



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/07439/2015  
AA/08741/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 15<sup>th</sup> March 2016

Decisions & Reasons Promulgated  
On 12<sup>th</sup> April 2016

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

SSK

TSK

(Anonymity direction made)

Respondents

**Representation:**

For the Appellant: Ms A Brocklesby – Weller, Senior Home Office Presenting Officer  
For the Respondent: Mr T Gaisford, counsel, instructed by Sriharans solicitors

**DETERMINATION AND REASONS**

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the parties in this determination identified as SSK and TSK or to K or I. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. SSK and TSK are Afghan Sikhs. SSK is the father of TSK who was born on 8<sup>th</sup> November 1996. Their appeal against removal decisions dated 15<sup>th</sup> April 2015 and 20<sup>th</sup> April 2015 respectively, made subsequent to the refusal of their claim for international protection was allowed in a Decision of First-tier Tribunal Judge Walker promulgated on 10<sup>th</sup> December 2015 following a hearing on 6<sup>th</sup> October 2015.
2. Permission to appeal that decision was granted by FtT Judge Frankish in the following terms:

“ ...

2. The application for permission to appeal asserts that the F-tTJ followed DSG and not SL & ors in finding a generalised risk to Sikhs in Afghanistan which was correct at the time of hearing (6.10.15) but she allowed herself to get caught out by not promulgating until 10.12.15 by which time TG [2015] UKUT 595 had overruled a generalised risk in favour of a case by case approach.

3. This application is a case study in the hazards of dilatory determination writing. Current country guidance cases are available on a publicly accessible list, but, unfortunately, the current country guidance case popped up on 9<sup>th</sup> November 2015, this decision having been drafted on 30 November 2015 and promulgated on 10 December 2015. The fact that it has not been applied amounts to an arguable error. No issue is taken with this otherwise careful determination as to the findings of fact which are hereby preserved. The appellants should take heart from the fact that, even applying TG, there is every likelihood of arriving at the same conclusion as arose here and as arose in the determination of a similar case by F-tTj Eldridge as referred to in this determination.”

3. Ms Brocklesby-Weller confirmed no issue was taken with regard to the findings of fact made by the First Tier Tribunal Judge. Thus the undisputed findings are as follows:
  - i. SSK and TSK are Afghani Sikhs.
  - ii. SSK's son K (and brother to TSK) lives in the UK and was recognised as a refugee on 11<sup>th</sup> March 2015 after his appeal was allowed in February 2015. He had arrived in the UK on 25<sup>th</sup> April 2014. Another son, I, is missing.
  - iii. SSK's daughter had been killed, aged 4, in 1996 in cross fire when a missile went off while she was playing outside.
  - iv. SSK's brother in law had been shot and died in 1997.
  - v. SSK speaks Pashtu, Dari and Punjabi. TSK speaks Punjabi and Kabli Punjabi.
  - vi. The family is from Jalalabad
  - vii. SSK and his wife left Afghanistan in 1998 to Russia where they lived until 9<sup>th</sup> November 2014 when they came to the UK. No adverse inferences were drawn from the failure to claim asylum until 18<sup>th</sup> November 2011.
  - viii. SSK has a brother in the UK who has been in the UK since 2001.
  - ix. SSK has limited mobility due to a disability in his leg. His wife is diabetic and suffers from arthritis.

- x. TSK left Afghanistan when he was aged about 6 months and arrived in the UK on 10<sup>th</sup> November 2014. He suffers from epilepsy but takes no medication. He has never been to school and did not leave the house in Moscow until he was aged about 12.
- xi. When in Afghanistan, SSK had owned and worked in a ladies fancy goods shop in partnership with his wife's brother. In 1997 when opening the shop his brother in law had been shot by the Taliban about 30 times. There had been no problems with the Taliban until this incident.
- xii. In the winter of 1996 the Taliban started coming to the shop about every 15 days, told not to tie their hair, to become Muslims.
- xiii. SSK sold the shop (for \$20,000) and their house (for \$90,000) in 1997. An agent took the family (SSK, his wife, TSK, K and I) to Moscow.
- xiv. None of the children went to school in Moscow.
- xv. In Moscow SSK made and sold jewellery and worked in a shop. The owner of the shop died in March 2013. He had continued to work there until the stock ran out.
- xvi. SSK had problems in Moscow from 1999 from the mafia when he was attacked on his way to market. He was further attacked in April 2012. TSK was attacked in November 2012. In 2013 SSK and TSK were stopped whilst walking, about 15 or 20 days after the shop owner's death and a demand for \$500,000 made.
- xvii. In March 2013 SSK started looking for an agent to get the family away from Moscow.
- xviii. SSK, his wife and TSK had lost contact with I when they had been put on a lorry and were told that I would follow in one or two days.
- xix. The SSK and TSK present as Sikhs. TSK, has not been lived in Afghanistan since he was a baby and has not had any previous integration into Afghan society.
- xx. Although SSK's medical problems do not meet the threshold of N, his and his wife's failing health represents a problem in that they will not have the resilience of fitter younger people in the face of the harm and harassment they will face.

4. In [57] of her decision, Judge Walker says

....the only question to be determined in respect of the appellants is what would be their position if they were returned to Afghanistan....

Judge Walker considered the background material before her including a Freedom House report, a report from Fox News, the COI dated 17<sup>th</sup> September 2013. There was no assertion by either party that the judge had failed to have proper regard to the relevant background material presented. In reaching her decision on the facts found, the judge, in [67] said

...In addition to my findings and reasoning above I also adopt the reasoning of Immigration Judge Eldridge in his decision.

5. Judge Eldridge, who heard and decided the appeal of K, considered in considerable detail the reduction in numbers of Sikhs in Afghanistan. He concluded that there was a continuing decline in Sikh numbers and a systematic intolerance of minority religions in Afghanistan. He concluded that K had shown he had a well-founded fear of persecution for the reason of his religious belief.
6. The country guidance in *TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 595 (IAC)* reads as follows:

*Risk to followers of the Sikh and Hindu faiths in Afghanistan:*

*(i) Some members of the Sikh and Hindu communities in Afghanistan continue to suffer harassment at the hands of Muslim zealots.*

*(ii) Members of the Sikh and Hindu communities in Afghanistan do not face a real risk of persecution or ill-treatment such as to entitle them to a grant of international protection on the basis of their ethnic or religious identity, per se. Neither can it be said that the cumulative impact of discrimination suffered by the Sikh and Hindu communities in general reaches the threshold of persecution.*

*(iii) A consideration of whether an individual member of the Sikh and Hindu communities is at risk real of persecution upon return to Afghanistan is fact-sensitive. All the relevant circumstances must be considered but careful attention should be paid to the following:*

*a. women are particularly vulnerable in the absence of appropriate protection from a male member of the family;*

*b. likely financial circumstances and ability to access basic accommodation bearing in mind - Muslims are generally unlikely to employ a member of the Sikh and Hindu communities - such individuals may face difficulties (including threats, extortion, seizure of land and acts of violence) in retaining property and / or pursuing their remaining traditional pursuit, that of shopkeeper / trader*

*- the traditional source of support for such individuals, the Gurdwara is much less able to provide adequate support;*

*c. the level of religious devotion and the practical accessibility to a suitable place of religious worship in light of declining numbers and the evidence that some have been subjected to harm and threats to harm whilst accessing the Gurdwara;*

*d. access to appropriate education for children in light of discrimination against Sikh and Hindu children and the shortage of adequate education facilities for them.*

*(iv) Although it appears there is a willingness at governmental level to provide protection, it is not established on the evidence that at a local level the police are willing, even if able, to provide the necessary level of protection required in Refugee Convention/Qualification Directive terms, to those members of the Sikh and Hindu communities who experience serious harm or harassment amounting to persecution.*

*(v) Whether it is reasonable to expect a member of the Sikh or Hindu communities to relocate is a fact sensitive assessment. The relevant factors to be considered include those set out at (iii) above. Given their particular circumstances and declining number, the practicability of settling elsewhere for members of the Sikh and Hindu communities must be carefully considered. Those without access to an independent income are unlikely to be able to reasonably relocate because of depleted support mechanisms.*

*(vi) This replaces the county guidance provided in the cases of K (Risk - Sikh - Women) Afghanistan CG [2003] UKIAT 00057 and SL and Others (Returning Sikhs and Hindus) Afghanistan CG [2005] UKAIT 00137*

7. Judge Walker did not consider *TG* in reaching her decision despite it being in the public domain prior to her reaching her conclusions on the evidence. That is plainly an error of law, as submitted by the respondent in the grounds seeking permission to appeal. Mr Gaisford sought to persuade me that although it was an error of law, in fact, the judge had considered material over and above that required to be considered under the previous

CG cases and the inevitable outcome of specific consideration of those findings of fact made and upheld, in the context of *TG* would result in a finding allowing the appeals in any event. Thus the error of law was not such as required the setting aside of the decision to be remade.

8. Ms Brocklesby-Weller submitted there needed to be an holistic assessment of all factors and this had not been undertaken. There was no assessment of the potential availability of funds from family members in the UK or the availability of the voluntary return package and that there was no conclusion as regards potential employment. She referred to [109] and [110] of *TG*:

#### Employment opportunities

109. As with many aspects of this country the evidence relating to economic reality for Sikhs and Hindus is contradictory. On the one hand there is evidence of members of the Sikh and Hindu community holding positions within the legislative bodies and various community and other influential groups, holding trading licences and having viable businesses, owners being able to retain land and property or to rent accommodation for themselves and their families and being able to send remittances to families living abroad, in places such as India. On the other hand, there is evidence of poor members of the community being unable to earn a living and having to live in the Gurdwara which, in accordance with the tradition of Sikh and Hindu hospitality, provides food aid, shelter, and a degree of companionship and protection. The evidence indicates that the declining numbers and economic well-being of those remaining in Afghanistan has an impact on the ability of the Gurdwara to continue to provide such hospitality and support as it is itself dependent upon donations to be able to meet its own financial needs and purchase food and other items.

110. A family without adequate resources is unlikely to be able to pay for private education which may be relevant when considering the situation of Sikh and Hindu children in Afghanistan whom it is proposed to return if receiving such education is demonstrated to be fundamental to that person's identity. There is also evidence that a Muslim is unlikely to employ a member of the Sikh or Hindu community in place of a Muslim, out of fear of potential reprisal or loss of business, indicating difficulties in securing an income with which to fund accommodation or essentials such as food, heating, clothing. The evidence we have been able to consider indicates that there is nothing in the law, the attitude of the Afghan government, or in theory preventing a member of either of these faith groups returned to Afghanistan from being able to set up their own businesses but whether they are able to do so will depend upon the availability of adequate funding, their ability to secure business premises in the light of possible hostility or opposition from Muslim traders who may see them as competition or not wish to rent premises out to them, making it difficult for them to pursue what has now become the remaining traditional trade of shopkeeper/trader. Whether an individual is in such a position is fact specific and they will have to satisfy the Tribunal that they are without economic means especially if they have paid a considerable sum of money to come to the United Kingdom, that they will not be able to re-establish themselves economically, and the impact upon family members as a result. Such individuals may also be required to provide appropriate evidence to show that there are no alternatives such as being supported by NGOs or through the Gurdwara and that any impact upon them, if destitution is alleged, is such that the threshold of Article 3 ECHR will be breached.

9. Although Judge Walker makes reference to the attendance of SSK and TSK at the Gurdwara, she makes no finding on the level of their religious devotion. She refers to the employment of SSK in Russia but there are no findings as to the possibility of employment/trading opportunities in

Jalalabad. It may be that the level of devotion would increase the possibility of local assistance or, the converse may apply. It is simply not possible to establish from the findings of Judge Walker what the possible consequences would be. Although *TG* refers to the difficulties faced by Sikhs, *TG* did not find that all Sikhs will have problems that amount to either persecutory or Article 3 mistreatment. There has been no assessment of the finances available to the family if they were removed to Afghanistan, particularly given that they appear to have been able to make a living in Russia whilst there illegally. Although on the face of it, it seems unlikely that TSK would find employment from Muslims, there has been no assessment of how this would fit with the possibility of his family commencing some sort of trade. Although there is reference to SSK's health problems there is no finding whether or to what extent that would prohibit him setting up some sort of business. Nor is there a finding, or any evidence, as to the possibility of SSK's brother in law who has, it seems, been in the UK for some considerable time and is now a British Citizen, assisting them financially. Although Judge Walker adopted the reasoning of Judge Eldridge in addition to her own findings, those findings do not shed any light upon the issues that ought to be included in any holistic assessment. There is limited consideration given to the funds that SSK left Afghanistan with other than a reference to him having paid the agent to transport him and his family to the UK.

10. Given these shortcomings, I am satisfied that the failure of the First-tier Tribunal Judge to take account of *TG* is a material error of law and I set aside the decision to be remade; all findings of fact preserved.
11. Given the very specific circumstances of this case it is appropriate for the remaking of this appeal to be undertaken by First-tier Tribunal Judge Walker such that she makes findings upon evidence in the context of the country guidance case of *TG*.

Conclusions:

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 to be remade, all findings of fact preserved.

Consequential Directions

This appeal is remitted to First-tier Tribunal judge Walker to enable her to complete her decision.

Date 16<sup>th</sup> March 2016



Upper Tribunal Judge Coker