



IAC-FH-AR-V1

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

Appeal Numbers: AA/10172/2014
AA/10174/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7 January 2016
Delivered Orally**

**Decision & Reasons Promulgated
On 27 January 2016**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

**N S
A K
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Blundell, Counsel, instructed by Malik & Malik Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellants, a husband and wife, in which AK's appeal was a dependent upon the outcome of her husband's appeal, the "Appellant". They are citizens of Afghanistan born on 8 October 1961 and 8 October 1964 respectively. They appeal against the decision of First-tier Tribunal Judge Fox, who, following a hearing at Richmond on 5 August 2015 and in a determination subsequently promulgated on 27 August

2015, dismissed their appeals on asylum and human rights (Article 3 of the ECHR) grounds, the Appellants being recorded as not pursuing any Article 8 claim.

2. Permission to appeal the decision was granted by First-tier Tribunal Judge Andrew on 24 September 2015 on the basis that it was an arguable error of law for the Judge to have failed to take into account the relevant country guidance concerning Sikhs in Afghanistan or the country information as to the present position for Sikhs. It was noted that as submitted, it was apparent from the skeleton argument filed at the hearing that the appellants relied on the Convention reason of religion.
3. At paragraph 50 of his determination the Judge, however, recorded that:

“Mr Khan [that being the Appellants’ Counsel before him] did not pursue the Appellant’s religious profile as part of the asylum claim and the Appellant’s own evidence supports this position.”
4. Earlier at paragraph 5 of the determination the Judge had recorded as follows:

“The first Appellant inferred a fear due to his status as an Afghan Sikh but this was not pursued by the Appellant or Mr Khan at the appeal hearing.”
5. At paragraph 9 of his determination the Judge stated inter alia:

“Mr Khan filed and served a skeleton argument. He also confirmed that the Appellant’s religious status is insufficient to engage the Refugee Convention. Mr Khan confirmed that the issues are confined to imputed political opinion and Article 3 of the ECHR.”
6. I note however that in contrast and at paragraph 33 of the determination under the subheading “Submissions” the Judge recorded as follows:

“33. Mr Khan relied upon his skeleton argument and made submissions that the Appellant genuinely fears return to Afghanistan. The fears arising from his business dealings continue to escalate. The Appellant maintains his fear of the Taliban and provided further details today.”
7. I pause there, because clearly as recorded by the Judge, Mr Khan in his submissions before him, placed reliance on his skeleton argument upon which clearly over paragraphs 7 to 19 he referred to “*the general situation of Afghan Sikhs and whether it would be safe for them to be returned*” and in so doing his skeleton argument placed particular reliance on the relevant country guidance available at the time of the hearing, namely SL and Others (Returning Sikhs and Hindus) Afghanistan CG [2005] UKIAT 00137, and the subsequent decision in DSG and Others (Afghan Sikhs: Departure from CG) Afghanistan [2013] UKUT 0048.
8. The Respondent in her Rule 24 response, relied upon what the Judge recorded at paragraphs 5, 9 and 50 in opposing the Appellant’s appeal. It is submitted by the Appellant in that regard, that those observations do not sit well with the Judge’s acknowledgement at paragraph 33 of the determination that: “*Mr Khan relied upon his skeleton argument and made*

submissions that the Appellant genuinely fears return to Afghanistan". Mr Khan unequivocally relied on his skeleton argument that clearly and in some detail, included the contention that apart from the Appellant's fears *"arising from his business dealings ..."* and *"his fear of the Taliban"*, he also feared return for religious reasons as a Sikh.

9. The question of whether the Judge was correct in recording that Mr Khan before him and on the Appellant's behalf, was clear that he did not pursue the asylum appeal on the basis inter alia, of his religion/ethnicity, when the opening sentence of the Judge's paragraph 34 records Mr Khan's submission before him that *"Sikhs are vulnerable in Afghanistan"* suggests, I find, a significant confusion.
10. I have had regard with the agreement of the parties, to the Judge's written Record of Proceedings (ROP) and to the extent that it is legible, I see that it is recorded by him under "Submissions" that Mr Khan indeed referred to the Appellant's *"fear from business ... from the Taliban"* but there is reference to *"paragraph 19 [that I note dealt with the background evidence concerning the Sikh community facing considerable hostility in Afghanistan] - General discussion"*. Notably there is also reference to *"Sikhs are vulnerable in Afghanistan - two Muslim partners pursue them ..? .. on to A"*. There is also reference to the Judge's record of Mr Khan's submission that Sikhs were a *"small population that will not merge into the community. No sufficiency of protection."*
11. Overall therefore and upon a reading of the determination in this regard as a whole, there is clearly a confusion that is not resolved, as to whether or not the Judge was correct in his understanding that the Appellant's claim for refugee protection on the Convention ground of religion was not pursued. I could find nothing in the ROP that confirms that this was Mr Khan's stated position as recorded in paragraphs 5, 9 and 50 of the determination.
12. It is apparent to me that this is a matter where even if it was the Judge's understanding that Mr Khan at the outset of the hearing, *"did not pursue the Appellant's religious profile as part of his asylum claim"* it appears that in the course of the hearing the position arguably changed and that in consequence it was therefore incumbent upon the Judge to deal with this issue and in failing to do so the Judge fell into legal error.
13. There was handed to me at me at the outset of the hearing, Mr Blundell's skeleton argument which in summary largely reflects what I have said above.
14. It is right to say that most helpfully and in my view realistically and at the outset of the hearing, Mr Walker informed me that the determination was confusing and that upon his reading of the determination and Counsel's skeleton argument before the Judge, *"religion must have been a main factor in the Appellant's claim given the situation of Sikhs in Afghanistan that has been the position for a number of years"*. He therefore informed

me that he conceded that in consequence, the determination disclosed a material error of law.

15. In those circumstances I did not trouble Mr Blundell to address me.
16. It was further agreed that having regard to the error of law found, the length of the hearing estimated at two and a half hours, there were highly compelling reasons falling within paragraph 7.2(b) of the Senior President's Practice Statement as to why the decision should not be remade by the Upper Tribunal. It was clearly in the interests of justice that the appeal be heard afresh in the First-tier Tribunal. I agreed with the parties that in consequence of the error of law identified, it was apparent that the Judge's failure to deal with the claimed Convention reason of religion, would have inevitably tainted the Judge's adverse findings in respect of the other aspects of the Appellant's asylum claim and that in the circumstances it was right that in ordering that the appeal be heard afresh, none of the findings of the First-tier Tribunal Judge should be preserved.
17. At the remitted hearing cognisance can of course be taken of the recent country guidance decision in TG and Others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595 (IAC).
18. For the reasons I have above given and by agreement with the parties, I conclude therefore that the appeal should be remitted to a First-tier Tribunal Judge other than First-tier Tribunal Judge Fox, to determine the appeal afresh at Taylor House Hearing Centre on the first available date with none of the Judge's findings preserved. I am informed that for that purpose an interpreter in Punjabi will be required.

Notice of Decision

19. The First-tier Tribunal erred in law such that the decision should be set aside and none of its findings preserved.
20. I allow the Appellants' appeal to the extent that I remit the making of the appeal to the First-tier Tribunal at Taylor House before a First-tier Tribunal Judge other than the Judge to whom I have above referred.

Anonymity

The First-tier Tribunal anonymised the appeal in accordance with the FTT (IAC) Presidential Guidance Note No. 2 2011. That order is preserved.

Signed

Date 23 January 2016

Upper Tribunal Judge Goldstein