Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/04540/2014**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Decision Promulgated**
On 27 August 2015	**On 2 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

BOBBY SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Khan instructed by Legal Justice Solicitors
For the Respondent: Mr A McVitie Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Adio after a hearing on 7 August 2014 which dismissed the Appellant's appeal against a decision dated 17 June 2014 to refuse an application for asylum

Background

3. The Appellant was born on 1 January 1984 and is a national of Afghanistan. He is a Sikh.

4. On 24 March 2014 the Appellant applied for asylum on the basis that he and his wife had fled from Afghanistan after his wife was kidnapped and mistreated by people who wanted her to convert to Islam.

5. On 17 June 2014 the Secretary of State refused the Appellant's application. The refusal letter gave a number of reasons:

   (a) The Appellant gave inconsistent accounts as to the circumstances of his wife's kidnapping by a neighbour.

   (b) The Appellant's claim that he could not leave the house for fear of mistreatment is inconsistent with the account he gave of leaving the house on a regular basis.

   (c) The Appellant had not suffered treatment that amounted to a sustained pattern or campaign of persecution directed at him that amounted to persecution.

   (d) Internal relocation to other areas of Kabul where his wife's family lived was an option.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Adio ("the Judge") dismissed the appeal against the Respondent's decision. The Judge found :

   (a) The only background material placed before him was that contained within the COIS from February 2013 and he took that into account and summarised it in so far as it was relevant to the case at paragraph 37 and 38 of the decsion.

   (b) He found that there were some inconsistencies in relation to the account of the kidnapping but in essence he accepted that the Appellant's wife had been kidnapped and ill treated and during the detention a lady spoke to her about converting to Islam.

   (c) The Judge found that there was some exaggeration about the level of ill treatment and he did not find it amounted to torture or amounted to a systematic or sustained pattern of persecution.

   (d) He found that the incident was a 'one off' and didn't amount to a sustained attack on the Appellant or his family.

   (e) He accepted that there was societal discrimination against Sikhs but it did not collectively amount to persecution.

   (f) The Appellant and his wife could relocate to another part of Kabul as eh does not accept that the Appellant and his wife have been truthful about the whereabouts of other family members.

7. Grounds of appeal were lodged arguing that:

   (a) The Judge failed to properly assess the evidence of the kidnapping and harassment which could lead to the loss of future livelihood in that the treatment suffered amounted to persecution.

(b) It would be unduly harsh to expect the Appellant to relocate.

(c) The Judge did not refer to either SL and Others (Returning Sikhs and Hindus) Afghanistan CG 2005 UKAIT 00137 or DSG & Others (Afghan Sikhs: departure from CG) Afghanistan [2013] UKUT 148 (IAC) which allowed a Judge to depart from SL on the basis that due to diminishing numbers the attacks would not be considered to be merely random but targeted at this much smaller community.

(d) The Respondent failed to disclose that they granted asylum to the Appellant's brother who claimed asylum on the same day as him.

8. On 24 September 2014 First-tier Judge Cheales gave permission to appeal on all grounds.

9. At the hearing I heard submissions from Ms Khan on behalf of the Appellant that:

(a) She relied on the grounds of appeal.

(b) Kidnapping, detention and ill treatment meets the definition of ill treatment and he assesses persecution in a restrictive way that is legally flawed.

(c) The Judge failed to place the treatment suffered by the Appellant and his wife into the context of the diminishing number of Sikhs as set out in DSG.

(d) The Judge failed to take into account what was said in the COIS at 21.35 about the absence of state protection.

(e) Kabul was the Appellant's home area and given the diminishing numbers he could not relocate.

(f) The brother's grant of asylum was not taken into account.

10. On behalf of the Respondent Mr McVitie submitted that :

(a) The Appellant bears the burden of proof and in the bundle before the Judge there was no background material or any evidence from the Appellant's brother to suggest that that the time of the decision he had been granted asylum.

(b) The Judge made a finding that was open to him that the treatment suffered by the Appellant and his wife was not enough to meet the definition of persecution.

(c) The case of DSG is not a Country Guidance case and was not referred to by the Appellant in his grounds of appeal or in submissions before the Judge.

(d) DSG was not authority to say that all Afghan Sikhs are at risk it simply stated that it was possible for a Judge to go behind the CG case of SL on the basis of the background material placed before him. This Judge had none other than the COIS.

(e) Kabul is a very big city and on the basis of the limited material before him the Judge was entitled to find that it was possible for the Appellant and his family to relocate.

(f) This was an attempt to re argue the case with better evidence,

11. In reply Ms Khan on behalf of the Appellant submitted that the gravity of what happened to the Appellant's wife could not be diminished. An attempt to change a person's religion was serious. She accepted that she had not realised that DSG was not before the Judge and he only had the COIS.

Finding on Material Error

12. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.

13. The first challenge to the Judge's decision to refuse the Appellant's appeal against a refusal of asylum was that he interpreted the definition of persecutory treatment too restrictively. I am satisfied that the Judge took into account the submissions made by counsel who represented the Appellant before the First-tier Tribunal which are recorded at paragraph 34-35 of the decision that the treatment complained of would meet the definition of persecution. The Judge who heard the evidence of the Appellant and his wife about the circumstances of her detention made findings at paragraphs 39-41 that were open to him about what exactly he accepted had occurred which was not entirely consistent with the accounts given by the Appellant and his wife.

14. The Judge concluded that there was some exaggeration about the level of mistreatment; he found that the Appellant's wife had a swollen face but that did not amount to torture as claimed; he did not accept that the Appellant's wife was blindfolded or had a cloth round her mouth and concluded :

> "I find that the ill treatment the Appellant's wife had dos not amount to a systematic or sustained pattern of persecution.....
>
> I therefore find that this is a one off incident and does not amount to a sustained attack on the Appellant and his family. Whilst I accept that there is societal discrimination which may result from time to time with verbal abuse when the Appellant and his wife go out, this collectively does not amount to persecution of the Appellant and his family."

15. In setting out those findings I have considered whether the Judge applied too restrictive a definition and I am satisfied that he directed himself appropriately. While he made no specific reference to caselaw nor indeed was directed to any by counsel representing the Appellant he would have found much support from such caselaw in the words he used. In MI (Pakistan) and MF (Venezuela) v Secretary of State for the Home Department [2014] EWCA Civ 826 the Court of Appeal held that the concept of persecution for the purposes of the Geneva Convention (and indeed the Directive) requires that the past or apprehended harm to the asylum seeker must attain a substantial level of seriousness. Family or social disapproval in which the state has no part lies outside its protection. Discrimination against members of a particular social group in the country of origin is not enough, even though such discrimination might be contrary to the standards of human rights prevailing in the state in which asylum is sought. In Ali Cem Kaya v SSHD (2003) EWCA Civ 1195 the Tribunal had found that a single brief period of detention and mistreatment could not amount to persecution as it lacked "the pervasive element which is commonly said to be a feature of persecution". In HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31 (07 July 2010) Lord Hope said "the Refugee Convention does not define "persecution". But it has been recognised that it is a strong word". He went on to quote from Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473, paragraph 40, McHugh and Kirby JJ said: "*Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to state sponsored or condoned discrimination in social life and employment*. *Whatever form the harm takes, it will constitute persecution only if, by*

reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it." He then added "To constitute persecution for the purposes of the Convention the harm must be state sponsored or state condoned. Family or social disapproval in which the state has no part lies outside its protection. As Professor J C Hathaway in The Law of Refugee Status (1991), p 112 has explained, "persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community."

16. I am therefore satisfied that there is nothing in the Judges assessment of the one incident described by the Appellant's wife in so far as the Judge found it credible that is inconsistent with the guidance as to what constitutes persecution. It is clear that the fact of kidnapping of itself is not determinative of whether the treatment is persecutory.

17. It was argued that the Judge failed to take into account the guidance in the case of DSG although Ms Khan quite properly conceded that she did not realize that the case had not been placed before the Judge. DSG is not the a Country Guidance case and it is not an error of law for the Judge to fail to carry out the work that those who represented the Appellant at that time should have done by providing helpful caselaw and background material. Neither was provided in a inadequate bundle that consisted merely of three statements and copies of the decision letters. Moreover DSG provides that the CG case of SL that in essence provides that being a Sikh of itself does not constitute a risk in Afghanistan can be departed from if persuasive evidence before the Judge justified it. In this case the Judge had no such material as he had only with a COIS from 2013. I am therefore satisfied that the Judge was therefore not in error in not considering DSG.

18. In relation to failing to take into account the fact that the Appellant's brother had been granted asylum I am satisfied that the Judge was not in error. I remind myself as the Judge did that the Appellant bears the burden of proving is case. It was open to him if he chose to call his brother to give evidence that he was granted asylum and what account he placed before the Respondent that led to the grant as of course it could not be assumed that the grant was on the same factual basis. I have read the record of proceedings and the decision carefully and nowhere is it mentioned that the brother made an asylum claim or indeed was granted asylum. I am therefore satisfied that this was not an error of law.

19. It was finally argued that the assertion that the Appellant and his wife could not relocate elsewhere in Kabul was unreasonable. However I am satisfied that this assertion is based on background material that was not before the Judge. On the basis of the very limited material in the COIS placed before him and the positive findings he made that the Appellant and his wife had family living in other parts of Kabul who could support them on their return it was open to the Judge to reach this conclusion.

20. I remind myself of what was said in Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC) about the requirement for sufficient reasons to be given in a decision in headnote (1): "*Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those*

reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge."

21. I was therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

22. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

23. **The appeal is dismissed.**

Signed Date 1.9.2015

Deputy Upper Tribunal Judge Birrell