Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02921/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 26 October 2015	**On 30 October 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

AJIT SINGH MADAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss J Todd, of Latta & Co Solicitors
For the Respondent: Miss S Aitken, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. There have been extensive prior proceedings in this case, running from 2007 to 2015, in which the appellant failed to establish his identity as a Sikh from Afghanistan. However, he and his family proved their Afghan nationality to the satisfaction of the respondent by production of passports in March 2015. (In 2007, they had used false Indian passports.) It is unexplained why it took them so long to establish their nationality and identity, but that delay is now irrelevant.

2. The respondent now accepts that the appellant and his family members are Afghan Sikhs. His date of birth is recorded as 1 January 1972 and his wife's as 1 January 1978. They have 3 children, whose dates of birth are recorded as 1 January 2005, 26 November 2008 and 16 January 2012. His wife and children are dependants on his claim. On 5 February 2015 they were all granted 30 months leave to remain under Article 8 of the ECHR. However, protection in terms of the Refugee Convention and of Articles 2 and 3 of the ECHR was refused.

3. The respondent's letter takes the view that the appellant had not in the past been ill-treated or targeted on account of his religion, but only because of an individual dispute. The letter depends heavily on adverse findings in previous proceedings. It goes on to cite background information about Sikhs in Afghanistan, the police force, and other avenues of complaint. It declines to find a risk of persecution and holds that there is any event sufficiency of protection through the police and the Afghanistan Independent Human Rights Commission.

4. A panel of the First-tier Tribunal comprising Judge Ferguson and Designated Judge Murray dismissed the appellant's appeal by determination promulgated on 22 April 2015.

5. The panel took the adverse credibility findings of a determination made in 2008 as its starting point, and found that the present claim also hinged on credibility, and that the appellant was neither credible nor reliable. As to general risk to Sikhs in Afghanistan the panel found there was "no evidence … case specific to this appellant" (paragraph 40); there had been an improvement in local police forces; there was still a Sikh community, although numbers had dwindled considerably; the appellant had previously been a shopkeeper, was capable of working, and had community ties; and he did not face a real risk of suffering serious harm.

6. The appellant sought permission to appeal to the Upper Tribunal on grounds of (1) failure to engage with the appellant's evidence about the religious aspect of his experiences in Afghanistan; (2) failure to consider the internal consistency of his account, and its consistency with country evidence; and (3) looking for "case specific evidence" or corroboration which did not exist, while engaging only minimally with detailed background evidence regarding risk to Sikhs.

7. Miss Todd sought to add a new ground of appeal, based on *Devaseelan,* and which she said was possibly "*Robinson* obvious", along these lines. The panel should not have applied *Devaseelan* principles as it did [without expressly citing *Devaseelan*], taking as a starting point a previous adverse determination in which the appellant failed to establish his identity as an Afghan Sikh. Now that the central issue of identity was conceded, prior adverse findings which must have been inextricably linked to that issue should not have been given such weight.

8. Miss Aitken did not object to amendment of the grounds to that effect, partly on the view that the point could be extracted from the existing grounds.

9. Miss Todd submitted thus. The determination started to go wrong at paragraph 35, where the adverse credibility findings made in 2008 are taken as the starting point. That had to colour what followed. The background evidence and country guidance was dealt with inadequately. There has been no country guidance since *SL and Others* (returning Sikhs and Hindus) Afghanistan CG [2005] UKIAT 00137. That case did not support general risk, but it was followed by *DSG and Others* (Afghan Sikhs: departure from CG) Afghanistan [2013] UKUT 00148, holding that the evidence had moved on and the First-tier Tribunal in that case had been entitled to depart from *SL* and to allow an asylum appeal. The FtT had been asked to take the same course in the present case, on a legal and evidential basis set out in a written argument and in submissions, with which the FtT failed to engage. That error should be put right by remaking the decision. At that stage, there should be admitted into evidence an expert report by Dr A Giustozzi dated 18 October 2015. Dr Giustozzi is an expert recognised as such in previous country guidance cases. His report explains why the large majority of Afghan Hindus and Sikhs have abandoned their property and fled, and why although 5 million of those who fled Afghanistan have returned, Sikhs and Hindus have not done so in any significant or proportionate numbers. The author considers that there is "rampant hostility and discrimination against Sikhs in Afghanistan" (paragraph 12) and that they are easy targets because they have no redress. The appellant is originally from Kunduz. Miss Todd drew particular attention to paragraph 15 of the report which states that there was a small Hindu and Sikh community remaining there, but it is not clear what happened to them after the city was stormed by the Taliban on 28 September 2015. Miss Todd also drew attention to other particular passages, including page 18, paragraph 10 – few returning Sikhs, often leaving again because they cannot recover their properties and have no source of livelihood; page 20, paragraph 15, relocation outside Kunduz would not improve the appellant's predicament; and the near inability of Sikh children to attend school.

10. The concluding paragraph of the report states:

> 'In sum, Mr Madan would certainly be unable to return to … Kunduz … where pro-government militias and pro-Taliban militias are still rampaging. The risk from these militias would be very high … relocation to Kabul would represent only a relative improvement … the Kabul/Sikh community in Karte Parwan has largely been expropriated and their properties demolished to made space for villas of powerful war lords … Mr Madan would in all likelihood experience harassment wherever he relocates in Afghanistan. The risk of extortion would only arise if he managed to start some economic activity of his own. The risk for Mr Madan's wife is also plausible; she

would have to spend her days at home in order to avoid being targeted for conversion to Islam by Muslim zealots.'

11. Miss Aitken submitted that the panel had properly considered both credibility and the country evidence. The principle of taking a previous determination as a starting point had to be qualified by the narrowing of the issues, but paragraph 8 of the determination showed that the panel was well aware that nationality and identity were no longer in dispute. The panel had kept the resolution of those issues in mind. This aspect did not undermine the previous good reasons to doubt the appellant's credibility, or the further reasons given by the panel in coming to their own view. This case was different from *DSG* because that appellant had the benefit of positive credibility findings. *SL* and *DSG* showed that there had to be a "case by case" approach and that lack of credibility was a significant element. Having not been found credible, the panel were right to conclude that this appellant fell short of the position reached in *DSG*. The determination should stand.

12. Miss Aitken did not raise any objection, if error were found, to the expert report being introduced into evidence. She argued, however, that even with the addition of this evidence there was insufficient to establish general risk to the level required by the Refugee Convention or Articles 2 and 3 ECHR.

13. I reserved my determination.

14. In my opinion, the panel erred in law at paragraph 35 by taking the determination made in 2008, without qualification, as the starting point. The appellant (largely, it appears, through his own fault) failed in prior proceedings to show that his nationality and identity were as claimed. That was a central issue. Once that point was cleared up, a prior determination based on disputing called for cautious treatment.

15. I also think that the panel went wrong by treating this as a claim hinging mainly on credibility. Once nationality and identity were established, the case turned much more on the general risk to Sikhs in Afghanistan. That argument is clearly and crisply set out in the appellant's skeleton argument in the FtT, to which the panel gave only cursory treatment.

16. The decision falls to be remade.

17. The respondent's refusal letter fairly cites the background evidence. It then mixes up its general conclusions with consideration of the appellant's past failure to prove his case, and the absence of fresh individual evidence. It is far from clear that the background evidence cited in the letter justifies its conclusion that Sikhs in Afghanistan face no more than harassment and discrimination, or that there is sufficiency of protection for Sikhs in particular. Paragraph 28 states that there is no accompanying evidence that the appellant's difficulties regarding education, housing or employment would be "over and above that of the general population";

yet much of the information the respondent has quoted is precisely to the effect that Sikhs do suffer problems which do not apply to the general population.

18. The refusal letter cites a particular instance both from the US Commission on International Religious Freedom Annual Report 2012 and from a Guardian newspaper report of 3 July 2012. This concerns a Sikh returned from the UK to Afghanistan in 2010. On arrival he was identified by his turban, imprisoned for 18 months on an informal "charge" of falsely claiming to be Afghan, verbally and physically abused, and eventually returned to Birmingham "by the British government". This is quoted as if it is a reliable account. If the British government were not responsible for this person's return to the UK, the respondent would have been in a position to know and would surely have said so.

19. The enforced return of failed asylum seekers to any country is a difficult task. The number of Sikh returnees to Afghanistan must be very low. This is the only available example (in these proceedings) of what has happened to a returnee. If there had been any examples of more successful returns of Sikhs, it would be reasonable to expect the respondent to have reported on them, by way of contrast with the disastrous example which is quoted.

20. On the background evidence cited by the respondent, as fortified by the expert report, the appellant has shown that the country guidance in *SL and Others* should be departed from herein, and that he and his family would be at such risk on return to Afghanistan as to entitle them to asylum.

21. The determination of the First-tier Tribunal is **set aside**. The following decision is substituted: the appeal, as originally brought to the First-tier Tribunal, is **allowed** on Refugee Convention grounds and under Article 3 of the ECHR.

22. No anonymity direction has been requested or made.

Upper Tribunal Judge Macleman
29 October 2015