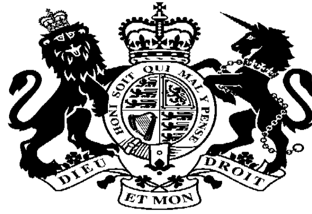

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/10736/2012
AA/10740/2012
AA/10741/2012
AA/10742/2012
AA/10743/2012
AA/10744/2012

THE IMMIGRATION ACTS

Heard at North Shields
On 8 August 2013

Date sent
On 6 September 2013
…………………………………

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MR JEET SINGH GOGAR
MRS MEENA KAUR
MISS PRIYA GOGAR
MASTER ANEESH SINGH GOGAR
MISS SANJAN GOGAR
MASTER SURAJ SINGH GOGAR
(Anonymity order not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Chelvan of Counsel
For the Respondent: Mr C Dewison, Home Office Presenting Officer

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DETERMINATION AND REASONS

1) These are appeals with permission granted by the Upper Tribunal against the decision of Judge of the First-tier Tribunal Trotter dismissing the appeals on asylum and human rights grounds.
2) The appellants are a family, comprising a husband, wife and four children, from Afghanistan. Although before the First-tier Tribunal nationality was disputed, the Judge of the First-tier Tribunal found that the family were from Afghanistan having regard to the acceptance by the Embassy of Afghanistan that the mother and father are Afghan citizens. Before the First-tier Tribunal it was disputed that the appellants were of the Sikh religion but it was accepted by the Judge of the First-tier Tribunal that the father of the family is a Sikh, as are his wife and children.

3) The first appellant worked for a while in Moscow. Initially he lived there on his own. He married the second appellant in 2000. After the marriage the second appellant remained in Afghanistan until the appellant decided to take his wife and children to Moscow because of the worsening situation for Sikhs in Afghanistan. The family returned to Afghanistan after the market in which the first appellant had a stall was closed. After the family returned to Afghanistan the first appellant obtained a job working with his cousin for a company transporting stock to Kabul and other cities in Afghanistan. The company was called MDC and its business appears to have been mine clearance and medical assistance. Although the appellant was self-employed as a driver the company, although not an American company was associated with the Americans by reason of the proximity of its office in Mazar-e-Sharif to the American base. In the summer of 2011 the appellant's cousin disappeared on a journey to Mazar-e-Sharif. About 10 days afterwards the appellant was threatened that if he continued to deliver to "the Americans" he would suffer the same fate. Nothing happened to the appellant until he was attacked in Ghazni Province in October 2011 but the appellant went on working for MDC because he needed work to feed his family. The appellant was again threatened by the Taliban and at that point the first appellant felt obliged to leave his job. He moved with his family to his brother-in-law's house in February 2012 before fleeing Afghanistan in May 2012.

4) The Judge of the First-tier Tribunal had regard to the timescale between the alleged disappearance of the appellant's cousin and the threats to the first appellant. The judge noted that the first appellant claimed to have received a number of threats, none of which were carried out before he relocated with his wife and children to his brother-in-law's property, where he claimed to have received further threats. The judge considered that if the Taliban had any interest in the appellant and wished to carry out their threats they would have done so without giving notice of their intentions. The judge did not accept that the first appellant was threatened as he alleged. If the first appellant was in danger he would not have waited to arrange a journey to the UK at considerable cost but would have fled to India, with which he had family connections.

5) The Judge of the First-tier Tribunal heard argument as to whether the country guideline case of SL & Others (Returning Sikhs and Hindis) Afghanistan CG [2005]

UKIAT 00137 should still be followed as it was argued the risk to Sikhs currently is considerably greater than it was found to be in that case. The judge took the view that he was bound to follow the country guideline case. Although he was referred to two expert reports which contained evidence contrary to the findings in the country guideline case, the judge put considerable weight on the fact that the appellant's brother-in-law was still living in Afghanistan in "considerable prosperity and with easy travel between Afghanistan and India." The judge accepted that children of either the Sikh or Hindu minorities were subject to bullying and discrimination but the evidence did not show that they were subject to persecutory maltreatment.

6) One of the grounds upon which permission to appeal was granted by the Upper Tribunal was that the judge made this finding about Sikh children in Afghanistan but did not proceed to consider the best interests of the children in these appeals in the context of Article 8. Permission was granted also on the grounds that the judge did not make a finding in respect of the evidence of the second appellant, the wife and mother of the family. Her evidence was that after the family relocated a bearded man came to the house asking for her husband's whereabouts and warning of dire consequences if he helped foreigners. Because of this the family decided to flee as they realised the Taliban had discovered their whereabouts. This evidence is directly material to the appeals and the judge arguably erred in not mentioning a finding in respect of it.

7) The other grounds of the application for permission to appeal were also considered arguable. These were whether the judge was right to follow the country guideline case of SL without analysing the evidence before him in respect of the risk of persecution to Sikhs as a group. It was the appellant's contention that the case of SL should no longer be followed as the evidence suggested that all Sikhs and Hindus are at risk of persecution in Afghanistan.

8) It was further contended that the adverse credibility findings made by the judge were unsound. The judge referred to none of the threats of the Taliban having been carried out but the evidence of the first appellant was that he was attacked in Ghazni in October 2011 and beaten so badly that he was rendered unconscious and had to be taken to hospital. The first appellant's account of the threats was found by an expert witness, Dr Giustozzi, to be plausible with regard to the country background. It was the practice of the Taliban to send their potential victims warning letters. There was no evidence before the judge that the first appellant and his family would be given permission to live in India. The treatment by the judge of a document purporting to emanate from the Taliban containing a threat to the appellant was also criticised.

9) At the hearing before me Mr Chelvan pointed out that a case had been listed for hearing in September which was intended to be a country guideline case. He pointed out that in the present appeals although permission to appeal had been granted there was no Rule 24 notice from the respondent. Mr Dewison responded that he nevertheless sought to oppose the appellant's submissions and would not be expressing any argument that would take the appellant's counsel by surprise.

10) Mr Chelvan argued that the appellants were making two asylum claims. The first was made on the basis of HJ (Iran) on the basis that the appellants are Sikhs. The second was based on the appellants' experiences in Afghanistan and on the evidence that openly Sikh people were persecuted there. There was a challenge to the findings in the country guideline case of SL. Reference was made to the reported decisions in SI (reported cases as evidence) Ethiopia [2007] UKAIT 00012 and DSG & Others (Afghan Sikhs: departure from CG) Afghanistan [2013] UKUT 00148. In DSG it was conceded by the Presenting Officer that SL was no longer good authority. In SL it was found that Sikhs faced discrimination but not persecution. The reports from Dr Ballard and Dr Giustozzi both post-dated SL - by 6 years in the case of Dr Ballard and by 8 years in the case of Dr Giustozzi. Mr Chelvan drew attention to some of the issues arising from these reports. He acknowledged that the decision in DSG is not available at the time of the hearing of the present appeals before the First-tier Tribunal but DSG showed the force in the challenge to the findings made by the First-tier Tribunal. A country guideline decision should not be seen as a "straitjacket" and the Judge of the First-tier Tribunal had misdirected himself as to the law in this regard.

11) For the respondent, Mr Dewison relied on Practice Direction 12.4 which states the following:

> "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) Mr Dewison submitted that the Judge of the First-tier Tribunal was under a duty to follow the country guideline case unless there was a good reason not to. Mr Dewison referred to paragraph 45 of the determination, where the judge considered the submission that he should not follow the country guideline case. The judge decided that he was bound to follow the country guideline case and, anyway, on their facts these appeals would not support the submissions based on the two expert reports to the effect that Sikhs face persecution in Afghanistan.

13) I consider that the Judge of the First-tier Tribunal erred in law in his approach to the country guideline case of SL. First he considered himself bound to follow the country guideline case but this is not strictly accurate as the Practice Direction states that a country guidance case must be followed only if it is clear and apparently applicable. The submission made to the Judge of the First-tier Tribunal was that the country guideline case of SL was out of date and therefore no longer applicable. The judge did not adequately consider the reasons arising from the expert reports why SL should no longer be followed but instead gave as his reason the finding that there was one Sikh, namely the first appellant's brother-in-law, still living "a life of considerable prosperity" in Afghanistan with travel between Afghanistan and India. It was wholly inadequate for the Judge of the First-tier Tribunal to reject the submissions and expert evidence on the risk to Sikhs in Afghanistan on the basis of the example of a single individual. The situation of one individual from a community may be wholly atypical

of the community as a whole and a finding that one individual is able to survive and prosper in what is alleged to be a persecutory environment does not imply that there is not a real risk to others of the same religious or ethnic group. The reasoning by the Judge of the First-tier Tribunal in this regard is inadequate and amounts to an error of law.

14) Having set aside the decision on the basis of error of law, I invited the parties to make submissions with a view to re-making the decision.

15) In his submission Mr Chelvan once more relied on HJ (Iran). He pointed out that according to the respondent's Operational Guidance Note in April 2012 there were only 2,200 Sikhs left in Afghanistan, not the 20,000 wrongly claimed to be there in SL. There was no evidence offered by the respondent to challenge the expert reports by Dr Giustozzi and Dr Ballard. If there was a real risk for adult Sikhs in Afghanistan the risk for children was even greater. Dr Giustozzi referred to the risk of Sikh girls be abducted. Among the appellants in this family there were two girls. In terms of HJ (Iran) it was necessary to look at how the family would conduct themselves on return. The evidence of the appellant's wife was that when she went out she had to hide any evidence that she was a Sikh and wore a Burka, pretending to be a Muslim. The appellants had to conceal their religion to avoid persecution. It was pointed out that the first appellant had been clean shaven when in Afghanistan in order to avoid known to be a Sikh. A finding to this effect was made by the Judge of the First-tier Tribunal at paragraph 42 of the determination.

16) For the respondent, Mr Dewison's position was that if the decision of the First-tier Tribunal was considered to be unsafe then the evidence should be reheard. He sought to rely on the reasons for refusal letter. Mr Chelvan pointed out in response that the reasons for refusal letter at paragraph 65 relied upon the decision in SL. Mr Dewison then referred to criticisms made by the judge of the second appellant's evidence.

17) For my part I did not consider it was necessary for the evidence to be reheard in order for the decision to be re-made. There were two highly significant findings by the Judge of the First-tier Tribunal which were unchallenged. These were, first, that the appellants are Sikhs and, secondly, that they are from Afghanistan. The risk to the appellants on return to Afghanistan must be assessed on this basis. As already noted, a further finding by the Judge of the First-tier Tribunal was that the first appellant had gone clean shaven in Afghanistan in order to avoid being identified as a Sikh.

18) In assessing risk on return the first issue I should consider is the weight to be given to the country guideline case of SL. Although, as Mr Chelvan submitted, a new country guideline case on Sikhs in Afghanistan is awaited, I was referred to the decision in DSG. This found that evidence before the judge in that appeal justified departure from the country guidance in SL.

19) In DSG the Tribunal had before it evidence from Dr Ballard and Dr Giustozzi, as in the present appeals. The report by Dr Ballard is a generic report on the position of the

Hindu and Sikh population in Afghanistan. The report before me by Dr Giustozzi is a specific report dated 29 December 2012 on the circumstances of the first appellant in the present appeals.

20) In both these appeals and in DSG the Tribunal was referred to the decision of Collins J in Luthra [2011] EWHC 3629 (Admin). In that case Collins J noted that there had been a drastic reduction in the number of Sikhs in Afghanistan and this, coupled with discrimination extending to violence, meant that there was fresh material which was significantly different from the material in SL and consequently the claimant in that case had a realistic prospect of success. According to a report by Dr Giustozzi submitted in DSG, by 2001 the Sikh Community in Afghanistan had dwindled to somewhere as little as a few hundred and not more than a few thousand. In Kabul it was estimated that by the end of 2001 there were only 50-100 families of the approximately 2000 who had lived there in 1992. Although reports of attacks and harassment of Sikhs were not great, this should be considered in terms of the size of the population, which was now very small. In DSG it was accepted that in SL the Tribunal had relied upon erroneous evidence as to the number of Sikhs living in Afghanistan. The same point was made by Mr Chelvan in his submission to me. The Tribunal in SL assumed there was a Sikh/Hindu population in Afghanistan of 20,000 of which very few were at risk and they were simply victims of random and opportunistic attacks. The figure of 20,000 came from UNHCR report of July 2003 which referred to 3,500 Sikh/Hindu families with an estimate that each family would comprise 5-6 people. Before the Tribunal in SL promulgated their decision in October 2005 the UNHCR position had changed. As of June 2005 UNHCR estimated that there were 600 Sikh and Hindu families in Afghanistan amounting to about 3,700 persons in total. Mr Chelvan argued that if the Tribunal in SL had assessed the adverse incidents in Afghanistan against much smaller numbers it would have reached the view that all Sikhs and Hindus were at risk. Even if this assertion was not correct, Mr Chelvan continued, the current evidence was that the number of adverse incidents had grown since the case of SL, including attacks, extortion, discrimination, forced conversions and confiscation of land, all without legal redress. When the increase and nature of such incidents were compared with the number of Sikhs/Hindus now left in Afghanistan, estimated at between 1,500 and 3,100, the opinion of Dr Giustozzi was justified that there was a serious threat to these communities.

21) The evidence before me about the position of Sikhs and Hindus in Afghanistan is very similar, and in some respects identical, to the evidence before the Tribunal in DSG. On the basis of this evidence the Upper Tribunal accepted that the judge was entitled to depart from the country guidance. The Tribunal noted that according to the respondent's Operational Guidance Note on Afghanistan of April 2012 there were only an estimated 2,200 Sikhs and Hindus remaining in Afghanistan. The case was said to have clear implications for other cases involving claimed risk on return to Afghanistan for Hindus or Sikhs until further country guidance on the subject was issued.

22) I now turn to the report by Dr Giustozzi in the present appeal. Dr Giustozzi reports that the Taliban threaten government officials and anybody whom they consider to be

collaborating with the enemy in order to force them to abandon their activities. Contractors like the first appellant's employer are likely to receive such threats. If intimidation does not work then assassinations are common. Those regarded as "collaborationists" are normally first warned to quit their job and/or to stop co-operating with the government and the foreigners. These warnings may be face to face or in the form of "night letters", which are mostly handwritten tracts widely distributed. After several warnings, a collaborationist will be beaten up or their property damaged. If this tactic fails then the Taliban would proceed to "physically eliminate" the collaborationist.

23) I note that this account is consistent with threats reported by the first appellant. The Judge of the First-tier Tribunal did not consider it plausible that the first appellant would have received warnings, or indeed successive warnings, from the Taliban without any threats being carried out. As has been pointed out in the application for permission to appeal, however, the Judge of the First-tier Tribunal neglected to have regard to the occasion in October 2011 when the first appellant was badly beaten. The first appellant explained that he moved to live with his brother-in-law in order to avoid the threats and left Afghanistan once the threats were resumed at his brother-in-law's house.

24) Dr Giustozzi reports that attacks on and harassment of Sikhs are sometimes reported in the press but at the time of the case of SL in 2005 the seriousness of the condition of Sikhs in Afghanistan was greatly underestimated. The known episodes of harassment and violence presumably represented only a proportion of the actual incidents and when these were compared to the size of the population it showed rampant hostility and discrimination against Sikhs in Afghanistan. The police in Afghanistan are known for being abusive and inefficient. Police corruption is widespread. In Kabul the quality of law enforcement is very low.

25) Dr Giustozzi refers to mistreatment of Sikhs by the authorities. He refers to a recent case in which a Sikh removed from the UK was arrested on arrival in Kabul because he lacked identification. He was tricked into making a televised conversion to Islam. There was a danger of Sikhs being forced to convert. There were continuing attacks on and dispossession of Sikhs. This was partly because they were typically relatively wealthy. They were put under pressure to sell their property at prices unfavourable to them. Sikh children were more vulnerable. Dr Giustozzi refers to reports of Sikh girls going missing and later being found to have been forcefully converted to Islam and married to a local Muslim. Young Hindus and Sikhs suffer harassment at school. Typically Sikhs and Hindus in Afghanistan are self-employed, running their own family businesses. A returning Sikh such as the first appellant would have to seek employment from another Hindu or Sikh business but there were relatively few of these left and the owners would always prioritise their own relatives. Without relatives and acquaintances the first appellant would struggle to find any kind of food or accommodation and might have to rely on the charity of the temple for accommodation and food.

26) For the reasons I have given, I do not consider that the adverse finding by the Judge of the First-tier Tribunal in respect of the threats to the first appellant from the Taliban was soundly based. The judge failed to have regard to the expert's report in this regard, which showed that the manner in which the threats were delivered was consistent with the way in which the Taliban were known to operate. The judge failed to have regard to the assault on the appellant in October 2011. I am satisfied that the first appellant was the victim of threats from the Taliban because of his activities as a driver and that at the time he left Afghanistan he was at risk because of this.

27) In these appeals findings have been made that the appellants are a Sikh family from Afghanistan. As Mr Chelvan submitted, there is no contrary evidence to the evidence of Dr Giustozzi to the effect that a Sikh family such as the appellants returning to Afghanistan would face a real risk of persecution. This persecution might manifest itself in the form of assault or even murder; it might amount to forced conversion or abduction of the girl members of the family; and it might include being denied the ability to earn a living and the ability to practise the Sikh religion openly.

28) The ability to practise religion openly brings in the HJ (Iran) issue relied upon by Mr Chelvan. It was accepted by the Judge of the First-tier Tribunal that the first appellant had been clean shaven in Afghanistan, contrary to one of the precepts of his faith, in order to avoid being identified as a Sikh. The second appellant, the first appellant's wife, gave evidence that she wore a burka when she went out to avoid being identified as a Sikh. The Judge of the First-tier Tribunal did not make a finding directly upon this. I see no reason not to accept the second appellant's evidence on this issue as credible, particularly having regard to the background evidence.

29) I am satisfied that the only possibility for the appellants to avoid a real risk of persecution were they to return to Afghanistan would be to conceal completely any signs of their faith and to avoid entirely being identified by the authorities or the community as Sikhs. Not only do I consider that this course of action would not be a sustainable possibility but to require this as the price of safety would be contrary to the principle of HJ (Iran).

30) Having regard to the background evidence, including the expert reports, and the appellant's circumstances, I am satisfied that they face a real risk of persecution on return to Afghanistan and accordingly the appeals will succeed on asylum grounds.

Conclusions

31) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.

32) I re-make the decision in the appeal by allowing it.

Anonymity

33) The First-tier Tribunal did make an order pursuant to Rule 45(4)(i) of the Asylum & Immigration Tribunal (Procedure) Rules 2005. I lift that order.

Fee Award **Note:** This is not part of the determination.

No fee is paid or payable and therefore there can be no fee award.

Signed Date

Upper Tribunal Judge Deans