Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13391/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 April 2019	**On 09 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

M A S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss J L Blair, Counsel instructed by Legal Justice Solicitors
For the Respondent: Miss J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal from a decision of First-tier Tribunal Judge James promulgated on 16 February 2018.

2. The appellant is a national of Afghanistan born on 1 January 1982. She arrived in the United Kingdom on 16 October 2015 and claimed asylum on 5 June 2017. Her asylum claim was treated by way of dependency, being parasitic on the separate claim of the same date brought by her husband. There are five dependent children. The husband's appeal was refused on 26 February 2016, appealed and refused on 15 March 2016. That appeal

was dismissed on 10 October 2016, in substantive decision of First-tier Tribunal Judge Burns.

3. When the matter of this appellant's claim came before Judge James, the starting point, in the light of the decision in **Devaseelan v Secretary of State for the Home Department [2002] UKIAT 00702**, was that the decision of Judge Burns and that Judge James was required to consider the extent to which there had been any change, particularly of familial circumstance or within prevailing country guidance.

4. Judge James came to the conclusion, having regard to the material that was available, that although the situation in relation to Sikhs within Afghanistan was becoming progressively more problematic as the population shrank, there was a rejection of a claim in relation to Article 15(c) on the basis that there was no evidence that the appellant would face the death penalty, execution, unlawful killing or torture on return, nor would she face inhuman or degrading treatment.

5. The basis upon which permission to appeal was granted in this matter turned primarily upon the error on the judge's part in finding that Article 15(c) was not engaged. It is argued that the judge failed (either at paragraph 30 or elsewhere) to give clear or adequate reasons that she was satisfied that the level of mistreatment of the appellant and her daughter would reach the level of serious harm. The judge did not give any proper or adequate consideration of the country guidance decision in the case of **TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595 (IAC)** in relation to the risk of persecution on return of Afghan Sikhs.

6. Miss Blair, on behalf of the appellant, relies on her skeleton argument which helpfully summarises and brings into sharper focus the somewhat discursive grounds which had been settled by her instructing solicitors. In her oral submissions she relies particularly on the fact that there had been a significant change in the substantive issues to be addressed by Judge James, in contradistinction to those which were considered and resolved by Judge Burns, in relation to the appellant as a female Sikh and the two daughters growing in age and having a greater period in secondary education in the United Kingdom.

7. The criticisms made by Miss Blair are well-founded, that there is not an appropriate engagement with the principle in **HJ (Iran) v Secretary of State for the Home Department (Rev 1) [2010] UKSC 31** and particularly the requirement of female Afghan Sikhs being required to live discreetly. This is of relevance not merely to the appellant but also to her two teenage daughters.

8. The impact on the appellant and her daughters not fully or properly considered. However, my principle concern is with the paucity of the judge's of the applicability of 15(c). It is not enough simply to rely upon what Judge Burns may have decided two years earlier in cases where the

situation on the ground was changing and changing rapidly and where the country guidance was of greater significance.

9. However, what is dispositive of this appeal, is the complete absence of any consideration of Article 8 of the European Convention on Human Rights. Paragraph 3 of the decision makes plain that the appellant was relying on Articles 2, 3 and 8 of the Convention, and yet when it comes to the judge's findings and reasons, none of it addresses Article 8.

10. Miss Isherwood for the Secretary of State takes me to paragraph 29 and to the application of the statutory test under Section 55 of the 2009 Act which considers the best interests of minor children. Whilst this is a feature which is placed in the balance when an Article 8 assessment is being made, it is not the only feature nor is it determinative of the assessment. The two teenage daughters had spent further time in secondary school since the matter was heard by Judge Burns. There was material available from the school regarding their education and development which ought properly to have been considered and was not. In addition, the level of discrimination which the appellant and her two daughters might suffer is something which was given at best only cursory consideration.

11. Looking at the decision holistically, the error into which the judge fell was in placing undue reliance on Judge Burns' decision and not taking proper account of the altered circumstances between then and when the judge determined the matter, in particular the features especially relevant to the appellant as a woman and to her two teenage daughters.

12. Although the decision is in many ways comprehensive, the analysis of these matters is illusory. Miss Isherwood concedes in relation to Article 8 that it is insufficient, although she says not material in the overall context of the decision. I reject that. The failure to address Article cannot be remedied by reference to other sections of the decision. This is not a decision which appears to have been the subject of anxious scrutiny. It is not appropriate to try to preserve any one part of it. The flaw goes to the heart of the decision.

13. The decision must be set aside and the matter heard afresh. Of course the outcome may be entirely the same, but it is important the judge considers all matters and applies the correct tests.

Notice of Decision

(1) This appeal is allowed and the decision of the First-tier Tribunal is set aside.

(2) The matter is remitted to the First-tier Tribunal for it to be reheard by a judge other than Judge James.

(3) No findings of fact are preserved.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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.

Signed *Mark Hill* Date 7 May 2019

Deputy Upper Tribunal Judge Hill QC