



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

Appeal Number: PA/09614/2017

THE IMMIGRATION ACTS

Heard at Birmingham CJC

On 3rd October 2018

Decision & Reasons

Promulgated

On 30th October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**BUPINDER [S]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss E Norman (Counsel)

For the Respondent: Mrs H Aboni (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Jessica Pacey, promulgated on 6th November 2017, following a hearing at Birmingham on 27th October 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Afghanistan, and was born on [~] 1988. He appealed against the decision of the Respondent dated 19th September 2017, refusing his claim, and that of his wife and two children, for asylum and humanitarian protection pursuant to paragraph 339F of HC 395.

The Appellant's Claim

3. The essence of the Appellant's claim is that he is an Afghan Sikh who cannot return to Afghanistan where he would be persecuted for reasons of his religion and ethnic orientation.

The Judge's Findings

4. The judge's findings began from the premise that there was a previous decision by another judge, namely, by Judge Garbeet (AA/12364/2014) which was promulgated on 10th November 2016, following a hearing at Stoke-on-Trent, Bennett House, on 24th October 2016. In that determination the judge had wrongly concluded (as it subsequently transpired) that the Appellant was not from Afghanistan, and that there were serious concerns about the credibility of his claim. At the hearing now before Judge Pacey, it had been conceded that the Appellant was indeed from Afghanistan. His nationality was therefore not an issue. The only question that remained now was whether his claim was credible with respect to the alleged persecution that he complained of.
5. At the hearing before Judge Pacey, Mr Samra, appearing on behalf of the Appellant, submitted that the Appellant's protection claim should now be accepted given that it was conceded that he was from Afghanistan, because it would now be plausible that he would be found credible with respect to other matters. He did not speak Dari or Pushto, and so could not obtain employment on return.
6. On the Respondent's part, the judge noted how, at the hearing below, the Appellant had provided statements and documents to confirm his nationality and that the Afghan Embassy had acknowledged that he was a national of Afghanistan. He had also provided a DNA test to establish that he was the brother of two people, who had been accepted as Afghan nationals, with full refugee status in the UK, and with leave to remain. Therefore, it was accepted that the Appellant was a national of Afghanistan, see paragraph 18 of Judge Pacey's determination. However, what was submitted now before Judge Pacey was that the previous judge had not accepted the Appellant's claim that he had been persecuted by the Taliban or that his account of suffering attacks was credible. The Appellant's home area was Jalalabad, and this was under the control currently of the Afghan government, so there would be avenues of protection open to him. Moreover, Judge Pacey had regard to the country

guidance case of **TG [2015] UKUT 595**, where it was accepted not every Afghan Sikh case stood to succeed.

7. Against this background, Judge Pacey made the following two findings. First, that given that the starting point was **Devaseelan [2004] UKIAT 000282** the decision of Judge Garbeet on 10th November 2016, with respect to his having found the whole of the Appellant's account to be lacking in credibility, had to be the starting point of considerations now by Judge Pacey (see paragraphs 27 to 29).
8. Judge Pacey also very properly considered how she might depart from the decision of Judge Garbeet, within the structures already allowed for in the Rule in **Devaseelan**, by expressly stating that,

“The question therefore to my mind is the extent to which the fact that, albeit correctly on the evidence before me, the previous Immigration Judge found the Appellant's claim to be from Afghanistan not to be credible, this affected her consideration of the other aspects of his claim, and whether that consideration was, to use a word employed in oral submission, ‘tainted’ by a finding on nationality” (paragraph 29).
9. Second, Judge Pacey then looked at the decision of Judge Garbeet and observed that his crucial findings were at paragraph 27, where he had said that, “I am not satisfied even to the lower standard of proof that the Appellant is from Afghanistan or that the attacks by the Taliban he described took place”. Judge Pacey deduced from this that the use of the word “or” was one which suggested that there were two limbs to paragraph 27 and that the second part was “a discrete and separate finding from a finding that the attacks by the Taliban did not, in their view, take place. The second finding is not dependent on the first” (paragraph 33).
10. Based on this, the judge went on to conclude that, “despite that, with respect to the Appellant, despite his apparent lack of knowledge of Afghanistan, he is from that country” but he had simply reasserted the same points made before, and did not address the credibility issues particularly put forward in the previous determination (at paragraph 23). The judge so concluded at paragraph 34 of the determination.
11. The appeal was dismissed.

Grounds of Application

12. The grounds of application state that the judge erred in law because she proceeded on the basis that the starting point, under the Rule in **Devaseelan**, had to be the decision of Judge Garbeet, whereas that decision was fundamentally flawed by a wrong decision on nationality, when it had subsequently been confirmed that the Appellant was indeed an Afghan national, such that everything that thereafter flowed from that

initial wrongful conclusion, was bound to have been also wrongly arrived at.

13. On 3rd January 2018 permission to appeal was granted by the Tribunal on the basis that there was an arguable error of law in the way that Judge Pacey assessed credibility, failing to do so entirely for herself, and basing her conclusions to a large extent upon those of Judge Garbeet on 10th November 2016. Second, permission was also granted on the basis that the country guidance case of **TG [2015] UKUT 00595** had not been applied.

Submissions

14. At the hearing before me on 3rd October 2018, Miss Norman, appearing as Counsel on behalf of the Appellant, submitted that the fact that the Appellant lacked knowledge of his surroundings in Afghanistan, including the mountains and the terrain, as well as other aspects of the country, confirmed that he lived an isolated life in his home and was afraid to venture out, except to go to the family's market stall. That being so the Appellant's very ignorance went to proving his particular claim. It was therefore important for the judge to have undertaken her own assessment of the credibility of the Appellant, rather than relying upon the credibility findings of Judge Garbeet. Second, she submitted that this was a case where the Appellant's two brothers had been granted full refugee asylum status in the UK. Whereas, of course, it is accepted, that each case must be determined on its own facts, to the extent that the basis of their claim, as Afghan Sikhs, from the same area, was similar to the Appellant's own claim, was a matter that could relevantly have been taken into account, which the judge did not do. Third, there ought to be, accordingly, a finding of an error of law because there should have been an entirely fresh approach to the credibility of this Appellant by Judge Pacey. No previous finding should be preserved, apart from the Appellant's nationality.
15. For her part, Mrs Aboni submitted that if one looks at the determination of Judge Garbeet, it is clear that considerable time is spent assessing the Appellant's credibility, before the conclusion is reached that "the Appellant's account is riddled with inconsistencies" (paragraph 23). A number of examples are then given in subparagraphs that are carefully set out. For example, the Appellant had said that he does not venture out of his house except to go to temple. And yet it transpired he did go out. He had said that he did not know how to ride a bicycle, and that the journey to the brother's wife was almost 25 to 30 minutes' bicycle ride, and yet it transpired that he did go to his brother's market stall with some food alone, when he was then attacked for the first time in 2005. Indeed, the Appellant and his brothers, who are also Sikh, left on a daily basis to go to the market stall (see paragraph 23(iii)). Moreover, in his screening interview, the Appellant did not mention having been subject to any attacks in Afghanistan (paragraph 23(iv)). Furthermore, the Appellant mentioned for the first time in oral evidence before Judge Garbeet that his brother had been attacked by the Taliban in Afghanistan on his way to the

market stall, and when he had asked why this had not been done before, he had said that he had not been asked previously (paragraph 23(v)).

Error of Law

16. I am satisfied that the making of the decision by the judge did involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.
17. First, this is a case where the fact that a previous judge had reached the wrong conclusion with respect to the Appellant's nationality meant that the credibility assessment made by the judge had to be very carefully evaluated before it could be adopted. Instead, what the judge actually had done, against the background where it is accepted that documentation has been forthcoming from the Afghan Embassy that the Appellant is an Afghan national, is to proceed on the basis that Judge Garbeet had come to clear conclusions about the Appellant's credibility. This is clear from what is said by Judge Pacey (at paragraph 34) that the Appellant "has reasserted points he made but no more" (paragraph 34). Judge Pacey has gone on to say that, "that does not address the credibility issues particularly put forward in the previous determination at paragraph 23, which do not rely on the extent of his knowledge about Afghanistan generally or his home area in particular" (paragraph 34). This is because it is not the case that the expression that, "I am not satisfied even to the lower standard of proof that the Appellant is from Afghanistan or that the attacks by the Taliban he described took place" can be mutely compartmentalised into two discrete limbs. It is not the case that the use of the word "or" means that there are two "discrete and separate findings" here. This is because plainly the reference to "the attacks by the Taliban" is a reference to attacks by the Taliban in Afghanistan. Given that the Appellant's nationality by the previous judge had not been accepted, as his being from Afghanistan, this very question needs to be visited again in terms of his credibility by the freshly convened Tribunal.
18. Second, Judge Garbeet did draw attention to the fact that, "he confirmed that his brothers, who are also Sikh, left the house on a daily basis to go to the market stall" (paragraph 23(iii)). This shows that the situation of his brothers was relevant to his own situation. These two brothers have now been granted refugee asylum status in the UK. The basis of why that has been the case is directly relevant to the Appellant's own claim, not only with respect to the evidence before Judge Pacey, but also with respect to the evidence before Judge Garbeet, insofar as it remained relevant on the **Devaseelan** principles. With respect to other findings at paragraph 23, these are all matters that should have been considered again by Judge Pacey because it is entirely arguable that the findings arose directly from a conclusion that the Appellant was not from Afghanistan made by Judge Garbeet on the previous occasion.

Notice of Decision

19. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Pacey, pursuant to Practice Statement 7.2(b) because the nature or extent of any judicial fact-finding, which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.
20. No anonymity direction is made.
21. This appeal is allowed.

Signed

Date

Deputy Upper Tribunal Judge Juss

22nd October 2018