Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01928/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 March 2018	**On 24 April 2018**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

BL
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Harvey, Counsel, instructed by Legal Justice Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal McAll (the judge), promulgated on 3 May 2017, in which he dismissed the appellant's appeal against the respondent's decision dated 9 February 2017 refusing his protection claim.

Factual Background

2. The appellant is a national of Afghanistan, date of birth [ ] 1979. He and his family, consisting of his wife and 3 sons, are Hindu. They entered the United Kingdom clandestinely on 8 September 2016. The appellant claimed asylum on that date.

3. The appellant maintained that he and his dependents would be subjected to serious ill treatment if returned to Afghanistan on account of their religion. They lived in a district of Kabul since 2003 and had encountered harassment and discrimination based on their religion including the throwing of stones at their house, the posting of stickers on their door, and verbal abuse. The appellant's wife could not go to the Hindu temples as she was unable to go out alone. Their oldest son was hit on the head with a stone because he was Hindu. On one occasion, two years before arriving in the UK, the appellant was hit by a soldier using a rifle butt because he was sleeping on a coach when the other Muslim passengers were praying. The appellant stopped working 2 months before leaving Afghanistan. He does not have a job to go back to and the family would have nowhere to live.

4. Although she accepted that the appellant and his family where Afghan Hindus, the respondent rejected his account of their ill-treatment. This was because of internal inconsistencies in the appellant's account relating to the reasons that caused the family to leave Afghanistan and the time that their problems started. The respondent relied on background evidence and the Country Guidance case of TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595 (IAC) in concluding that members of the Hindu community did 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 religious identity per se, and that the appellant and his family would be returning to Kabul as a family unit where there were functioning Hindu temples from which they could seek support and assistance.

The decision of the First-tier Tribunal

5. The judge heard oral evidence from the appellant and his wife and considered a bundle of documents that included statements from them, several media articles, a 'generic' report by Dr Jasjit Singh, dated 9 June 2016 in respect of the status of Sikh women in Afghanistan, and a copy of TG.

6. In the section containing his findings of credibility and fact the judge quoted extensively from TG and indicated that he had considered the background evidence published after TG. The judge said it was clear that the Afghan Hindu and Sikh communities continue to reduce in number as members of those communities seek better lives elsewhere. The communities remain concentrated

in areas such as Kabul and are seen as easy targets for kidnaps and extortion. The judge found that the situation for Sikhs and Hindus had not improved since TG, but that the situation had not altered to such an extent that would entitle him to depart from the Country Guidance decision.

7. At [30], with reference to the report by Dr Singh, the judge stated that this particular topic (the status of Sikh and Hindu women in Afghanistan) "… *was considered and dealt with in the decision of TG and others*." The judge noted that Dr Singh arrived at "*a different conclusion than the Tribunal in its consideration of the HJ Iran test*", and the expert's opinion that "… *the forced veiling of women contradicts the beliefs of seek women*." The judge noted that Dr Singh had not been called to give oral evidence whereas the expert in TG had been cross-examined. The judge was not satisfied that the Tribunal in TG would have reached a different conclusion if Dr Singh's opinion had been communicated to them, and was not satisfied that the report amounted to fresh evidence or information entitling him to depart from the guidance in TG.

8. In respect of the appellant's submission that his wife did not have the freedom to walk the streets of Kabul unless she was covered as she would otherwise be automatically identified as a Hindu and targeted, the judge quoted from paragraphs 92 and 93 of TG and noted that the appellant's wife did not fall within the "single women" group referred to in the Country Guidance decision. Having acknowledged that the appellant's wife was unable to find employment as a Hindu woman in Afghanistan, and accepting that women in general are discriminated against, the judge did not find that the discrimination identified by the appellant and his wife amounted to persecution for the purposes of the Refugee Convention.

9. The judge then considered the appellant's evidence in respect of the assault by the soldier on the coach, noting that there was no mention of this incident in the appellant's Screening Interview, and concluded that the appellant had fabricated this incident as he would otherwise have mentioned it in his Screening Interview.

10. The judge considered whether the appellant's children would be able to receive an education in Afghanistan and quoted from paragraph 94 of TG. At [36] the judge noted that the funds used by the appellant to bring his family to the UK would have comfortably secured a private education for his children and observed that the appellant had been in employment with sufficient funds to pay for accommodation, provide for his family and to save a substantial sum of money. Given that the appellant had been employed for 12 years without experiencing any discrimination the judge found that he would be able to find and obtain employment in Kabul which would allow him to finance his children's education. The judge was not therefore satisfied that the appellant's children would face such serious discrimination in their education so as to amount to persecution.

11. The judge accepted that the appellant's son had been struck by a stone on the way home from school, and that the appellant had worked exceedingly hard and in difficult for circumstances to provide for his family and to save his income in order to find a better life outside Afghanistan. The judge did not accept the appellant's claim that he and his family would be without accommodation given his evidence that the Sikh and Hindu populations are continuing to dwindle.

12. While the judge accepted that the appellant and his family had faced some discrimination in the past, he was not satisfied that they had been specifically targeted, other than one isolated incident involving his son. Applying the guidance in TG, the judge concluded that neither the appellant nor his family held a well-founded fear of persecution.

The challenge to the First-tier Tribunal's decision

13. The grounds of appeal, as amplified by Ms Harvey in her skeleton argument and in her oral submissions, challenge the judge's decision on 3 bases. It is first submitted that the judge misdirected himself in his application of TG to the appellant's wife. In TG the Tribunal indicated that the HJ (Iran) issue in respect of Sikh or Hindu women had not been adequately developed by the parties. The judge merely noted that the appellant's wife was not a single Hindu woman and therefore had the protection of her husband. There was however no finding of fact as to why the appellant's wife did not leave her home unaccompanied and unveiled, and no assessment as to whether she modified her behaviour in order to avoid ill-treatment on account of her religion or sex. The 2nd ground contends that, in rejecting the appellant's account of the attack on the coach as a fabrication, the judge failed to appreciate the limited purpose of the Screening Interview and that he was not consequently entitled to draw an adverse inference based on the appellant's failure to mention this attack at his Screening Interview. The 3rd ground contends that the judge failed to undertake a lawful assessment of the cumulative effect of the discrimination faced by him and his family, and, in so doing, failed to make material findings of fact and failed to take into account relevant considerations, particularly in respect of the appellant's ability to find employment on return to Afghanistan, the availability of accommodation, and the impact on the appellant's children.

Discussion

14. At [30] the judge indicated that the status of Sikh and Hindu women in Afghanistan, in the context of the HJ (Iran) principles, "… *was considered and dealt with in the case of TG & others*.." The judge was not consequently satisfied that the evidence before him, albeit relating to the status of Sikh women and not Hindu women, was sufficient to entitle him to depart from the findings in TG.

15. Paragraph 92 and 93 of TG read,

> "92. Dr Giustozzi also referred to Sikh and Hindu women not leaving the house unless properly covered, as with most if not all women in Afghanistan, in order to avoid an adverse reaction amongst some members of the Muslim community. We accept that a Sikh or Hindu woman not 'properly attired' may be subjected to abuse and harassment on the streets in Afghanistan but the evidence clearly indicates that this is the same for all women, whatever their religious persuasion, including Muslim women. It was submitted that such a requirement may give rise to an HJ (Iran) issue. Whilst our attention was not drawn to Y&Z by the parties we can confirm that we have considered the application of the HJ (Iran) issue to the religious context although this argument was not adequately developed before us and fails to distinguish between members of these religious groups who choose not to go out alone or covered as that is the way they ordinarily behave and those that may be forced to hide a fundamental element of their belief(s) to avoid persecution.
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> 93. Nevertheless we do consider that a Sikh or Hindu single woman without family protection from a husband, other male member of the family, or within a family unit in which there is no male member of the household able to provide effective protection, may be entitled to international protection based upon threats and related acts as a result of their perceived vulnerability as a member of a minority religious group with no form of available protection against such. In this respect we note the evidence regarding abductions of women and female children and forced conversions to Islam. Credible threats of any form of violence or serious harm (including forced marriage involving forced conversion or not), where there is inadequate protection should entitle that person to a grant of international protection."

16. It is apparent from the above extracts that the Tribunal in TG did not comprehensively deal with the issue whether the requirement for women to be veiled and to be accompanied by a male relative outside the home, which would include visiting places of worship, amounted to a modification of a fundamental element of their beliefs, or the reasons for such modification. Because he wrongly believed that the position of Hindu women had been 'dealt with' in TG, the judge failed to conduct an analysis on the HJ (Iran) model. As a consequence, there are insufficient findings as to whether the appellant's wife would, even in the absence of any feared ill-treatment, conceal herself with a veil and only venture outside accompanied for cultural or religious reasons, and whether the treatment feared by the appellant's wife might amount to persecution. In her statement the appellant's wife indicated that she was a prisoner in her own home. On the basis of the evidence before the judge, it cannot be said that he would inevitably have reached the same conclusion even if he had undertaken a full and proper assessment under the HJ (Iran) principles. I am consequently satisfied this amounts to a material legal error.

17. I am additionally satisfied that the legal error is material given that there was no consideration of the HJ (Iran) principles in respect of the position of women as a Particular Social Group, not just Hindu women. The general background evidence suggests that women, regardless of whether they are single or married,

and regardless of their religion, do not have the freedom to walk outside without being veiled and without being accompanied by a suitable male relative. One can easily imagine the debilitating impact this may have on a woman's personal freedom. The imposition of these strictures appears to be on account of both religious principles and sex. I note that in NS (Social Group - Women - Forced marriage) Afghanistan CG [2004] UKIAT 00328, a CG case now of some vintage, women were held to constitute a particular social group within Afghanistan. Had the judge applied the HJ (Iran) principles to the particular facts of this case, his conclusion, so far as it relates to the appellant's wife, may have been different.

18. At [36] to [40] the judge finds that the appellant would be able to find employment given that he previously worked for 12 years delivering medical cartons, that he would consequently be able to afford to educate his children privately, and that there would be accommodation available for the family given the dwindling size of the Hindu and Sikh populations.

19. The appellant's evidence was that he and his family could not afford to leave Afghanistan when their property was seized in Khost in 2003. The appellant was previously employed transporting cartons of medicine around the environs of Kabul. He did not have his own vehicle and relied on public transport. He maintained that he only got his previous job from a Muslim man who knew his father, and that his father was no longer residing in Afghanistan. He believed he would be unable to obtain other employment because of religious discrimination. The evidence presented by the appellant indicated that he did not have any qualifications and had not studied. He stated an interview that he could "write a name". He maintained that all the money earned by him and his father was put into a joint family savings to enable them to come to the UK. Since he and his family arrived in the UK his parents left Kabul and he believed they are making their way to the UK. The appellant no longer has any family members left in Afghanistan. The appellant's wife claimed that, although her family are in Afghanistan, they do not speak as they are unhappy with her choice of husband and there has been no contact since the marriage in 2003. The appellant claimed that it had taken many years for his family to save sufficient funds to enable them to leave the country together. He claimed in his asylum interview [78] that he had been saving money his whole life in order to leave Afghanistan.

20. The judge found that the appellant had worked very hard for a period of 12 years in order to save enough money to get his family outside the country. I am not however satisfied that the judge made clear findings in respect of the circumstances in which the appellant obtained his employment in Kabul, or that the judge appreciated that the funds paid to the agent were jointly earned by both the appellant and his father over an extended period. Nor am I satisfied that the judged adequately engaged with the explanation given by the appellant as to why he would have difficulties in getting the same employment or finding

alternative employment. In concluding that the appellant would be able to get employment and that his employment would enable him to privately educate his children, the judge has not taken into account this evidence. I am satisfied that the judge's failure to engage with the explanation provided by the appellant in respect of the circumstances in which he obtained his previous employment and the difficulties he envisaged in finding further employment on return, and his failure to take into account the length of time that it took both the appellant and his father to accumulate their savings, renders his conclusion that the family would have adequate resources to pay for private education unsafe.

21. Paragraph 94 of TG reads,

> "In relation to Sikh and Hindu children a number of areas of concern arise from the evidence we have been asked to consider. The evidence indicates that there have been occasions of Hindu and Sikh families not sending their children to school in Afghanistan, especially girls, as a result of the fear of harassment and ill-treatment which is corroborated by the evidence. Within the state system where children of all denominations are taught there is evidence of requirements to learn and recite the Koran, discrimination, and lack of adequate education facilities. In areas where numbers warrant, such as Kabul, special schools have been set up to provide education for children by Sikh teachers and some children are taught within the Gurdwara as a result. Such education is only provided however up to and including primary level with the requirement that at secondary level children will be taught within the state system where they become exposed to problems referred to in the evidence unless an individual's family has the means to pay them to be educated privately. If credible evidence is provided of a real risk of such ill-treatment and harassment to a child on return sufficient to prevent them receiving a proper education, which is shown to be a fundamental element of their personal identity, that they wish to pursue, rather than a child not being further educated as a result of the traditional belief that they will continue within a family business and therefore do not require to be further educated or for some other reason, then this may amount to such serious discrimination either on its own or cumulatively with other forms of discrimination such as to cross the threshold of persecution. However, this is a fact sensitive issue that must be considered in each case."

22. The appellant's oldest son, who was 12 ½ years old at the date of the First-tier Tribunal hearing. If returned to Afghanistan he would enter general secondary education. If his father was unable to privately educate him, the appellant's oldest son, who had already been specifically targeted on account of his religion, would be required to attend a general secondary school where he may encounter sustained discrimination. Given the guidance in paragraph 94 of TG, this discrimination may amount to persecution. I am therefore satisfied that the judge's failure to adequately engage with the appellant's evidence relating to his employment is a material legal error.

23. For the reasons given above I am satisfied that the judge's decision is vitiated by material legal errors. There is no need for me to consider in any detail the

remaining ground of appeal. I am nevertheless satisfied that the judge may not have fully appreciated the limited purpose of the Screening Interview when he concluded that the appellant fabricated his account of the assault on the coach. In YL (Rely on SEF) China [2004] UKIAT 00145 the Tribunal stated, at [19]

> "… a screening interview is not done to establish in detail the reasons a person gives to support her claim for asylum. It would not normally be appropriate for the Secretary of State to ask supplementary questions or to entertain elaborate answers and an inaccurate summary by an interviewing officer at that stage would be excusable. Further the screening interview may well be conducted when the asylum seeker is tired after a long journey. These things have to be considered when any inconsistencies between the screening interview and the later case are evaluated."

24. There is no indication that the judge was aware of the nature and purpose of the screening interview and, although he additionally relied on what he described as further embellishments in the appellant's later evidence concerning this incident, I find that his conclusions are nevertheless unsafe.

25. Both parties indicated that, were I to find a material error of law, the most appropriate approach would be to remit the matter back to the First-tier Tribunal for a fresh hearing. given the nature of the judge's legal errors, I am satisfied this is the most appropriate course of action.

Notice of Decision

The First-tier Tribunal's decision is vitiated by material legal errors. The case is remitted back to the First-tier Tribunal for a fresh hearing, all issues open, before a judge other than judge of the First-tier Tribunal McAll.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

23 April 2018

Signed
Upper Tribunal Judge Blum

Date