as the factual findings will need to be remade.
21. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2.

Decision

The appeal of the Secretary of State is allowed.

The decision of the First-tier Tribunal is set aside in its entirety with no findings preserved.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal to be made de novo.

I make no order for costs.

Signed: DMW Pickup

Upper Tribunal Judge Pickup

Date: 2 September 2020

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

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

Signed: DMW Pickup

Upper Tribunal Judge Pickup

Date: 2 September 2020