IAC-AH-DP-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: AA/06765/2014

**THE IMMIGRATION ACTS**

| **Heard at Manchester** | **Decision & Reasons Promulgated** |
|---|---|
| **On 9th September 2015** | **On 18th September 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE M A HALL**

**Between**

**M S A**
**(ANONYMITY ORDER MADE)**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Mr M Saleem of Malik & Malik Solicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a male Afghan citizen born 10th August 1988 who appeals against the decision of Judge of the First-tier Tribunal Hands promulgated on 5th November 2014.

2. The Appellant claimed asylum on 21st January 2014, following his arrest by the police, having been in the United Kingdom since 2006. His claim was based on the fact that he is a Sikh.

3. The Respondent refused the application on 1st September 2014 not accepting that the Appellant had given a credible account.

4. The appeal was heard by Judge Hands (the judge) on 13th October 2014 and dismissed on all grounds, the judge concluding at paragraph 24 of her decision;

> "24. Based on the facts as I have found them at paragraphs 19 to 22 above, the inconsistencies in the Appellant's recollection of events and the illogicality of his entire claim leads me to find that he is not a credible witness and that his account of events cannot be relied upon. I find that he has fabricated the story in order to substantiate his erroneous claim for asylum and that he has in fact travelled to the United Kingdom for economic reasons. He was successful in remaining here undetected for eight years before coming to the attention of the police and it was only at this stage he claimed asylum. The Appellant has indicated throughout his evidence that he constantly took the advice of friends and I find that his claim has been concocted by him, and possibly his friends and the witness he called to give evidence before me in order to create an asylum claim where none exists."

5. The Appellant applied for permission to appeal to the Upper Tribunal. In summary it was contended that the judge had erred by failing to consider DSG and Others (Afghan Sikhs: departure from CG) Afghanistan [2013] UKUT 00148 (IAC). This decision specifically considered the appropriateness of departing from the country guidance in SL and Others (returning Sikhs and Hindus) Afghanistan CG [2005] UKIAT 00137. It was submitted that the Upper Tribunal in DSG upheld the conclusions of the First-tier Tribunal, which were that Sikhs are generally at risk in Afghanistan.

6. Permission to appeal was granted by Designated Judge of the First-tier Tribunal Macdonald in the following terms;

> "The judge found that the Appellant was not a credible witness for clear reasons given and referred to country guidance in paragraph 26. It is not clear if the judge was referred to the reported case of DSG and if not, she could not be expected to rehearse its terms.
>
> Nevertheless given the well-known position of Sikhs in Afghanistan it is arguable that the judge should have referred to the country guideline case in some depth and that not to do so and address the present background material in more detail was an arguable error in law. On this basis permission to appeal is granted."

7. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 contending in summary that the judge had directed herself appropriately, and provided sound reasons for concluding that the Appellant had not given a credible account.

8. The Tribunal issued directions that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

## Submissions

9. Mr Saleem relied upon the grounds contained within the application for permission to appeal, pointing out that the judge had not considered either SL or DSG and that new country guidance in relation to Sikhs in Afghanistan was awaited from the Upper Tribunal, following a hearing that had taken place in March 2014. Mr Saleem submitted that the judge had failed to consider the Appellant's account in the light of the objective evidence, and specifically in light of the evidence referred to in DSG.

10. Mr McVeety relied upon the rule 24 response, though he accepted that the judge had not referred to DSG, and there was no consideration of the objective evidence that had been discussed in DSG.

11. At the conclusion of oral submissions I reserved my decision.

## My Conclusions and Reasons

12. The judge did summarise some of the background material that was before her in paragraph 12, but did not make any reference to DSG, which is not a country guidance decision.

13. However reliance was placed upon DSG by the Appellant, and there was extensive reference to that case in the skeleton argument produced on behalf of the Appellant. The skeleton argument at paragraph 7 reproduces paragraphs 9-13 and 24-26 of DSG.

14. Reliance was placed upon this case because the Upper Tribunal found in DSG that the First-tier Tribunal had not erred in law in departing from the country guidance that had been given in SL. The guidance in SL was summarised stating that there was no evidence to support the claim that Afghan Sikh and Hindu minorities in Afghanistan are persecuted or treated in breach of Article 3, but following UNHCR Guidance their status as Afghan Sikhs and Hindus is a factor to be taken into account in assessing individual claims on a case-by-case basis.

15. The Upper Tribunal in DSG recorded the submissions made on behalf of the Afghan Sikhs in paragraph 18 which is set out below;

> "18. As to whether all Afghan Sikhs were at risk it had to be accepted that potentially there might be rare exceptions to the general position on risk, but it could properly be said that the generality of Afghan Sikhs and Hindus were at risk on return."

16. The Upper Tribunal found no error of law in the First-tier Tribunal decision and found that departure from the existing country guidance in SL was justified and stated, *inter alia*, in paragraph 25;

> "25. In the circumstances it seems to us entirely clear that the judge was entitled to depart from the country guidance in this case. Inevitably the remaining numbers of Sikhs and Hindus in Afghanistan must be to some extent a matter of speculation, but it is clear if one looks at the

evidence as a whole in such documents as Dr Ballard's report, Dr Giustozzi's report, the earlier UNHCR report and a more recent UNHCR report of July 2012 handed up by Mr Bazini that the remaining numbers are in the region of a thousand or two. Indeed the Respondent's Operational Guidance Note on Afghanistan of April 2012 states at paragraph 3.9.2 that there are an estimated 2,200 Sikhs and Hindus remaining in Afghanistan. This, together with the evidence set out in Dr Giustozzi's and Dr Ballard's reports, clearly justified the judge in departing from the existing country guidance.

26. This has clear implications for other cases involving claimed risk on return to Afghanistan for Hindus or Sikhs, in the period between now and such time as further country guidance on the subject can be issued."

17. No further country guidance has been issued since DSG was published.

18. Because extensive reliance was placed upon DSG by the Appellant, and the judge failed to make any reference to it, I find that this amounts to a material error of law. The judge should have considered the conclusions reached by the Upper Tribunal in DSG, and made findings as to whether those conclusions were relevant in this appeal. Failure to make those findings is a failure to take into account a material issue and means that the decision of the First-tier Tribunal must be set aside.

19. I have decided that the failure to consider DSG means that the findings of fact and credibility findings made by the judge are unsafe and therefore no findings are preserved.

20. Both representatives agreed that if an error of law was found and no findings preserved, it would be appropriate for the appeal to be remitted back to the First-tier Tribunal.

21. Paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012 states;

'7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make a decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that;

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact-finding which is necessary in order for the decision and the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.'

22. In my view the requirements of paragraph 7.2(b) are met, in that this appeal requires extensive judicial fact-finding.

23. The appeal is remitted to the First-tier Tribunal to be determined afresh with no findings of fact preserved.

24. The parties will be advised of the date of hearing in due course and the appeal is to be heard by a First-tier Tribunal Judge other than Judge Hands.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the First-tier Tribunal.

**Anonymity**

The First-tier Tribunal made an anonymity direction. I continue that direction pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date: 15th September 2015

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT**
**FEE AWARD**

The Upper Tribunal makes no fee award. This must be decided by the First-tier Tribunal.

Signed Date: 15th September 2015

Deputy Upper Tribunal Judge M A Hall