Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/02058/2013
AA/02060/2013
AA/02061/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 24 July 2013	**On 29 August 2013**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

L S B
R K
T K
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr I Ali, instructed by Malik & Malik
For the Respondent: Ms E Martin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order by the First-tier Tribunal pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI

2005/230). Neither party invited us to rescind the order and we continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. The appellants are citizens of Afghanistan. The first and second appellants are married and the third appellant is their daughter. They were born on 1 January 1962, 1 January 1967 and 1 January 1997 respectively. They entered the United Kingdom clandestinely on 15 November 2012. They claimed asylum on the basis that they had been ill-treated as Sikhs in Kabul where they lived. In particular, it was claimed that the first appellant owned a shop and, having accused a woman of stealing from his shop, was accused of sexually assaulting her. In a letter dated 21 February 2013, the Secretary of State refused each of the appellants' applications for asylum and humanitarian protection. The Secretary of State did not accept the first appellant's account and that he and his family would be at risk on return to Kabul. On 27 February 2012, the Secretary of State made decisions to remove each of the appellants to Afghanistan as an illegal entrant by way of directions under Schedule 2 to the Immigration Act 1971.

3. The appellants appealed to the First-tier Tribunal. Following a hearing on 3 April 2013, Judge Trevaskis dismissed each of the appellants' appeals. He found their claims not to be credible and concluded that the appellants had not established that there was a real risk of persecution for a Convention reason on return to Afghanistan and that, in any event, they could internally relocate and live in a different area of Kabul. The judge also dismissed the appellants' appeals under Art 8 of the ECHR.

4. The appellants sought permission to appeal to the Upper Tribunal solely against the decision to dismiss their appeal under the Refugee Convention. Although permission was initially refused by the First-tier Tribunal, on 20 June 2013 the Upper Tribunal (UTJ P A Spencer) granted the appellants permission to appeal. Thus, the appeals came before us.

5. In granting permission to appeal, UTJ Spencer gave the following reasons.

> In paragraph 26 of its determination in DSG & Others (Afghan Sikhs: departure from CG) Afghanistan [2013] UKUT 148 (IAC) the Tribunal said that the evidence which it referred to in paragraph 25 had clear implications for other cases involving claimed risk on return to Afghanistan for Hindus or Sikhs, in the period between then and such time as further country guidance on the subject could be issued. Although understandably, the First-tier Tribunal judge made no reference to this determination because the hearing pre-dated the determination in DSG & Others nonetheless the determination in DSG & Others was reported before the determination in the instant appeal was promulgated and arguably the First-tier Tribunal judge made an error on a point of law in the determination of the appeal. I take this point on the appellant's behalf as *Robinson* obvious. All of the grounds may be argued."

6. Before us, Mr Ali relied upon DSG and Others and submitted that the First-tier Tribunal had erred in law in failing to depart from the relevant country guidance cases of SL and Others (Returning Sikhs and Hindus) Afghanistan CG [2005] UKIAT 00137 and IB and TK (Sikhs – risk on return – objective evidence) Afghanistan CG [2004] UKIAT 00150. He submitted that there was background material before the

judge, as in DSG and Others, which demonstrated that the number of Hindus and Sikhs in Afghanistan was much lower than had been the evidence in SL and Others. That, Mr Ali submitted, as was accepted in DSG and Others, altered the level of risk to individual Sikhs from attacks. As a consequence, Mr Ali submitted that Afghan Sikhs and Hindus were at real risk of persecution on return to Afghanistan and the judge's decision could not stand.

7. We begin with DSG and Others. That appeal concerned a claim by a number of Afghan Sikhs that they were at risk of persecution or serious-ill treatment on return to Afghanistan. The First-tier Tribunal in that case departed from the country guidance case of SL and Others relying on expert and background evidence submitted by the appellants, in particular as set out in the UT's determination at [11] that:

> "By the end of 2001 only 50 to 100 families were left of the approximately 2,000 who lived there in 1992."

8. In DSG and Others, the evidence was that the total number of Sikhs and Hindus in Afghanistan was about 3,700 rather than the 20,000 as was the evidence in SL and Others.

9. At [24], the UT concluded that, on the basis of this evidence, the First-tier Tribunal had been entitled to depart from SL and Others:

> "24. We consider it was open to the judge in the light of the glaring difference in the figures (3,700 as opposed to 20,000) to consider that the Tribunal's figures in SL were significantly wrong and that at the date of the hearing before him that remained the case. He went on to note, as we have set out above, what was said by Collins J in Luthra and what was said in the report of Dr Giustozzi which was specifically prepared for this appeal. He also noted and bore in mind what was said by Dr Ballard. Of clear relevance also were the positive credibility findings and the adoption of the earlier finding by the judge in April 2004 that the appellant had experienced persecution in the past in Afghanistan."

10. Consequently, at [25] the UT stated:

> "In the circumstances it seems to us entirely clear that the judge was entitled to depart from the country guidance in this case."

11. A failure to follow (without good reasons) a relevant country guidance case is likely to amount to an error of law. That is recognised in the *Senior President's Practice Directions: Immigration and Asylum Chambers of the First-Tier Tribunal and The Upper Tribunal* (2010) at para 12.4:

> "Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law."

12. The point was made forcibly by the Court of Appeal in SG (Iraq) v SSHD [2012] EWCA Civ 940 where Stanley Burnton LJ (at [47]) said this:

> "It is for these reasons [efficient use of tribunal resources], as well as the desirability of consistency, that decision makers and tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so."

13. Although he relied upon it, Mr Ali was unable to tell us when DSG and Others had been reported. Having consulted the Upper Tribunal's website ourselves, it is clear that DSG and Others had not been reported at the date of the First-tier Tribunal's hearing on 3 April 2013. The Upper Tribunal's website records that the decision was reported on 8 April 2013. It appears from the Tribunal file that Judge Trevaskis' decision was, in fact, sent to the Home Office on 19 April 2013, in other words after DSG and Others had been reported. It was, therefore, technically available to Judge Trevaskis before the appeals process in the First-tier Tribunal was concluded.

14. As Ms Martin, who represented the Secretary of State, pointed out in her submissions, it is a curious feature of these appeals that despite the reporting of DSG and Others on 8 April 2013, the case was not relied upon by the appellants, either in the grounds seeking permission to appeal lodged with the First-tier Tribunal nor in the grounds lodged with the renewed application to the Upper Tribunal. Those grounds, mirroring the submissions made to Judge Trevaskis, argue instead that the appellants' appeals should be decided in line with the country guidance cases, in particular SL and Others. It is only in the reasons of UTJ Spencer when granting permission to appeal that DSG and Others is raised in these appeals. It was relied upon for the first time by the appellants in Mr Ali's oral submissions before us.

15. We do not accept that DSG and Others can directly assist the appellants in this appeal. DSG and Others is not a country guidance case and the Judge's failure to take it into account and follow it cannot, in itself, amount to an error of law. The appellants' case must, instead, rest upon an argument that the material in DSG and Others and that relied on in these appears required the Judge to depart from SL and Others. We do not consider that it did. Nothing in DSG and Others persuades us that Judge Trevaskis was required to depart from SL and Others and erred in law in dismissing these appellants' appeals.

16. First, as we have already said, DSG and Others is not a country guidance case. All, in fact, it decides is that the evidence in that appeal, entitled the judge to depart from the country guidance case SL and Others (see [25]).

17. Secondly, whilst there was some evidence before Judge Trevaskis that the total number of Hindus and Sikhs in Afghanistan was now estimated to be "around 3,000" (see *Operational Guidance Note: Afghanistan* (June 2012) at 3.9.4), it is far from clear to what extent that evidence was drawn to the judge's attention and directly relied upon. It was certainly not relied upon to justify departing from SL and Others as the appellants relied on that decision (see para 41 of the determination) to support their claims to be at risk on return to Afghanistan. We do not consider that it gave rise to "very strong grounds supported by cogent evidence" for departing from SL and Others.

18. Thirdly, the evidence before the First-tier Tribunal in DSL and Others was different and more focussed on the individuals in that case because it included two expert reports which supported those particular appellants' claims to be at risk. Finally, in upholding the First-tier Tribunal's decision to depart from SL and Others, the Upper Tribunal in DSG and Others stated at [24] that:

> "Of clear relevance also were the positive credibility findings ... that the appellant had experienced persecution in the past in Afghanistan".

19. By contrast, in these appeals Judge Trevaskis made an adverse credibility finding. That finding is not challenged. As a consequence, the appellants could not establish that they had been subject to any past persecution. We accept Ms Martin's submission that this is an important and significant difference from the factual matrix which the UT held entitled the judge in DSG and Others to depart from the country guidance case.

20. In these appeals, the first appellant had been running a shop in Kabul for 20 to 25 years. Whatever the evidence was concerning the number of Sikhs currently living in Kabul, and the instance of any acts of persecution against that population, these appellants had lived free of persecution and, in the case of the first appellant, had done so for over 20 years running his shop. On that evidence, we see no basis for concluding that the judge was not entitled to find that the appellants had failed to establish a real risk of persecution for a Convention reason or serious ill-treatment. That finding was consistent with the relevant country guidance cases, in particular SL and Others, and there was simply no basis to say that there were "very strong grounds supported by cogent evidence" to depart from it, the case which, as we have already pointed out, the appellants relied upon before Judge Trevaskis.

21. For these reasons, the judge did not err in law in dismissing the appellants' appeals.

22. The First-tier Tribunal's decision stands.

23. These appeals to the Upper Tribunal are dismissed.

Signed

A Grubb
Judge of the Upper Tribunal