



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/00385/2019

**THE IMMIGRATION ACTS**

Heard At Manchester Civil Justice Centre  
On 14<sup>th</sup> February 2020

Decision & Reasons Promulgated  
On 6<sup>th</sup> August 2020

**Before**

**UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Mrs K + 4**  
**(anonymity direction made)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

For the Appellant: Mr Holmes, Counsel instructed by Legal Justice Solicitors  
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a national of Afghanistan born in 1980. Her dependents are her husband and three children.
2. The Appellant and her family members have been trying to secure international protection in the United Kingdom since at least the 8<sup>th</sup> August 2016 when they are recorded as having arrived at London Gatwick. At first it was the Appellant's husband who claimed asylum, with the Appellant and their children as his dependents. That claim failed and the subsequent appeal had been dismissed by

First-tier Tribunal Smith, in a decision dated 14<sup>th</sup> March 2017. On the 4<sup>th</sup> July 2018 the Appellant herself claimed asylum, this time with other family members as her dependents. The Appellant's claim was refused on the 31<sup>st</sup> December 2018 and the Appellant appealed.

3. When the appeal came before First-tier Tribunal Judge Herwald in February 2019 some matters were not in issue. The family were accepted by the Respondent to be nationals of Afghanistan, and they were accepted to be Sikhs. The relevant country guidance for the assessment of the risk of persecution for reasons of religious belief was therefore TG (Afghan Sikhs etc) Afghanistan CG [2015] UKUT 595. The Appellant and her dependents further submitted that their religious identity placed them at an enhanced risk of ill-treatment within the framework of Article 15(c) of the Qualification Directive. Alternatively, it was submitted that there were "very significant obstacles" to the family's integration in Afghanistan such that the appeals should be allowed on Article 8 grounds pursuant to paragraph 276ADE(1)(vi) of the Immigration Rules.
4. The First-tier Tribunal noted that this was not the first time that this family had pursued an appeal on protection grounds. Applying the principle in Devaseelan [2002] UKIAT 00702 and TK (Consideration of Prior Determination – Directions) Georgia [2004] UKIAT 00149 Judge Herwald treated Judge Smith's decision as his starting point. The effect of that was that neither the Appellant nor her husband were to be treated as credible witnesses; their account of why they had decided to leave Afghanistan was rejected. Judge Herwald did not accept that they feared for their life there, noting *inter alia* that the family had been living in Russia for many years (where all of the three children had been born) but had voluntarily returned to Kabul in 2016. Accordingly he dismissed the appeals.
5. The Appellant sought permission to appeal to the Upper Tribunal. She was granted such permission on the 8<sup>th</sup> October 2019 by Deputy Upper Tribunal Judge Davey.
6. On the 18<sup>th</sup> November 2019 the matter came before me at the Manchester Civil Justice Centre. The grounds of appeal were that the First-tier Tribunal had erred in law in the following material respects:
  - (i) Failing to make findings on the Article 15(c) claim for humanitarian protection; and
  - (ii) Likewise failing to make any findings at all on whether removal would result in a disproportionate interference with the Appellant's private life as protected by Article 8, such an assessment required by the United Kingdom's international obligations under the ECHR and by paragraph 276ADE(1) of the Immigration Rules.
7. Before me Mr Bates accepted that both grounds were made out. Although the Tribunal had rejected in clear terms the historical narrative advanced by the Appellant – these findings not being challenged in this appeal – the Secretary of State agreed that the Tribunal had failed to make any finding on the two matters raised in

the grounds. The Appellant had submitted that the situation for Sikhs was such that they fell within an *Elgafaji* enhanced risk category, and that their ability to lead meaningful private lives in Afghanistan was severely curtailed. Neither myself nor Mr Bates could find any evidence in the determination that these arguments had been addressed. The determination did contain a wider Article 8 assessment, but did not specifically address the question of “very significant obstacles”. By my written decision of the 19<sup>th</sup> November 2019 I ordered that the decision of Judge Herwald be set aside to that extent, in order that those matters can be determined.

8. The matter was relisted before me on the 14<sup>th</sup> February 2020, when I heard submissions from the parties on the matters outstanding. There has since been a delay in promulgation of a decision, for which the parties have my apologies. Immediately following the hearing in February I was unwell, and I was then on leave. I had been intending to deal with this case upon my return from leave but due to the special measures put in place to deal with the Covid-19 pandemic I was then unable to access the file, held at Field House. On the 27<sup>th</sup> May 2020 I notified the parties that the file was then in my possession and that I intended to proceed to remaking the decision in the appeal. I made the following directions:

“I am conscious that since I heard submissions the Upper Tribunal has promulgated the decision in AS (Safety of Kabul) Afghanistan CG [2020] UKUT 00130 (IAC). In view of the Appellant’s reliance on Article 15(c) I consider that it would be appropriate to now give the parties an opportunity to address that decision, should they wish to do so. Given that the bulk of the submissions have been made it seems to me that this could be done without difficulty by remote hearing”.

9. In response to these directions Mr Bates on behalf of the Respondent sent in a brief note inviting me to determine the appeal in light of the applicable country guidance. For the Appellant Mr Holmes took the opportunity to file further written argument. I have taken those written submissions, and indeed all the submissions and evidence into account in reaching my decision. I am grateful to the parties for their assistance and again apologise for the length of time it has taken for this decision to be issued.

### **Legal Framework**

10. Article 15 of the Qualification Directive<sup>1</sup> reads:

‘Serious harm consists of:

- (a) Death penalty or execution
- (b) Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

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<sup>1</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

- (c) Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.'

11. In the 2009 case of *Elgafaji v Staatsecretaris van Justitie* (C-465/07) the European Court of Justice gave guidance on the application of Article 15(c). It held that unlike the matters covered by (a) and (b) thereof, part (c) of the article did not require the individual claimant to establish a personal risk. Article 15(c) covers a more general risk of harm:

"34 Reference is made, more generally, to a 'threat ... to a civilian's life or person' rather than to specific acts of violence. Furthermore, that threat is inherent in a general situation of 'international or internal armed conflict'. Lastly, the violence in question which gives rise to that threat is described as 'indiscriminate', a term which implies that it may extend to people irrespective of their personal circumstances.

35 In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive ..."

12. Importantly, however, the Court went on to note that the concept of such a generalised risk is not inconsistent with an individualised assessment. It here introduced what has come to be known as the *Elgafaji* 'sliding scale' of harm:

"39 In that regard, the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection."

13. The most recent country guidance addressing the security situation in Kabul is AS (Safety of Kabul) Afghanistan CG [2020] UKUT 00130 (IAC). In AS the Tribunal was asked to consider the evidence in the context of the reasonableness of internal flight to the city. In its review the Tribunal *inter alia* concluded that the findings made by the Tribunal in AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 on Article 15(c) should be maintained. Both parties invited me to have regard to those findings which can be summarised as follows:

- (a) There is not a general risk of serious harm arising from indiscriminate violence in Kabul albeit that there is today widespread and persistent conflict related violence there [headnote (ii) AS]
- (b) A person with a support network or specific connections in Kabul is likely to be in a more advantageous position on return [headnote (v) AS]

- (c) The *Elgafaji* sliding scale nevertheless had to be applied to the particular circumstances faced by an individual claimant. A relevant factor could be membership of an “outright risk category” as defined by UNHCR such as “members of minority religious groups and persons perceived as contravening Shari’a law” and “members of minority ethnic groups” [paragraphs 86, 209 AK].
14. In respect of the weight to be attached to the UNHCR’s views on such matters, Mr Holmes relied upon the (unappealed) observations in AS (safety of Kabul) Afghanistan CG [2018] UKUT 00118 that: “it is uncontroversial that significant weight can and should be attached to such evidence from the UNHCR as the Guidelines on International Protection and the ‘Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan’” [at §189].
15. Relying as he did on the Appellant’s minority status, Mr Holmes accepted that also relevant to my enquiry would be the guidance of the Tribunal on the position of Sikhs in Afghanistan. The headnote of TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595 (IAC) reads:
- “(i) *Some members of the Sikh and Hindu communities in Afghanistan continue to suffer harassment at the hands of Muslim zealots.*
  - (ii) *Members of the Sikh and Hindu communities in Afghanistan do 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 ethnic or religious identity, per se. Neither can it be said that the cumulative impact of discrimination suffered by the Sikh and Hindu communities in general reaches the threshold of persecution.*
  - (iii) *A consideration of whether an individual member of the Sikh and Hindu communities is at risk real of persecution upon return to Afghanistan is fact-sensitive. All the relevant circumstances must be considered but careful attention should be paid to the following:*
    - a. *women are particularly vulnerable in the absence of appropriate protection from a male member of the family;*
    - b. *likely financial circumstances and ability to access basic accommodation bearing in mind:*
      - *Muslims are generally unlikely to employ a member of the Sikh and Hindu communities*
      - *such individuals may face difficulties (including threats, extortion, seizure of land and acts of violence) in retaining property and / or pursuing their remaining traditional pursuit, that of a shopkeeper / trader*
      - *the traditional source of support for such individuals, the Gurdwara is much less able to provide adequate support;*
    - c. *the level of religious devotion and the practical accessibility to a suitable place of religious worship in light of declining numbers and*

*the evidence that some have been subjected to harm and threats to harm whilst accessing the Gurdwara;*

*d. access to appropriate education for children in light of discrimination against Sikh and Hindu children and the shortage of adequate education facilities for them.*

*(iv) Although it appears there is a willingness at governmental level to provide protection, it is not established on the evidence that at a local level the police are willing, even if able, to provide the necessary level of protection required in Refugee Convention/Qualification Directive terms, to those members of the Sikh and Hindu communities who experience serious harm or harassment amounting to persecution.*

*(v) Whether it is reasonable to expect a member of the Sikh or Hindu communities to relocate is a fact sensitive assessment. The relevant factors to be considered include those set out at (iii) above. Given their particular circumstances and declining number, the practicability of settling elsewhere for members of the Sikh and Hindu communities must be carefully considered. Those without access to an independent income are unlikely to be able to reasonably relocate because of depleted support mechanisms.*

*(vi) This replaces the county guidance provided in the cases of K (Risk – Sikh – Women) Afghanistan CG [2003] UKIAT 00057 and SL and Others (Returning Sikhs and Hindus) Afghanistan CG [2005] UKAIT 00137.”*

16. Paragraph 276ADE(1)(vi) of the Rules provides that a claimant is to be granted limited leave on human rights grounds where he can demonstrate that he has:

*‘(vi) ... lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant’s integration into the country to which he would have to go if required to leave the UK.’*

17. The test of “very significant obstacles” has been construed as a stringent one: Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 415 (IAC). It will only be satisfied where there is a significant impediment to the claimant re-establishing a private life for himself in the country of return. The ambit of ‘private life’ within the meaning of Article 8 is broad, and famously not susceptible to exhaustive definition. In the context of this rule it could encompass the right to work and earn a living, accessing education, securing basic necessities, practising one’s faith, and the right to meet and form relationships with other human beings.

### **The Facts**

18. The Appellant is a 40 year-old woman. Her dependants are her 36 year-old husband and their three children who are today a girl aged 13, a girl aged 8 and a boy aged 5.

19. The agreed facts are that the Appellant and her family are practising Sikhs who although originally from Khost, were formerly resident in Kabul. They left Afghanistan in 2004 and travelled to Russia where the Appellant’s husband ran a

small business. The children were all born in Russia. The family returned to Afghanistan in 2016 before leaving again, this time for the United Kingdom. The Appellant suffers from Thalassaemia and anxiety. There is no evidence of any illness in any other member of the family.

20. A number of findings of fact have been made against the Appellant and her family, first by First-tier Tribunal Judge Smith, and then by First-tier Tribunal Herwald in his decision of 28<sup>th</sup> March 2019. These include:
- a) A rejection of the claim that they fled Afghanistan, in either 2004 or 2016, as a result of persecution;
  - b) A finding that the family funded the \$35,000 cost of their migration to the United Kingdom from an “independent income” and so could do so again;
  - c) Prior to the family’s arrival in the United Kingdom none of the children received an education in either Russia or Afghanistan – leading to the inference that the adult Appellants’ expressed fears of their daughter not being able to attend school are disingenuous.
21. At the date of the hearing before me the family had been living in the United Kingdom since August 2016.

### **Country Background Information**

22. I have had regard to the findings in TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595 (IAC), AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 and AS (Safety of Kabul) Afghanistan CG [2020] UKUT 00130 (IAC).
23. At the hearing in February I admitted an additional bundle of evidence adduced on behalf of the Appellant. This included an updated report by Dr Magnus Marsden and a series of recent news reports. I refer to these documents, where appropriate, in my discussion and findings below.

### **Discussion and Findings**

24. In accordance with the guidance in *Elgafaji* my starting point must be to determine the nature of the general risk prevailing in Kabul. Only then can I assess whether the particular characteristics of the Appellant mean that she will be specifically affected, so that a lower level of indiscriminate violence will be required in order that she qualify for protection.
25. By its decision in AS, the Tribunal has maintained the country guidance in AK. Although neither Tribunal was satisfied that levels of violence had reached the threshold where *any* civilian was at risk, they both make for sobering reading. The concern expressed at paragraph 248 of AK has been shown to be well-founded. In 2012 the Tribunal could not overlook the fact that NATO was leaving, or that “the current overall trend is one of rising levels of violence now over several years”; in 2020 the Tribunal accepted the evidence that civilian casualties in Afghanistan are now at record levels, with the Taliban and other groups such as Islamic State rushing

to fill the void left behind by withdrawing NATO troops. UNAMA have documented a 42% rise in the number of civilian casualties between July and September 2019, compared to the same period in 2018. At the date of their report of the 17<sup>th</sup> October 2019 they had recorded 8,239 civilian casualties for the year. It was evidence like this which caused the Tribunal in AS to acknowledge that the situation had deteriorated in the years since 2012.

26. The Tribunal in AS concluded that the chances of an economically active resident (that is to say an individual who needs to leave the home – there a male Muslim) being subject to indiscriminate violence was “low”. Faced with competing submissions about how low, the panel accepted that chances were 1 in a 1000. At §201:

“Kabul (both the city and province) is significantly affected by widespread and longstanding conflict-related violence and has been - at a relatively consistent level - since at least 2016. Some of the violence is targeted (e.g. at police, embassies or ethnic groups) but much of it is indiscriminate. Even the targeted violence affects civilians in an indiscriminate way, because people can be killed or injured as bystanders. There is also a significant problem of violent crime”.

27. The position of minorities was not specifically considered by the Tribunal in AS, but the panel did endorse the reasoning in AK. In this regard Mr Holmes relied in particular on paragraph §209 of AK:

“209. We agree with Mr Vokes and Ms Rutherford that the “sliding-scale” element of Article 15(c) as set out by the Court of Justice in *Elgafaji* in para 39 would appear to make it possible for anyone with a relevant individual characteristics to be able to show a real risk under Article 15(c) even if the relevant level of violence was not at a high enough level for such a person to qualify merely as a civilian. The Court does not confine its description to civilians whose relevant risk characteristics are such as to make them at risk of serious harm under 15(a) or (b) (or indeed Article 1A(2) of the Refugee Convention or Article 3 of the ECHR). **In principle, therefore, there is scope for Article 15(c)’s “sliding-scale” to protect not only recognised risk categories such as those set out (non-exhaustively) by UNHCR in its 2010 Eligibility Guidelines (i)-(xi), but also intermediate categories who do not come within the former’s scope...**”

28. Those Guidelines were set out at AK’s §86:

“86. Reference has already been made to the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan*, 17 December 2010. They include references to a considerable body of empirical data about conditions in Afghanistan, as well as UNHCR’s evaluation of it in the form of guidelines. The Guidelines identify two types of risk category. The first concerns persons with a specific risk profile:

“UNHCR considers that individuals with the profiles outlined below require a particularly careful examination of possible risks. These risk profiles, while not necessarily exhaustive, include [NB. For convenience we start each subcategory on a separate line:]



- (i) individuals associated with, or perceived as supportive of, the Afghan Government and the international community, including the International Security Assistance Force (ISAF);
- (ii) humanitarian workers and human rights activists;
- (iii) journalists and other media professionals;
- (iv) civilians suspected of supporting armed anti-Government groups;
- (v) **members of minority religious groups and persons perceived as contravening Shari'a law;**
- (vi) women with specific profiles;
- (vii) children with specific profiles;
- (viii) victims of trafficking;
- (ix) lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals;
- (x) members of (minority) ethnic groups; and
- (xi) persons at risk of becoming victims of blood feuds."

29. So there is scope for the Article 15(c) 'sliding scale' to be applied so as to offer protection to members of minority faiths. Whether this family - this Appellant - should be offered such protection must be evaluated in light of the particular evidence on Sikhs.

30. In TG & Ors (Afghan Sikhs persecuted) the Tribunal were not satisfied that there was in 2015 a real risk of serious harm *per se*. It did however accept that Sikhs had faced persecution under the Taliban regime, and that the community continued face systematic discrimination in Afghanistan [at §78]:

"It is not disputed before us that **historically members of the Sikh and Hindu community in Afghanistan have been subjected to what may be perceived as acts of persecution** by both state and non-state actors. The material we have been asked to consider demonstrates that the number of such incidents has reduced (but this might be explained by the reduction in the Sikh and Hindu population) and there is currently little material to support a claim of official state sponsored persecution. **The material does support a finding that there is ongoing harassment of and discrimination against some members of the Sikh and Hindu community in Afghanistan**, as set out above, but the evidence includes very few examples of recent acts of harm or threats of harm sufficient to satisfy the necessary test. We bear in mind Dr Giustozzi's point that this is an area that has not been prioritised by the media for reporting but when we consider all the material available to us, we find it of note that there is little to suggest that there have been continuing recent incidents of harm toward Sikhs/Hindus. Although Dr Giustozzi has described a picture of 'intensive harassment' at page 12 of his report, he has not supported this by drawing attention to specific examples of individuals being repeatedly harassed. Expropriation has been said to have almost stopped because the most valuable properties have already been taken away. Under the heading 'post-2005 violence and harassment' Dr Giustozzi focuses on examples of violence up to 2010 and references to more recent years are vague and generalised. This is notwithstanding the fact that Dr Giustozzi's

researcher carried out three interviews in December 2013-January 2014 with senior members of Sikh and Hindu communities ...”

31. It then makes the following observation:

**“We accept that whilst the subject group diminishes in size opportunities to inflict harm may also decrease and note that the small number of Sikhs and Hindus who remain in Afghanistan have been reported to be even more vulnerable to abuse** (see UNHCR report 2013), but the lack of evidence of such ongoing issues is a relevant consideration. Perhaps the best evidence in support of the existence of a current real risk from the perspective of the appellants is to be found in the Respondents OGN of 2013 which we set out above.”

32. Mr Holmes submitted that that this was an important point. In the 1980s there were believed to be in excess of 50,000 Sikhs living in Afghanistan. At the date of the appeal in TG that population had diminished to the extent that the community in Kabul numbered no more than 3000 individuals. That meant that whilst the incidence of reported hostility towards the community dropped, it was nonetheless rendered more vulnerable. That this is so is expressly accepted at §83 of TG: “we note the decline in actual numbers of members of these religious groups remaining in Afghanistan although we also appreciate this may increase their vulnerability”. The report of Dr Marsden before me details a visit that he made to Kabul in 2018. He found that there were at that time still approximately 150 Sikh or Hindu families living in Kabul: this roughly accords with the estimate of 1000 people given in the Respondent’s CPIN today. There has accordingly been since 2015 a reduction of approximately two thirds of the remaining population. It should also be noted that according to Dr Marsden, many of those families are Sikhs who have internally relocated to Kabul from other parts of Afghanistan, so in fact the indigenous Sikh community of the city is even smaller than that.
33. As to the circumstances faced by that small population, I was referred to the evidence in the Appellant’s bundle.
34. In TG the Tribunal had heard that the once prosperous community in Kabul - historically engaged in trade and commerce - had faced significant losses in the preceding twenty years. Under the Taliban the community gradually lost trading partners, through either hostility or fear, so that by the time that that country guidance was given, their losses ironically underpinned the Tribunal’s conclusions that they were no longer at risk *per se*: they could no longer be subject to land seizures or extortion because there was nothing left to rob. In his 2018 visit Dr Marsden found that most of the men in the Sikh community were today engaged in low-return small businesses, in the main selling herbal remedies, or ‘Greek medicine’. These businesses employ only individual men, and bring in just about subsistence levels of income. I pause here to note that this country background information - unchallenged by the Respondent - is somewhat difficult to square with the First-tier Tribunal’s conclusion in this case that having spent \$35,000 on getting here, this family would be returning to an “independent income” and comparable levels of prosperity. That conclusion is simply not consistent with the objective

evidence that this is a community that has been economically devastated. I am nevertheless bound by Judge Herwald's finding that it is likely that the Appellant still has family left in Kabul, and in light of Dr Marsden's evidence that the community accommodate their own – either in private homes or in the Gurdwaras themselves – I am satisfied that there would be a roof over their heads and basic financial support extended to them should they return. Another preserved finding is that the Appellant's husband, a resourceful businessman, could, in common with his co-religionists in Kabul, support the family by starting a small business.

35. It is however in respect of security and safety that Mr Holmes concentrated his submissions.
36. Dr Marsden reports that there have been a number of significant attacks on the community in recent years. The largest occurred on the 1<sup>st</sup> July 2018 when 17 senior members of the community were murdered in a targeted attack by a Daesh suicide bomber. The delegation had been on their way from Kabul to Jalalabad to meet with President Ashraf Ghani to discuss *inter alia* the security concerns of the community. The May 2019 CPIN *Afghanistan: Sikhs and Hindus* reports that although the attack was widely condemned at government level the crime remains unsolved. Dr Marsden records subsequent incidents of a shopkeeper being shot in Herat, and the gruesome murder of a young herbalist in Kabul, apparently abducted on his way home and never seen alive again. The community reported to Dr Marsden that as well as dealing with the heartbreak of this boy's death, they also had to deal with the trauma of the authorities' actions following their discovery of his body. Although mutilated by torture (possibly with acid), Sikh elders maintain that he was identifiable as a Sikh by the *khalsa* on his wrist and his long hair. The police nevertheless failed to inform the community that the boy's body had been found, and instead buried him in an unmarked grave in the Muslim cemetery. It was only recovered by the community for Sikh funeral rites some two months later.
37. These murders – significant as they are for such a small population – are extreme but not the only incidents of violence recorded in the evidence before me. A report prepared by the World Sikh Organisation of Canada, based on cited reports from reputable news organisations, entitled the *Plight of Afghan Sikhs and Hindus* (hereinafter 'WSO') makes reference to other, more regular pressures placed on the community. Four features of daily life are identified, which I consider in turn below: as these issues also feature in the May 2019 CPIN I have included relevant references to that.
38. The first is that Sikhs face physical and verbal assault by hostile members of the public. As well as actual attacks this everyday abuse can include taunting and name calling, turbans being pulled from the head, being spat at, windows being smashed, homes being graffitied, or stones and rubbish being thrown [see for instance CPIN 6.2.3]. The CPIN [at 6.2.1] notes the conclusions expressed by the US State Department that the community are particularly vulnerable to this kind of harassment and attack because the distinctive headdress of the turban renders them highly visible. This hostility can range from the loudspeakers of a Mosque being

'aimed' at Sikh homes as intimidation [CPIN 6.2.2] to a man being knocked from his motorbike in a targeted incident in September 2018 [CPIN 6.2.3] and people being beaten up and robbed in the street [WSO at page 85].

39. Second, although the Sikh community in Kabul enjoys very warm relationships with many of their Muslim neighbours [see for instance CPIN at 6.1.1] there is a constant pressure to convert. Some commentators attribute this to extremist elements from elsewhere in Afghanistan having moved into the capital [2.3.8]. This pressure can be applied simply by abuse in the street (see above) but there have also been examples of abductions and assaults in which it has been a feature. One example in the WSO report is of a shopkeeper in Kabul being threatened by a man who in June 2016 held him at knifepoint and ordered him to renounce his faith. The CPIN documents young Sikh men disguising themselves in public in order to avoid such pressure [6.1.3] or coming under pressure to fast during Ramadhan [6.2.1].
40. Third, there is a tension between their position as an officially recognised minority, ostensibly under the protection of the Afghan government, and the complete failure of the state to offer any kind of restitution for the crimes that have already been committed against them. As the Tribunal heard in TG, the Sikh community in Kabul have in the past twenty years lost significant amounts of valuable land in the city centre to illegal and often violent 'land grabs'. To date there has been no legal action to return the land to its rightful owners. Today they live in overcrowded and cramped quarters right next to the land that they know is legally theirs. The new 'owners' of these properties are often powerful individuals and so there is for the alienated Sikh a constant fear that they will be targeted by these men in pre-emptive strikes to protect the seized assets.
41. Fourth, the rise of Daesh in the last few years as given rise to a new threat: pressure to pay the *jizya*, a heavy 'protection tax' levied against non-Muslims. Under the Taliban the community had been forced to pay this money to survive and today this barely veiled form of extortion has made a comeback. There have been several reports of Daesh proclamations - and some members of the community in Kabul have received direct demands for payment - accompanied by threats of death if the 'tax' is not paid. Against the background of the suicide attack in Kandahar these threats are taken extremely seriously [CPIN 6.2.4-6.2.5].
42. As to whether the community can reasonably be expected to look to the Afghan state for protection against these harms I am bound by the findings of the Tribunal in TG that it cannot:

"90 In relation to Sikh or Hindu individuals who do experience persecution or harassment and discrimination capable of crossing the threshold into serious harm (based upon the Horvath/Hathaway approach that persecution = serious harm + ineffective protection), **whilst there may be a willingness at governmental level to provide protection we do not find it established on the evidence that at a local level members of the Afghan police are willing, even if able, to provide them such protection to the level required in Refugee Convention/Qualification Directive terms.** There is evidence in the materials provided [Appendix A. Items 10 and 33]

of police corruption. We accept the evidence that it is reasonably likely that complaints made directly to the police of harassment by members of the Sikh and Hindu community have been ignored. In the event of intervention that has occurred this has mainly been as a result of a specific instruction that they do so issued at the highest level. There is also evidence that some of those involved in 'Mafia style' gangs responsible for land seizures and exploitation of members of these groups, based upon a perception of wealth, have been members of the police or security forces past or present who specifically target members of the Sikh and Hindu communities as a result of the fact that they are perceived as religious minorities with little or no means to respond to protect themselves. It has not been shown that representations made by members of the community holding posts in the administration have secured adequate protection, the common complaint recorded in the evidence is that notwithstanding these concerns being brought to the attention of those in authority, very little is done to remedy the situation in practice."

For the sake of completeness I note that these findings remain uncontested by the Respondent [see CPIN 2.4.4].

43. I have borne in mind Mr Bates' reliance on the conclusions in AS that overall the level of violence in Kabul is – in terms of Article 15(c) – “low”, but I am satisfied, having regard to the country background information before me which post-dates TG, that for the Sikh community the level of violence is considerably higher. For the ordinary Kabuli the risk of indiscriminate violence can, as the Tribunal in AS found, be mitigated by avoiding obvious targets such as government buildings or crowded places such as markets. For the Sikh community no such option exists since they *are* a target. I do not doubt that many native Muslim Kabulis are warm and supportive of their neighbours. The CPIN [at 6.1.1] alludes to such relationships and the support that the ancient Sikh and Hindu communities derive from them. The city is however much changed. Four decades of war and ongoing instability has left people withdrawn and afraid, and the solidarity felt in neighbourhoods where once everybody knew each other fractured.
44. In this environment, Sikhs are unable to leave the house feeling any kind of security. As the Tribunal noted in ZMM (Article 15(c)) Libya CG [2017] UKUT 00263 (IAC) [at §81] the harm covered by Article 15(c) is not limited to death or physical injury: the mental health consequences of living under that kind of stress is also a relevant metric. There considering the impact on Libyans of living under heavy shell bombardment the Tribunal found that it did not need to see specific medical evidence relating to the individuals concerned to accept that living in fear can have a serious impact upon mental wellbeing. Here I accept that the same must be said of this tiny community, subject as it is to attacks ranging from suicide bombs to daily taunting. Even in the context of Afghanistan's miserable recent history, the challenges faced by the Sikh community are overwhelming. As one Hazara man cited in the May 2019 CPIN [at 6.2.5] put it: “to be a member of a minority in Afghanistan is hell; but to be a Sikh means being in the innermost circle of hell”.

45. Having taken all of the submissions and evidence into account I am satisfied that in light of the size of the Sikh population left in Afghanistan the figures of violence are such that applying the *Elgafaji* 'sliding scale' there are substantial grounds for believing that a Sikh civilian returned to Afghanistan would, solely on account of his presence there face a real risk of being subject to the serious threat within the meaning of Article 15(c) of the Directive. The appeal is allowed on that basis.
46. It follows that applying the same factual matrix I am satisfied that the requirements of paragraph 276ADE(1)(vi) of the Rules is made out. I make clear that in this alternative finding I have based my decision solely on the preceding matters and have not found it necessary to consider the additional submissions made by Mr Holmes, and indeed Mr Bates, in respect of the relevance of education for the children, or the additional challenges faced by a Sikh woman living in a conservative Islamic society.

### Decisions

47. The decision of the First-tier Tribunal is set aside to the extent identified above.
48. The Tribunal erred in omitting to consider Article 15(c) of the Qualification Directive and 276ADE(1)(vi) of the Immigration Rules. In respect of those matters I remake the decision in the appeal as follows:

"The appeal is allowed on protection grounds.

The appeal is allowed on human rights grounds."

49. Having regard to the fact that this is a protection claim I make the following direction for anonymity, pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders.

"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 Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings".



Upper Tribunal Judge Bruce  
27<sup>th</sup> July 2020