Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08791/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 January 2019	**On 7 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

P P S W
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms N Quadi of Counsel, instructed by Legal Justice solicitors
For the Respondent: Ms L Kenny, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Afghanistan born on 20 May 1977. He is of Sikh religion and wears a turban. He arrived in the UK unlawfully on 16 August 2014 and claimed asylum three days later.

2. The basis of his claim is that he had had a shop in Afghanistan which sold cosmetics and underwear. Acid was thrown at him in 2010 and his foot was burnt. He believes this was carried out by Muslims. He had lived in Afghanistan all his life and there

was a further attack in 2013 which was an alleged kidnapping. He feared persecution if returned for himself and his family. It was also his case that he suffered polio as a child which had left him with one leg shorter than the other and pain in his back and legs which required treatment.

3. The Secretary of State refused his asylum application in a decision dated 2 July 2018 albeit it was accepted that he is an Afghan Sikh as claimed. The Appellant appealed against this decision and his appeal came before First-tier Tribunal Judge Andonian for hearing on 10 August 2018. In a decision and reasons promulgated on 29 August 2018 the judge dismissed the appeal.

4. Permission to appeal to the Upper Tribunal was sought, in time, on the basis of five grounds. Firstly, that the judge erroneously failed to take account of relevant evidence in light of the fact-sensitive approach required in TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595 (IAC). In particular, the judge failed to consider the vulnerabilities faced by the Appellant's wife and whether the Appellant's medical health conditions meant that he could be considered an adequate protector in respect of his wife. Those vulnerabilities were identified as the fact that the Appellant's wife had experienced threats and harassment whilst at home and in public even with the accompaniment of the Appellant and the increased risks she felt being at home on her own since the death of her father-in-law and the fact she was unable to leave the home on her own for safety and security reasons. It was asserted that the judge's findings in respect of the Appellant's wife as a Sikh woman in Afghanistan are unclear and there was a failure to provide any or adequate reasons as to why he dismissed the appeal in this respect.

5. It was asserted further that the judge had failed to consider whether the requirement on the Appellant's wife to wear a burka was contrary to the judgment of the Supreme Court in HJ Iran and Lord Justice Beatson in MSM Somalia [2016] EWCA Civ 715 at 37. Reference was made to the appeal currently before the Supreme Court in FA Pakistan and whether refusal of asylum on the expectation an individual will supress the expression of their religious faith where the state criminalises the reasonable expression of that identity is consistent with the fundamental right to live openly and freely as themselves, see HJ Iran and HT Cameroon [2010] UKSC 31 or with the understanding of religious belief as "so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution": see RT Zimbabwe [2012] UKSC 38.

6. Ground 2 asserted that the judge failed to address the issues of sufficiency of protection and internal relocation which was important given that the home area is Kabul and this requires a fact-sensitive approach, see: AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC).

7. The third ground of appeal asserted that, in finding that the Appellant's son would be able to access education in Afghanistan based on his findings at [37] to [41] and [76] that he is doing so well he must have attended school in Afghanistan contrary to the evidence before him. It was submitted that this finding was entirely speculative and thus it was unlawful as lacking any evidential basis. The judge also stated at [38]:

> "*The Appellant's son is not handicapped educationally. I would have expected a letter from his school in the UK to set out the problems that he has if he was handicapped and if he had ever been to school before he arrived in the UK. Quite the contrary the reports on him are glowing reports*".

8. It was asserted to suggest that a child could only be doing well if he had previously attended school is beyond the remit of the Tribunal's expertise and goes beyond the factual findings and secondly the language used was wholly inappropriate.

9. Fourthly, it was submitted that the judge adopted a flawed approach to the best interests of the Appellant's children, a second child having been born who is a female child currently aged 18 months. It was asserted that the judge purported to deal with the best interests of the children at [70] to [72] but this is untenable

   (a) firstly, due to a lack of rigour in conducting that assessment;

   (b) secondly, in failing to have regard to or apply material aspects of TG CG, particularly given the younger child is a girl and at [94] in TG the Upper Tribunal found that Sikh children especially girls are not sent to school "*as a result of the fear of harassment and ill-treatment*"; and

   (c) thirdly, that the judge failed to provide any reasons for his conclusions in respect of the best interests of the children and failed to consider the enhanced risks the Appellant's daughter would face.

10. Fifthly, it was submitted that the judge had failed to give the appeal anxious scrutiny, given that the decision and reasons contain numerous spelling errors and was incoherent in structure and layout. It was further asserted that the decision lacked clear reasons as to why the Appellant's appeal had been dismissed, *cf.* Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC).

11. Permission to appeal was granted by First-tier Tribunal Judge Povey in the following terms

> "*It was arguable that the judge failed to adequately explain a number of findings material to his conclusions. The determination as a whole contained excessive spelling and grammatical errors which undermined its cogency and made aspects of it difficult to understand. It was also arguable that the best interests assessment was inadequately reasoned at 70 and the judge failed to consider properly or at all whether the family may face risks on return to Kabul, per AS Safety in Kabul Afghanistan CG [2018] UKUT 18. If those risks were considered the conclusions reached were not apparent … all grounds may be argued*".

12. A Rule 24 response was lodged by the Respondent on 12 November 2018, in which the Respondent stated that he opposed the Appellant's appeal and would submit that the Judge of the First-tier Tribunal directed himself appropriately, that the grounds of appeal were simply a disagreement and the judge gave full reasons for rejecting the evidence of the Appellant's wife that she was afraid to leave the family home. It was asserted that the judge properly applied all relevant case law to his findings of fact and he was clear to say that some Afghan Sikhs would face persecution on return but not this Appellant or his family.

Hearing

13. At the hearing before the Upper Tribunal, Ms Quadi sought to rely on the grounds of appeal and made further submissions in that respect. I indicated to both Ms Quadi and Ms Kenny for the Secretary of State that I considered the judge had erred in respect of his focus on the issue of the Appellant's son's education, given that he was only 6 at the time he left Afghanistan and if he had indeed gone to school at all it would, therefore, have been for a very short time. Thus I did not need to hear from either of them in that respect.

14. Ms Quadi submitted in summary that there was an absence of anxious scrutiny and adequate reasoning. There were no clear findings of fact or material issues, particularly as relates to the Appellant's wife and this led to the submission and conclusion that the decision could not be accepted as fair. Much of the evidence had not been considered properly or findings made and the judge had failed to consider whether the cumulative impact of the discrimination and likely circumstances the family would encounter would meet the threshold for persecution *cf.* Article 9 of the QD.

15. In her submissions, Ms Kenny stated that the starting point in light of the country guidance decision in TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595 (IAC) is that Afghan Sikhs can face discrimination amounting to persecution but this is fact specific. She submitted the judge had considered all the relevant factors; had considered the Appellant's past history at [48] and was entitled to find that there were only two instances where he personally had problems with Muslims.

16. At [52] the judge found the Appellant and his family had always lived in Afghanistan and the Appellant's wife's situation was no different from anyone else in Afghanistan in respect of being obliged to wear the burka. She submitted that the Judge considered the country guidance decision in TG quite thoroughly at [53] and found that in general the cumulative impact of discrimination suffered by the Sikh and Hindu communities does not reach the threshold of persecution.

17. Ms Kenny submitted that the judge was entitled to find the Appellant's wife is part of a stable family unit and has the support of her husband, that the judge had given sound reasons for finding that the Appellant and his family do not reach the threshold for international protection.

18. Ms Kenny submitted that it was not necessary for the judge to consider internal relocation in light of his findings on the credibility of the first Appellant and given the finding in TG at 119(ii) that there was no real risk of persecution or ill-treatment *per se*.

19. In respect of the children and their best interests the eldest child had only been in the UK for four years. He speaks Afghani language and would be easily able to adapt and it would be clearly in his best interests to remain with the family unit. In respect of the younger child as she was only 18 months she was very young and not yet of school age. She submitted the judge did address the issue of education for girls in

accordance with the country guidance decision in TG at [94] and [95] and there were no errors of law in the decision of the judge.

20. In reply, Ms Quadi submitted it was clear the judge had not properly considered risk on return to the Appellant's son. The judge's consideration of the fact the Appellant's wife would have to wear a burka is unclear and incoherent in structure, in that he begins that consideration at [51] and [52] however then returns to it at [57] and [58]. Whilst she accepted that the judge had given some consideration to TG it cannot properly be said that all the relevant factors had been considered, particularly given the Appellant's wife would be a female returning to Afghanistan, therefore the effectiveness of male protection and being obliged to wear a burka in order to be safe from persecution were key material issues and that the Appellant's youngest child is a girl. Ms Quadi submitted it was imperative for the judge to consider what would happen on return in respect of the individual factors in the case. The judge had failed to actually determine the best interests of the children and the manner in which the determination had been given was convoluted, confused and unreliable.

Findings and Reasons

21. I find material errors of law in the decision of First-tier Tribunal Judge Andonian essentially for the reasons set out in the grounds of appeal.

22. Whilst the judge did have regard to the country guidance decision in TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595 (IAC) I find there was an absence of clear findings of fact in relation to the risk on return for this family, the judge's focus being on the credibility of the first Appellant's account of the reasons why they had fled from Afghanistan. Even if, as the judge found, his evidence as to that was not credible, it was necessary to provide adequate reasons for his findings and there is an absence of such reasons in respect of material issues.

23. The judge rejected the Appellant's account that he has no family, his mother having passed away thirteen years ago and his father having passed away eight years ago and that he would have nowhere to live, the family home being sold. At [70] however the judge held under the heading, best interests of children

> "*I have considered the situation concerning the best interests of the children and there is another child who is 1½ of age and I believe they can be accommodated into their society in Afghanistan. I do not believe that the Appellant has no relatives in Afghanistan he could not turn to. Neither do I believe he does not have a home. Their evidence was not credible*."

24. The difficulty with this passage is it is not possible to know why the judge reached those findings, in that the findings lack clarity and are entirely unreasoned.

25. In relation to the best interests of the Appellant's children, there is no or no proper consideration of best interests at all. I find the manner in which the judge addressed the issue of education to be flawed and whilst the Appellant's daughter is not currently of school age, she would clearly become of school age on return to Afghanistan. In light of the judgment in TG 119(iii)(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 should be given careful attention when assessing the real risk of persecution.

26. I find that the judge, having reached a conclusion that the Appellant's evidence as to his past history was not credible, went on to dismiss the appeal essentially based on those findings, as opposed to a holistic consideration of the circumstances of the Appellant's wife and children.

27. In respect of the Appellant's wife there is no consideration of the fact the Appellant suffered from polio as a child and the impact of that on his day-to-day functioning would have on his effectiveness as a protector for his wife, nor on the risk to her on the basis of her gender as opposed to her religion and whether in light of HJ Iran [2010] UKSC 31, it was reasonable to expect her as a Sikh woman to have to wear a burka in order to avoid persecution. On the face of it this would appear to fall squarely within the category of case which would give rise to a well-founded fear of persecution in light of the judgments of their lordships in HJ Iran.

28. For the reasons set out above I find material errors of law in the decision of the First-tier Tribunal Judge. I remit the appeal for a hearing *de novo* before the First tier Tribunal.

Directions

1. A Punjabi interpreter is required (Afghani or Pakistani).

2. The hearing should be listed for three hours

3. Any further evidence upon which either party would wish to rely should be submitted five working days before the hearing.

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 him or any member of their 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 *Rebecca Chapman* Date 4 February 2019

Deputy Upper Tribunal Judge Chapman