Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13276/2018

THE IMMIGRATION ACTS

Heard at Manchester
On 13th June 2019

Decision & Reasons Promulgated
On 7th August 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

MRS J
(ANONYMITY DIRECTION MADE)
Appellant

AND

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:
For the appellant: Miss G Patel, Counsel, instructed by Legal Justice Solicitors.
For the respondent: Mr C Bates, Senior Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant has been given permission to appeal to the Upper Tribunal the decision of First-tier Tribunal Judge Devlin. In a decision promulgated on 7th March 2019 the judge dismissed her appeal against the respondent's refusal to grant her protection and found no breach of a protected human rights.

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2. The appellant is a national of Afghanistan, born in January 1993. She made a claim for protection on 14 August 2018. She arrived in the United Kingdom on 28 April 2015 along with her husband and their child. That child was born in May 2016 and whilst in the United Kingdom she gave birth to their second child in July 2018. Her husband firstly made a claim for protection, with the appellant and his child as his dependents. That claim was rejected and he became appeal rights exhausted on 15 January 2018.

3. His claim related to difficulties experienced as a Hindu in Kabul, Afghanistan. In the present claim the roles are reversed with the appellant basing her claim upon difficulties she has experienced as a Hindu with her husband and the fact they now have two children.

4. In her claim she said she had been living in Kabul with her family and then travelled to Russia where she married her husband in January 2015. He ran into difficulties there and they then moved to the United Kingdom. Subsequently, his brother arrived here directly from Afghanistan and he was granted protection on appeal. His claim also related to the difficulties for Hindus in Afghanistan.

5. This appellant's claim was refused by the respondent in November 2018. It was accepted she was from Afghanistan and that she followed the Hindu religion. The respondent applied the decision of Ocampo -v- SSHD [2006] in which the Court of Appeal applied the guidelines given in D -v- SSHD [2002] UKIAT 00702. The case held the Devaseelan guidelines are relevant where the parties involved are not the same but there is a material overlap of evidence.

6. Judge McCall heard her husband's appeal during which the position of this appellant was considered. Reference was made to the country guidance of TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595 (IAC). The guidance was that that Hindu communities in Afghanistan per se do not face a real risk of persecution. Whether an individual Hindu was at risk real of persecution upon return was fact-sensitive. All the relevant circumstances had to be considered. Women are particularly vulnerable in the absence of appropriate protection from a male.

7. Judge McCall referring to this appellant and concluded she did not come within the single women category in the guidance because she was married. Her statement had not referred to any attacks she personally experienced in Afghanistan. The judge found that the family network was larger than claimed and they could provide support, including finance to pay for the education of the children.

8. In line with this decision the respondent rejected this appellant's claim that she could not leave her home or that her children could not receive education and there would be an absence of State protection. The respondent noted that during her asylum interview she made reference to being threatened and abused when she was 14 of 15 years of age but there was no evidence of difficulties

subsequent. The respondent accepted she had experienced harassment but not to the level of persecution.

The First tier Tribunal

9. This appellant's appeal was heard in Manchester on 20 December 2018. She was represented by Ms Patel, as she is now. The judge referred to the details of her husband's claim as set out in the First-tier Tribunal determination. The judge requested a copy of the decision in the successful appeal of the individual said to be her husband's brother. His appeal was heard by First-tier Tribunal Judge Grant Hutchinson in Glasgow. It post-dated the decision of Judge McCall in her husband's appeal.

10. First-tier Tribunal Judge Devlin referred to the two country guidance cases of TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595 (IAC) and AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC). The latter county guidance case concerned relocation to Kabul. This appellant originated in Kabul so would not be relocating there. The decision was relevant in relation to its findings on conditions there. The Upper Tribunal had stated the security and humanitarian situation in Kabul was not dissimilar to conditions throughout Afghanistan. It was not in general unduly harsh for a single adult male in good health to relocate to Kabul but the particular circumstances of an individual applicant had to be taken into account. A person with a support network or specific connections in Kabul was likely to be in a more advantageous position on return and this support may counter any particular vulnerability. Although the number of security incidents was increasing, the proportion of the population directly affected was is tiny. The security situation in Kabul was not at such a level as to render internal relocation unreasonable or unduly harsh.

11. The judge then referred to the principles set out in Ocampo -v- SSHD [2006] and made findings. The judge analysed in detail potential differences between her husband's appeal and the appellant's appeal.

12. The decision in her husband's case was taken as a starting point. Judge McCall did not find his claim that his sister had been abducted credible. The judge also rejected the evidence that they had married in Moscow and lived there from 2012 to 2015 or that he had trouble with the Russian Mafia. Judge Devlin commented on this appellant's failure to obtain further evidence to call into question these findings. The judge considered facts personal to the appellant not brought to the attention of the first Tribunal.

13. The judge then commented in detail about the successful appeal said to relate to her husband's brother. The judge questioned the

claimed relationship. The judge considered whether in fairness the appeal should have been adjourned as requested by Counsel to enable the appellant's representatives to obtain further proofs. However, the judge concluded there had been ample opportunity to address this. In the alternative, the finding in his appeal was that he had no family in Afghanistan. It did not follow that this appellant had no family there.

14. The judge then went on to consider at paragraph 88 onwards the position of the appellant's child, [S], who has speech problems.

15. At paragraph 103 onwards the judge expressed difficulty with the appellant's claim that she and her husband were practising Hindus. Whilst the previous judge had made no finding on this there was a reference to the absence of evidence of their attending services.

16. The judge did not find the appellant to be credible and gave a number of reasons as set out at paragraph 140 onwards. The judge concluded by accepting the appellant and her husband were Afghan nationals and of the Hindu faith but otherwise rejected the claim. At paragraph 165 the judge goes on to detail the country guidance cases and seeks to apply them. The judge's conclusions are set out at paragraphs 256 onwards.

The Upper Tribunal

17. Permission to appeal was granted on the basis that it was arguable the judge assessed the appellant's credibility from a westernised viewpoint. Furthermore, it was arguable the judge had not considered the position of the appellant's youngest child.

18. In opening Miss Patel advised that the appellant's brother-in-law came directly from Afghanistan in October 2017; the appellant and her husband already being here. His appeal was heard in 2018, which post-dated the decision of Judge McCall in her husband's appeal. She also said that the diagnosis of the eldest child speech problems also post stated that decision and the youngest child had not been born. Judge McCall did not consider the question of children's education.

19. Ms Patel argued that the judge erred in law in how he treated the evidence relating to the appellant's brother-in-law. This is referred to paragraph 64 where the judge quotes extracts from the decision of Judge Grant Hutchinson. Judge Devlin questioned whether the blood relationship had been demonstrated. At that point in the hearing Ms Patel requested an adjournment so DNA evidence could be obtained. The judge refused to adjourn in that there had been adequate time for the direction of the necessary proofs. The judge also commented that the relationship did not have to be established by DNA evidence but the individual concerned could have attended or at least provide an affidavit. Ms Patel argued that

short of DNA evidence the court would have been likely to reject the evidence of a witness simply saying they were related. In the alternative, the judge questioned if he was her brother in law how his claim was relevant to her appeal. Miss Patel makes the point that Judge Grant Hutchison had found that her brother-in-law (and therefore her husband) had no family in Afghanistan to turn to for support. Consequently, this was relevant. Judge Devlin had made the point that if her husband had no family this still did not mean she was without family. However, Ms Patel submitted that in the Hindu culture when she married her husband's family became hers.

20. I was referred to paragraph 78. Ms Patel submitted that the judge the made a mistake of fact. The judge referred to the brother-in-law's wife and made the point that if she had no family like her husband that was not relevant to the situation of this appellant unless they were sisters.

21. She then referred me to the judge's conclusion that the appellant had not established she and her husband practiced their faith regularly. The judge had referred to an out of date letter from the Manchester Temple of 24 August 2015. However, there was a much later letter dated 24 July 2017 referred to in her husband's appeal. Furthermore, at the appellant's substantive interview she said she attended the Temple several times a week(Q99).

22. Ms Patel then moved on to her next point, suggesting that the judge did not take her husband's earlier decision as a starting point but in effect treated it as conclusive. She referred to the additional evidence in this appellant's appeal; the decision in her brother-in-law's appeal and the speech issue of the eldest child and the birth of a second child.

23. A further ground advanced was that the judge did not follow the country guidance decision of TG and others. She acknowledged that at paragraph 165 onwards the judge considers the country guidance decision. She argued that he failed to take into account the length of time she and the family had now been in the United Kingdom and the ongoing deterioration in the position of Hindus. She submitted this then linked into the question of education for the children and whether the family would have sufficient resources to pay for them.

24. She also argued the judge did not adequately deal with the difficulties she would face going outside in Kabul and attempting to practice her religious beliefs. She acknowledged the judge did consider these matters but he concluded her treatment was no different from that of any other female. She submitted this was not the proper approach. She submitted that the appellant was being required to hide her true religious feelings by dressing and

conducting herself as if she were a Muslim woman which was contrary to the HJ Iran principle.

25. She also argued that the treatment the children would receive on return would be unjustifiably harsh. She submitted the judge did not engage with this, for instance, in relation to their education.

26. In response, Mr Bates dealt with the appellant’s claimed brother-in-law. His point was that it was for the appellant to establish her claim. What there was about the relationship amounted to a simple assertion. The judge at paragraph 68 had noted that there was a difference between the two names and he had not been provided with any country expert report to explain naming traditions. Paragraph 69 records the presenting officer had raised this point, highlighting the fact the appellant had not produced any independent evidence to show the connection. There was nothing in the decision of First-tier Judge Grant Hutchinson to make the connection. Mr Bates makes the point that DNA evidence was not necessary. Other evidence could have been received, for instance, documents from Afghanistan or photographs and so forth to show the two together as to demonstrate the relationship. Ms Patel had suggested that had an individual simply provided a statement and said they were related it was likely the respondent would have rejected this. However, the matter was being adjudicated by the judge and oral evidence from the individual could have been received. Given her argument that such evidence is not readily acceptable and it was all the more reason for the appellant’s representatives to have obtained DNA evidence in anticipation of the hearing.

27. Mr Bates then went on to point out that the judge considered the position in the alternative: that he was fact the brother of the appellant. The significance of this related to the statement he had no family support. Mr Bates suggested Ms Patel is wrong in saying the judge erred in fact when referring to her brother-in-law’s sister. The point being made by the judge was that the finding by First-tier Grant Hutchinson that his wife had no family still did not exclude this appellant having family. The only way it could was if there was a connection established with her family, by her brother-in-law’s wife being her sister.

28. Regarding the suggestion that the judge did not follow the country guidance decision of TG and others and applied Devaseelan as an endpoint rather than starting point. I was referred to the decision were the judge specifically said Devaseelan is the starting point. The judge then went on to see what evidence beyond that. The judge went through the background evidence provided. TG and others did not find all Sikhs and Hindus were at risk in Afghanistan.

29. It had been suggested that the situation had deteriorated since country guidance case. Mr Bates said the judge carefully

considered this at paragraphs 179 onwards and at paragraph 184.The judge considered the UNHCR guidelines at paragraph 191. I was referred to paragraph 195 of the decision where the judge, having quoted from the guidelines, goes on to state that notably they did not make a recommendation that protection should be afforded to all Hindus. At para 218 the judge had made the point that much of the background evidence produced related to Sikhs and he could not necessarily transfer that over to the situation of Hindus.

30. Regarding the appellant’s practice of her faith, the judge had commented that she claimed it was a 10 minutes’ walk to the temple yet she was unable to provide any details in relation to the journey. The account then change to the temple being simply behind the house. The judge had referred to the outdated letter from the temple. Ms Patel had relied upon a more up-to-date letter contained in her husband’s determination. However, the judge had to make a determination on the practice of her religion as at the time of hearing in 2018. Again, he made the point the burden of proof is upon the appellant. The judge went into detail about the appellant’s ability to practice her religion. At paragraph 101 the judge referred to not being satisfied that her son had any significant speech or development problems or that treatment would not be available in Afghanistan or that his education would thereby be compromised.

31. Mr Bates emphasised the length of the judge’s decision because of all the different issues considered in detail.

32. In response, Ms Patel said that the situation of Sikhs and Hindus have always been considered together. They are both minority communities in Afghanistan who have experienced difficulties. She said that they are associated together, for instance, by sharing the same Temples. Regarding the comments by the judge about the brother in law’s wife, she submitted the judge was speculating in raising the possibility of them being sisters. Whilst the judge did not have the updated information from the Temple referred to in the decision of First-tier Tribunal Judge McCall if that earlier decision that it was incumbent upon the judge who also have regard to the evidence led in that decision.

Conclusions

33. It is clear from the decision of First-tier Tribunal Judge Devlin that he has taken exceptional care in the preparation of the reasons. It does the decision an injustice to simply refer to its length. The decision is not simply padded out by extensive recording from case law but is a careful analysis of the nuances involved.

34. This was a difficult appeal for any judge because it called for a consideration not only of the claim being made but also the evidence in relation to the overlapping decision in an appeal by her husband. Furthermore, agility was required because an additional appeal decision introduced said to relate to the appellant's brother-in-law. The judge had to evaluate the appellant's claim and compare and contrast that with the evidence in the earlier appeals. Then the judge had to look for any distinguishing features in the claim and evidence.

35. The decision of first-tier Tribunal judge McCall was concerned with the claim made by the appellant's husband. His credibility was an issue. The judge then heard from the present appellant. The reasons given by the judge are detailed. The judge referred to the absence of evidence about her husband's time in Moscow and particularly referred to the absence of any evidence from the temple in Moscow to confirm his presence. At paragraph 36 of that decision the judge refers to this appellant claiming to have lost contact with her family and to have no support mechanism. The judge commented on discrepancies between what this appellant said and what her husband said at screening.

36. Miss Patel has made a number of points seeking to challenge the decision of First-tier Tribunal Judge Devlin. She has argued that the judge did not apply the previous decision as the starting point but based his conclusions upon it. I find this is clearly unsustainable. The judge has carefully set out the practice to be followed where there are related decisions at paragraphs 36 onwards. A number of features have been advanced distinguishing the appellant's claim from that of her husband. There has been, for instance, the evidence about the brother-in-law. The presence of a second child has to be considered. The judge in applying the Devaseelan guidelines clearly went through what had been considered and what potentially was different. The judge has been most careful in setting out the various features considered as can be seen at paragraph 53 through to 62. In summary therefore, I find no error established on this point.

37. The next issue in contention related to how the decision in the claim the brother-in-law's appeal was dealt with. Again, the judge has been most careful in dealing with this issue. This is set out at paragraph 63 through to paragraph 87. There was no unfairness in the judge refusing an adjournment. The burden of proof is upon the appellant and her representatives should have known what the relevant proofs were. If they were relying upon a decision relating to a third party then clearly the proofs should have included establishing a nexus. As was pointed out, this did not necessarily need to be by way of a DNA test. In the circumstance, the judge was perfectly entitled to refuse an application made in the course of the hearing when the point was pursued in cross-examination.

38. Furthermore, the judge went on to consider the position in the alternative. Ms Patel has suggested the judge became muddled in doing so and engage in speculation in relation to a possible sister. Miss Patel has not followed the point the judge has made. Essentially, even if this person were related to the appellant through marriage then his claim to have no family support did not mean she had no family. The reference to this person and his wife having no family support would only be relevant if his wife were related to the appellant. Whatever may be the cultural practices Ms Patel referred to, by marrying her husband the appellant did not lose her own family and their potential for support.

39. I fail to see how it can be suggested the judge did not apply the country guidance cases. The judge has clearly had regard to them and also to country information subsequent. Again, this is set out in considerable detail in the decision. In determining the appeal it is clear the judge is focusing upon the appellant's personal circumstances and the individual features in the appeal. This is precisely the guidance given. Whilst Sikhs and Hindus clearly experience discrimination in Afghanistan it does not follow that this reaches the level of persecutory treatment for all Sikhs and Hindus.

40. The judge had regard to the appellant's ability to practice her religious beliefs. Relevant to this was the fervour with which she embraced her beliefs. Again, it was for the appellant to demonstrate this. The judge had given clear reasons for concluding she had not demonstrated she practised her religion, either in Afghanistan or Russia (see para 103). The judge confirms an awareness that there is no requirement for corroboration. However judge is entitled to have regard to evidence which might reasonably be produced to support the claim. The judge assessed answers and found them inadequate. It is unreasonable therefore to criticise the judge in relation to a letter produced in the earlier appeal decision of her husband's and referred to obliquely.

41. The final grounds advanced related to paragraph 276 ADE(1)(vi) and the reasonableness of the appellants ability to reintegrate. She has spent her lifetime Afghanistan so will a full appreciation of the culture. To suggest reintegration is not possible because of how she would be treated in the country is really repeating the protection claim.

42. In summary, I find no material error of law in this decision established. As stated the judge has been most careful in his analysis of the evidence. I find no fault with how the judge dealt with the appellant's claim or how he considered the best interests of the children. The issue is not whether I would have taken a different view of a matter but whether there is a material error. I see nothing in the other points raised which detract from the outcome.

Decision.

No material error of law has been established in the decision of First-tier Tribunal Judge Devlin. Consequently, that decision dismissing the appeal shall stand.

Deputy Upper Tribunal Judge Farrelly.   Date 1 August 2019