



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/01753/2015

THE IMMIGRATION ACTS

Heard at Field House

On 10th March 2016

**Decision &
Promulgated
On 1st July 2016**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

**MR KANSHI RAM LUND
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. S Khan instructed by Malik & Malik Solicitors
For the Respondent: Ms. I Broklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by First-tier Tribunal Judge Lloyd-Smith promulgated on 10th July 2015, in which she dismissed the appellant's appeal against the decision of the Secretary of State for the Home Department to refuse to grant the appellant asylum and the

respondent's decision of 21st January 2015, to remove the appellant from the UK by way of directions under s10 of the Immigration and Asylum Act 1999.

2. The appellant is a national of Afghanistan who arrived in the UK on 3rd August 2014. He claimed asylum the following day. The evidence received by the First-tier Tribunal, both by way of oral evidence and set out in statements and interview records, is set out at paragraphs [8] to [10] of the decision of the First-tier Tribunal Judge and I do not repeat that here.
3. The grounds of appeal that are advanced in the appeal before me are set out in the appellant's renewed grounds of appeal that are dated 14 August 2015. Permission to appeal was granted by Upper Tribunal Judge Kebede on 11th September 2015. In doing so, she noted that there is arguable merit in the grounds that the Judge, in relying as she did on the country guidance in **SL and Others (Returning Sikhs and Hindus) Afghanistan [CG] 2005 UKIAT 00137**, arguably failed to take account of the more recent decision of **DSG and Others (Afghanistan Sikhs departure from CG) Afghanistan [2014] UKUT 148** that was before her.
4. At paragraph [11] of her decision, the First-tier Tribunal Judge sets out the evidence before her that supports the submission that the appellant's account of events in Afghanistan is a credible one. At paragraph [13] the Judge sets out particular matters identified by the respondent that weigh against the appellant. The Judge's findings are set out at paragraphs [15] to [20] of her decision. Having considered the evidence before her, the Judge found at paragraph [16] that the appellant's account of events is not a credible one. At paragraph [23], the Judge concluded:

"There are no substantial grounds for believing that any harm would come to him on return to Afghanistan. His return will not breach Article 3 and it does not entitle him to humanitarian protection. I reject the

appellant's refugee, humanitarian protection and Article 3 claim because he has not established that there is any truth to his account."

5. The decision of First-tier Tribunal Judge Lloyd-Smith is in my judgement very carefully crafted and runs to some 26 paragraphs in which she carefully considered all aspects of the protection claim that was advanced before her. Insofar as the appellant relied upon his Hindu faith as the basis upon which the appellant fears return to Afghanistan, the Judge states at paragraph [20]:

"20. As far as his religion is concerned it is accepted that the appellant is from the Hindu faith. His son's claims were both connected to the problems they claimed to suffer as a result of their religion, both were rejected. The appellant was specifically asked if he had ever had any problems as a result of his religion, during his SEF his answer was "once they attacked our temple. When there was a problem over the Babri Mosque in India"(R B16 q 126). He was asked if he could practice his religion openly inAfghanistan and said that "earlier it was ok to practice openly but after the Taliban you have to do it quietly. They beat us up if we practice openly. We have to go to the temple quietly" (R B16 q130-131). He did say that he was able to attend the temple twice a day (R B16 q121). Whilst religion is mentioned by the appellant the main basis of his claim appears to relate to the fact that he had taken a photograph of a girl "a Taliban with a beard saw her and afterwards the Taliban came, searched my shop and they said they are not allowed to take photos of women", he goes on to describe his beating and his wife's murder (R B10 q49). Later he was specifically asked "These three incidents: the death of your first and second wives and the kidnap of your daughter". Are there any other incidents which have caused you to claim asylum?" to which he replied "no, nothing else" (R B15 q108). When it was put to him that he fears return because of the Taliban and he was asked "what is it that places you at risk over anyone else there?" he replied "Because of the photograph thing, they killed my wife. Then they wrecked my shop, so we are enemies. Therefore I'm scared" (R B25 q232). He went on to state that he fears all Muslims and has been asked to convert or he will be killed.

However, it is apparent from the content of the interview and his evidence that he believes photographs being taken started the problems he had and not his faith "In our case it all happened because we took a photo of a girl" (R B12 q76). He attributes the second attack in 2013 on the "earlier incident. They thought they had killed me but I was unconscious so they came again" (R B14 q95). Having considered the objective material that has been provided and given my credibility findings I have little difficulty in accepting the finding made within the refusal letter that whilst "Hindus in Afghanistan may face some societal discrimination, however, this does not amount to persecution". This is a finding that was also made in respect of the appellant's sons. It seems apparent that Hindus were not perceived as a threat and were not therefore persecuted. This is supported by the fact that the appellant prior to him leaving in 2014 was able to attend the temple twice daily and the temple is still able to operate. I therefore endorse the findings made in the previous appeals. It also accords with the current country guidance case of **SL and Others (Returning Sikhs and Hindus) Afghanistan CG 2005 UKAIT 00137** the Tribunal said that there was no evidence to support the claim that Afghan Sikh and Hindu minorities were persecuted or treated in breach of their protected human rights under article 3 by the State or that the degree of societal discrimination against them was such as to give rise to any such persecution treatment as a class. The objective material in the US Department of State report 27th April 2014, that I was invited to look at by Mr Blundell (A pg19), acknowledges that Hindus are "allowed to practice publically" but face discrimination. 'Non-Muslim minorities such as Sikhs, Hindus and Christians continued to face social discrimination and harassment and, in some cases, violencethe Hindu population...faced less harassment.....reportedly continued to face discrimination, including intimidation" (A pg25). This is not an indication that they are persecuted. Given my findings above I do not accept that in Jalabad the appellant would be persecuted as a result of his religious beliefs."

6. The findings of fact that were made by the First-tier Tribunal Judge are not in issue before me.

7. The grounds of appeal contend that it was the gravamen of the appellant's protection claim that he would be at risk upon return on account of his faith, and not the specific incidents he had described. The appellant contends that the Judge failed to consider the Kabulblogs article dated 28th February 2015 that had been submitted by the appellant and which clearly refers to comments made by the Afghan Minister for refugees and repatriation. Furthermore, the appellant contends that the Judge failed to consider the Upper Tribunal decision in **DSG & Others (Afghan Sikhs: departure from CH) Afghanistan [2013] UKUT 000418 (IAC)**.
8. At the hearing before me, Mr Khan submits that the Judge failed to properly take into account the matters that are set out at paragraphs [23] to [25] of the Upper Tribunal's decision in **DSG & Others**, and failed to take account of the evidence that was before the Judge regarding the reduction in the numbers of Sikhs and Hindus now living in Afghanistan. He submits that the community to which the appellant would be returning is diminishing, and these were factors that were not properly taken into account by the Judge.
9. A written response was submitted on behalf of the respondent under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The respondent opposes the appellant's appeal and in summary the respondent contends that although the Judge did not refer to the decision of the Upper Tribunal in **DSG & Others** there was no need to do so, given the unequivocal findings set out at paragraph [20] of the Judge's decision. The respondent submits that the appeal amounts to a disagreement with the overall outcome of the appeal in circumstances where the Judge made findings and reached conclusions that were properly open to her on the evidence. Ms Broklesby-Weller submits that the Judge has given cogent reasons for her conclusion that the appellant would not be at risk upon return on account of his being a Hindu. She submits that the decision in **DSG and Others** was based

upon the individual findings made in favour of the appellants in that case, and the specific expert evidence that they relied upon.

10. In my judgment, the grounds that the appellant seeks to rely upon overlook entirely the unchallenged findings that were made by the Judge. At paragraph [20] of her decision, the Judge considered the evidence before her as to the appellant's faith and whether it was his Hindu faith that gave rise to the protection claim, or the incidents that he had claimed had taken place, but were rejected by the Judge. The Judge carefully considered at paragraph [20] the evidence of the appellant as to whether he had faced any problems in Afghanistan as a result of his religion. The Judge considered what the appellant had said during his SEF interview, and found that it is apparent from his interview and his evidence that he believes it was the photographs taken, that had started his problems, and not his faith.
11. In the same paragraph, the Judge states that having considered the objective material that has been provided and in light of her findings as to the credibility of the appellant and the account advanced by him, she has little difficulty in accepting what had been said in the respondent's reasons for refusal letter that whilst "Hindus in Afghanistan may face some societal discrimination, this does not amount to persecution.". As the Judge records at paragraph [20] of her decision, the finding that she made that the appellant's problems were not because of his Hindu faith, and her conclusion that whilst Hindu's face some societal discrimination, that does not amount to persecution, are entirely consistent with the findings and conclusions reached in the previous appeals pursued by the appellant's sons.
12. In my judgement, it is clear that the appellant's appeal proceeded on the basis that whilst his Hindu faith was referred to, the core of the appellant's claim for protection arose from his claim that he had taken photographs of a girl that had been found by the Taliban, and it was

after that, that the Taliban had any interest in him. It is right in my judgement to note that the First-tier Tribunal Judge rejected the appellant's case in that respect. She rejected the appellant's account of having been targeted by the Taliban in 2013 as being untruthful. The conclusion reached by the Judge was consistent with the Country Guidance case of **SL and others** that makes it clear that all Sikh's and Hindu's are not at risk of persecution but the individual circumstances of each person will require consideration. The Judge, as is clear from paragraph [20] of her decision did consider the individual circumstances of the appellant and his family. I am satisfied that the Judge has adequately explained why she considers there is not a real risk of persecution for the appellant on account of his Hindu faith. The Judge has properly directed herself to the evidence before her that the appellant was able to attend the temple twice daily and the temple is still able to operate. The Judge has properly, and in line with **SL & Others** reminded herself that any general societal discrimination does not amount to persecution.

13. It is right to say that **SL and Others** does not support general risk. The appellant contends that that decision was followed by **DSG and Others** 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. There, the Upper Tribunal upheld the Judge in the First-tier Tribunal departing from a country guidance decision. 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 Upper Tribunal'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."

14. At [24], the Upper Tribunal 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."

15. Consequently, the Upper Tribunal concluded the First-tier Judge was entitled to depart from country guidance where evidence indicated that it should not be followed. At [25] the Upper Tribunal stated:

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

16. At paragraph [26], the Upper Tribunal stated:

"26. A country guidance case retains its status until either overturned by a higher court or replaced by subsequent country guidance. However, as this case shows, country guidance cases are not set in stone and a judge may depart from existing country guidance in the circumstances described in the Practice Direction and the Chamber Guidance Note. This does not amount to carte blanche for judges to depart from country guidance as it is necessary, in the wording of the practice direction to show why it does not apply to the case in question. In SG (Iraq) [2012] EWCA Civ 940, the Court of Appeal made it clear, at paragraph 47, the 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. To do so otherwise would amount to an error of law.”

17. In **DSG and Others** the Upper Tribunal summarised **SL and others** stating that there was no evidence to support the claim that Afghan Sikh and Hindu minorities in Afghanistan are persecuted or treated in breach of Article 3, but following UNHCR Guidance their status as Afghan Sikhs and Hindus is a factor to be taken into account in assessing individual claims on a case-by-case basis.
18. Mr. Khan submits 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**. The appellant claims that that alters the level of risk to individual Hindus from attacks. As a consequence, it is submitted that Afghan Sikhs and Hindus are at real risk of persecution on return to Afghanistan and the Judge's has made a material error of law.
19. **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 appellant's case must in my judgment rest upon an argument that the material in **DSG and Others** and that relied on in this appeal, such as the Kabulblogs article dated 28th February 2015, required the Judge to depart from **SL and Others**.
20. It is correct that the Judge does not refer to the decision of the Upper Tribunal in **DSG and Others** but it is clear that the Judge acknowledged that the appellant is a Hindu and his status as an Afghan Hindu is plainly a factor taken into account in by the Judge in assessing, as she was required to, the individual appeal before her.
21. On the facts of **DSG & Others** the Judge was entitled to depart from the country guidance case of **SL and Others** See [25], but that is not to say that the level of risk to individual Hindus from attacks is such that

all Afghan Sikhs and Hindus are at real risk of persecution on return to Afghanistan. I acknowledge that there was some evidence before the First-tier Tribunal Judge that the security situation in Afghanistan is not stable, but I do not consider that it gave rise to the very strong grounds supported by cogent evidence, required for departing from the country guidance decision of **SL and Others**.

22. In any event, the evidence before the First-tier Tribunal in **DSL and Others** was different and more focused on the individuals. The evidence included two expert reports which supported those particular appellants' claims to be at risk and the Upper Tribunal, in upholding the First-tier Tribunal's decision to depart from **SL and Others**, stated at paragraph [24] that:

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

23. In this appeal, the First-tier Tribunal Judge rejected the account of past persecution relied upon by the appellant and she made an adverse credibility finding. That finding is not challenged. As a consequence, the appellant cannot establish that he has been subject to any persecution in the past.
24. The appellant had been running a photography shop for several years and his own evidence was that he was able to attend the temple twice daily and that the temple is still able to operate. Whatever the evidence was, concerning the number of Hindu's currently living in Afghanistan, and the instance of any acts of persecution against that population, the appellant had lived free of persecution. On that evidence, there is in my judgment no basis for concluding that the Judge was not entitled to find that the appellant 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 case, and as I say, there is simply no

basis to say that there were "very strong grounds supported by cogent evidence" to depart from the Country Guidance case.

25. In the circumstances it was open to the Judge to conclude, as she did at paragraph [23] of her decision that there are no substantial grounds for believing that any harm would come to the appellant on return to Afghanistan, that his return will not breach Article 3 and it does not entitle him to humanitarian protection.

26. It follows that the appeal is dismissed.

Notice of Decision

27. The appeal is dismissed.

28. No anonymity direction is applied for and none is made.

Signed

Date **1st July 2016**

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

There can be no fee award in the circumstances.

Signed

Date **1st July 2016**

Deputy Upper Tribunal Judge Mandalia