Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03811/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
on 1 December 2015	**on 16 December 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

BL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T D Ruddy, of Jain Neil & Ruddy, Solicitors
For the Respondent: Mrs S Saddiq, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals against a determination by First-tier Tribunal Judge Kempton, promulgated on 14 May 2015, dismissing his appeal against refusal of recognition as a refugee from Afghanistan. The judge accepted that the appellant and his wife are Sikhs from Afghanistan, and that he and his family suffered persecution there, but found that the appeal failed because of the option of relocation to Kabul.

2. Mr Ruddy referred to paragraph 37 of the determination, where the judge found that internal flight the appellant exercised previously *"was to a*

cellar where he did not see the light of day. There is nothing to suggest that he could do anything different if he went to Kabul. If that is the best he could expect to do to save himself, it is not a way to live in the long term"; to paragraph 38, where she found that there was *"really no genuine prospect of protection within the community"* in Kabul; and to paragraph 40, where she found that Sikhs did not feel safe in Kabul and would feel even less secure if they had to move to a new settlement out of the city. Mr Ruddy said that these findings appeared to foreshadow that the appeal would be allowed. However, at paragraph 42 the judge found that an expert report by Dr Ballard was *"not sufficiently robust"* on internal relocation and that it was *"not totally impossible to live in Kabul as a Sikh, difficult may be and sometimes with discrimination"*. At paragraph 44 she said that the *"background evidence, taken as a whole, does not justify a finding that internal flight to Kabul is impossible."*

3. Mr Ruddy submitted that the judge applied the wrong test for internal relocation, and that the determination should be set aside and the decision remade, applying *TG and Others* (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595.

4. That case is headnoted as follows:

Risk to followers of the Sikh and Hindu faiths in Afghanistan:

(i) Some members of the Sikh and Hindu communities in Afghanistan continue to suffer harassment at the hands of Muslim zealots.

(ii) 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.

(iii) 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.

(iv) Although it appears there is a willingness at governmental level to provide protection, it is not established on the evidence that at a local level the police are willing, even if able, to provide the necessary level of protection required in Refugee Convention/Qualification Directive terms, to those members of the Sikh and Hindu communities who experience serious harm or harassment amounting to persecution.

(v) Whether it is reasonable to expect a member of the Sikh or Hindu communities to relocate is a fact sensitive assessment. The relevant factors to be considered include those set out at (iii) above. Given their particular circumstances and declining number, the practicability of settling elsewhere for members of the Sikh and Hindu communities must be carefully considered. Those without access to an independent income are unlikely to be able to reasonably relocate because of depleted support mechanisms.

(vi) This replaces the county guidance provided in the cases of K (Risk – Sikh - Women) Afghanistan CG [2003] UKIAT 00057 and SL and Others (Returning Sikhs and Hindus) Afghanistan CG [2005] UKAIT 00137.

5. The argument was that that the appellant falls within the last sentence of headnote (v).

6. In a Rule 24 response dated 23 June 2015 the respondent accepts the judge used too stringent a test at paragraph 42 and fell into error of law. However, the response argues that the determination might stand given the indications in the determination of "the facilities and assistance given to Sikhs in Kabul". Mrs Saddiq (correctly, in my view) accepted that the decision had to be remade. She maintained that there were inadequate findings on the financial aspect of the case to enable the appellant to succeed without a further hearing. She pointed out that it was plain that he came from a relatively wealthy family. His account was of part of an interest in the family business being realised to pay his ransom, and of difficulties in resisting further demands. He also spoke of having to realise remaining family assets in order to flee the country. However, it had not been fully explored whether there remain assets in Afghanistan which might amount to a sufficient support mechanism and access to an independent income.

7. I observed that the appellant and his wife are dependent on NASS in the UK. That involves a declaration that they are destitute. Mrs Saddiq

submitted (also correctly, in my view) that receipt of NASS was not conclusive. She said that the appeal should be remitted to the First-tier Tribunal for further decision by another judge.

8. Mr Ruddy in reply said that the evidence and findings in the First-tier Tribunal were sufficient for a decision to be substituted in favour of the appellant. Alternatively, the matter could be resolved by further evidence being taken in the Upper Tribunal, or by remit to the First-tier Tribunal. If that latter course were to be adopted, he had no difficulty with the case being remitted to the same judge for a further decision based on the correct criteria for internal relocation and on applying *TG and Others*. He accepted that financial matters had not been explored at the hearing in the First-tier Tribunal in such full detail as they might have been in light of the issues as now identified.

9. I reserved my determination.

10. There was a basis for Mrs Saddiq's final argument about the remaking of the decision. The appellant's family had a Muslim partner in their business. It was not examined how any remaining family interest in the property and business may stand. However, the gist of the evidence from the appellant and his wife was clear. The family was squeezed for everything it had, firstly to pay off the Taliban and secondly to pay for their flight from Afghanistan. If there remain realisable or income-producing assets in Afghanistan, then of course the appellant and his wife should not have accessed support in the UK on the basis of destitution; but it appears to me exceedingly unlikely that any further exploration of the evidence might flush out a finding that there are such assets in Afghanistan to provide a support mechanism or an independent income. There is no point in extending procedure further when the outcome is inevitable.

11. The test for internal relocation is not whether it is *"impossible"* (paragraph 44) or *"totally impossible"* (paragraph 42) to live elsewhere. It is whether it is unreasonable or unduly harsh to expect the appellant to relocate, comparing the home area not with the country of asylum but with the proposed place of relocation. The criteria are so well known in this jurisdiction that it should not readily be found that a very experienced judge has gone wrong on such a point. The determination does use other expressions, "*difficult may be and sometimes with discrimination",* which are more suggestive of the correct test, but that is not enough to remove the difficulty. As pointed out by Mr Ruddy the earlier findings (paragraph 37 in particular) suggest that the case would not be defeated by internal relocation. That implies that in the end the judge has gone wrong by applying the wrong standard. The decision must be **set aside** and remade. For the reasons given above, I do not think that requires any further procedure. The evidence does not disclose that the internal relocation option is excluded on the basis of support mechanisms and independent income available to the appellant if he were to relocate to Kabul. Applying country guidance, he is entitled to protection. The

following decision is substituted: the appeal, as originally brought to the First-tier Tribunal, is **allowed on Refugee Convention grounds**.

12. No anonymity order has been requested or made.

Upper Tribunal Judge Macleman

3 December 2015