



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03633/2018

THE IMMIGRATION ACTS

Heard at North Shields
On 29 July 2019

Decision & Reasons Promulgated
On 9 August 2019

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

J S (AFGHANISTAN)
[ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Muneeb Akram, Counsel instructed by Legal Justice Solicitors

For the respondent: Mr Andrew McVeety, a Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity order

The First-tier Tribunal made an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

Decision and reasons

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse him refugee status, humanitarian protection or leave to remain on human rights grounds.
2. The appellant, his wife and their two daughters came to the United Kingdom clandestinely, arriving on 18 September 2017 and claiming asylum the next day. The daughters would then have been 8 and 3 years old.
3. The appellant says he is a citizen of Afghanistan. During the appellant's oral evidence at the Upper Tribunal, Mr McVeety for the respondent gave notice to the appellant and his Counsel, Mr Akram, that the Secretary of State would withdraw her concession that the appellant was an Afghan man from Jalalabad, or that he is an Afghan citizen.
4. The respondent continues to accept that the appellant is a person of the Sikh religion, as is his wife.
5. The appellant speaks Punjabi. He says he also speaks Dari but had difficulty in his Home Office interview with the Dari interpreter, whose native tongue was Farsi. The appellant has sought to explain that by the Dari interpreter having the wrong dialect. I note, however, that he asked for a Punjabi interpreter for the remaking hearing.

Background

6. The appellant's account is that he and his wife were both born in Jalalabad, Afghanistan of Sikh parents. He says that he attended a Punjabi school in Jalalabad until the 8th class, but was not educated after the age of 15, and went into the family clothing shop business instead. The appellant came from a wealthy family: his paternal grandfather started the clothing shop where his father and then the appellant worked. The appellant said that all the clothes they sold came from a single supplier, but although he had worked in the business for some time, he could not name the supplier.
7. The appellant says that he has faced harassment and discrimination all his life, and that the extended families of himself and his wife were harassed particularly before they came to the United Kingdom, resulting in their losing their homes and business.
8. The appellant blamed the success of the shop for alienating the family's Muslim friends and neighbours. When there was peace, the shop was very profitable, but a time came when the shop was less profitable. At the First-tier Tribunal, the appellant identified the period of peace and profitability as the years when country evidence shows that the Taliban were in control in Jalalabad, and the period of difficulty in 2016/ 2017 as the time when the Taliban had lost control, but his evidence was that the Taliban first came to Jalalabad in 2016 or 2017 and caused the family's problems.

9. At interview, the appellant said that the family were evicted from their rented retail premises and home because it was so profitable: later, he said that in Spring 2016, about 6 months before he and his family left Afghanistan, the landlord refused to rent the shop and their home to them any longer.
10. The appellant and his family were advised by the Gurdwara to leave Afghanistan as they were causing difficulty for other Sikhs: the agent was arranged through the Gurdwara, but was a Muslim.
11. The appellant said in the First-tier Tribunal hearing that when leaving Afghanistan, each member of the family had an Afghan passport, in their own name, issued regularly just a few days before the family left Afghanistan, but that the agent took them from him during the journey. He says that the family travelled by aeroplane, train and van from Afghanistan to the United Kingdom. The appellant's wife's evidence contradicted that: she said she had never had an Afghan passport.
12. The appellant's passage and that of his family was paid for with the gold jewellery of his wife and mother: the arrangement with the agent was that his parents, his brother, his brother's wife and his younger brother would also come to the United Kingdom. The price paid in gold jewellery was for the travel of all of those people, but the rest of the family had not arrived. It is the case of the appellant and his wife that they made no arrangements to stay in touch with his parents after 18 July 2017, when they last met in Jalalabad, and that they did not know whether the parents were still there.
13. The appellant said that he had caused the President of a London Gurdwara to telephone the Gurdwara in Jalalabad to seek news of his parents, but there was no news of them. A letter from the Chairman of the Khalsa Diwan Afghanistan dated 6 April 2018, produced in support of the appellant's case, made no mention of a tracing attempt, although the author was said to be in touch with the small Sikh community which remains in Afghanistan.
14. On his own account, the appellant had lived for a time in Kabul, but said that it was unreasonable to expect him to live there as he had no friends or family in Kabul. The First-tier Judge dismissed the appellant's appeal against the respondent's decision to refuse protection.

Error of law decision

15. By a decision on 11 December 2018, I set aside the decision of the First-tier Tribunal and ordered that it be remade in the Upper Tribunal. I did so on the basis of irrationality in the reasoning of the First-tier Tribunal and failure to deal with the section 55 best interests of the children; Ms Cleghorn, who then appeared, suggested that the population of Sikhs in Afghanistan was now so small that further country guidance might be needed. She also mentioned a difficulty for Afghan Sikh women, as the Sikh religion prohibits veiling the face, while in Afghanistan, women are not permitted to leave home unless they are fully veiled, including their faces.

Evidence at the Upper Tribunal hearing

16. I have before me the evidence which was before the First-tier Tribunal, together with the record in the First-tier Tribunal decision of the oral evidence given. No new bundles or witness statements were produced for the Upper Tribunal remaking hearing but I heard oral evidence from the appellant and his wife. In particular, there is no new evidence about the children's best interests, or about the Sikh face-covering issue for women.
17. The appellant gave oral evidence. He adopted his previous witness statement. He said he had had it read to him by a Punjabi interpreter at the solicitors' office and that it was true. He asked for it to be treated as his evidence-in-chief.
18. In his witness statement of 5 April 2018, the appellant said that although he had referred to those who attacked him as 'unknown people' in his screening interview, he meant that they were Taliban. He did not know them personally, which was why he said they were 'unknown people'. When young, he and other Sikhs were constantly harassed by Muslims, forcing them to read the six Kalimas (texts which Muslims memorise to learn the fundamentals of Islam), calling them Kaffirs and teasing them about their hair and turban. When the appellant went to his father's shop by himself, people would attack him and pull off his turban. When he was an adult, the attackers would tell him to change his religion. It got worse, and he maintained that he was targeted both as a Sikh and because he was successful.
19. The family's landlord said the Taliban were harassing him to get the Sikhs out of his shop and house, so the appellant had no reason to think that the attackers were not Taliban. He had twice been beaten up in an isolated alleyway on his way to the mosque, by about five men whom he assumed to be Taliban because 'ordinary people do not hurt us to that level'. He screamed for help and after five or six minutes, the preacher from the mosque came and reasoned with his attackers, and because he was elderly, they respected his wishes and left.
20. There were no Sikhs in the police force, or in authority, that the family could approach for help. They could not be expected to seek help from the Gurdwaras indefinitely, and neither the government nor Muslims generally would employ Sikhs. His daughters would not be able to go to school because of the risk to them, and if anything were to happen to the appellant his wife would be alone at home, a prisoner because of the risk of persecution if she went out without a male protector. His daughters would also be very vulnerable and unsafe in Afghanistan.
21. The appellant said that he went regularly to a Gurdwara in the United Kingdom, where he heard stories of bombs exploding and innocent people being killed. The power of the Taliban was rising, now the security forces had left the country. They walked around openly and made problems for Sikhs and Hindus.
22. There were no supplementary questions. The appellant was tendered for cross-examination.

23. In cross-examination, the appellant was asked when the problems in Afghanistan with the Taliban began. He could not say exactly, but it was eight or nine months before the family came to the United Kingdom, which would put the difficulties as having begun early in 2017. He insisted that before that, the shop had been profitable for years, 'before the Taliban came' but that immediately after the Taliban arrived in early 2017, business began to go down.
24. Before the Taliban took control of Jalalabad in 2017, business was very good. The family had operated profitably and peacefully in the Taliban-free years in the 1990s and 2000s. All that he could remember was that they had been beating him and his family from around 2017. He did not remember the dates, as they were not written down anywhere.
25. The Taliban would come to the shop, swearing and taking the family's men's turbans off, and helping themselves to stock from the shop. When the beating and swearing began, his family thought the men were the Taliban; the Taliban had been teasing and torturing them since childhood, but it became worse when they started hitting them and damaging the business.
26. When asked what happened in 2001, the appellant sounded very uncertain but said that the Taliban had taken over Afghanistan that year and were in full control. Strikingly, he did not mention the 9/11 attack on the Twin Towers in New York as something which happened around that time.
27. In re-examination, the appellant said he had lived in Afghanistan since birth, for all of his life before he came to the United Kingdom. He had paid the agent with his mother and wife's gold jewellery, and the agent arranged for them to leave via Pakistan, to the United Kingdom. The shop went back to the landlord: it was a rented property and he kicked the family out.
28. The appellant said that he could not go back and set up another shop because 'they will kill us and our children, we were in strong danger there'. He and his family were no different from other Sikhs returning to Pakistan; they felt their lives were at risk, and that was why they had fled to the United Kingdom. The risk was because they were Sikhs; 'they beat us, they hate us'.
29. The appellant's wife then gave evidence. She had brought their daughters to Court with her and the appellant took them outside to look after them while his wife testified. She adopted her previous witness statement and asked that it be treated as her evidence-in-chief.
30. The wife's witness statement is also dated 5 April 2018. In it, she said that in Afghanistan as a woman she was confined to her home, whereas in the United Kingdom she was free to attend the Gurdwara, to meet friends, and to move around freely. If returned, she feared for her husband and for herself: a woman in Afghanistan could not work and was very vulnerable without a male protector. She understood that violence was rising in Afghanistan, significantly, and that the

general Muslim population had no interest in coming to the aid of Sikhs who were attacked.

31. The witness statement continued:

“5. A lot of the wealthy Sikhs have left the country. There are not many families left now, apart from the old and the frail remain. Some young remain because they cannot leave the old and frail behind. However, the numbers have gone down significantly.

6. If we are forced to return to Afghanistan, we have no home, friends or family that we can return to. We have no links to Kabul or any place other than Jalalabad. However, in Jalalabad the situation got significantly worse for us, so we were forced to leave.

7. We cannot be expected to live in the Gurdwara because there is no life living in a shelter such as the Gurdwara. I want to be able to live freely. The Gurdwara provide only short-term support. The numbers are dwindling and the Gurdwara have run out of money. Therefore, things are tough in the Gurdwaras now.

8. The Home Office say we can relocate to Kabul. However, as Sikhs we do not feel safe anywhere in Afghanistan. Whenever we go to the Gurdwara in the United Kingdom, we hear more bombs are exploding and innocent people are being killed. The police cannot stop the Taliban so how will they protect us.

9. the Taliban have more and more power since the security forces left the country. They have made more problems for the Hindus and Sikhs. They have become stronger and now they openly walk around.

10. I fear for my children who are with us in the United Kingdom. My daughters should be able to live a free and open life without fearing persecution. This would be in their best interests. My children should be able to go to school freely without discrimination and persecution. In Afghanistan we do not send children to school because they would suffer harm. We are scared that our children could be kidnapped if left in the schools. As far as I’m aware there are no schools in Afghanistan opened for the children of Sikh faith.

11. I want my children to be successful in the United Kingdom. They will work hard and make a life for themselves and not remain prisoners in their own home. I see parents happy with their children in the park, the school and the shopping centres. I see parents taking their children to the Gurdwaras. This is life which was not possible for us in Afghanistan.

12. I believe we would be at risk of persecution if forced to return to Afghanistan and I hope our appeal is allowed.”

There were no supplementary questions. The wife was tendered for cross-examination.

32. In cross-examination, she said her daughters had not been attending school in Afghanistan. A man used to come and teach a little to girls at the Gurdwara; he

taught them the English alphabet, a little counting, basic mathematics and world alphabets. Her own mother, father and two brothers remained in Afghanistan, but she did not know whether they were alive or where they were. She had no means of contacting them.

33. The wife said that her family members had not seen her younger daughter, born in 2014. A few minutes later, she said that she meant that they had not met the older daughter, born in 2009. Given that the wife and her family members all lived in Jalalabad, where they were part of a tiny Sikh community, she was asked to explain why her children should not have met their relatives over such a long period. She said that with all the killing and beating, if someone wanted to go somewhere, nobody would tell anyone where they were going, for fear they might be harmed.
34. When pressed again as to why her family members had not met her elder daughter, who was 8½ years old when the family left Afghanistan, the witness said that they *had* met the elder daughter but that there had been no contact between her and her family members after 2014, the year her younger daughter was born. She did not know whether her parents and brothers were alive, and nobody had seen them. She was the only sister and would like to see her brothers, but she was not sure whether even God knew where they were. The witness became tearful at this point.
35. In re-examination, the witness said that her daughters had not attended school in Afghanistan because it was dangerous: 'they used to take the girls away'. There was news in the papers all the time, even over the last few days, and she did not know where her parents had gone. She was still tearful. Asked why there had been no contact with her parents since 2014, the witness said that there was danger in Afghanistan, otherwise why would they have come to the United Kingdom. Too many people had come here.

Submissions

36. There were no skeleton arguments to assist the Tribunal but I heard oral submissions from both representatives.
37. For the respondent, Mr McVeety said that he was not relying on the refusal letter as he was now advancing the argument that the appellant was not an Afghan citizen, nor from Jalalabad. He acknowledged that the appellant had answered a few questions correctly at interview but suggested that he could have memorised that information, which was available on the internet. The appellant knew very little of the history of Afghanistan, no matter how often the question was put. He did not know that 2001 was the year of the Al Qaeda attack on the Twin Towers and had appeared to guess that 2001 was the year the Taliban took control in Afghanistan, when asked, but by 2017 Mr McVeety submitted that the Taliban were not in control in the appellant's home area. Mr McVeety did not rely on any specific country evidence on this point.
38. The appellant had produced evidence of his children excelling at school in the English language, very soon after arrival, and of his elder daughter doing

particularly well in mathematics. That was not consistent with the wife's evidence of the very limited education they had received at the Gurdwara in Afghanistan. Mr McVeety asked me to find that the girls were more highly educated than the appellants had admitted and that such education could continue on return.

39. The wife's evidence about her family members was 'all over the place': she could not or would not say why she had not seen her immediate family members for almost 4 years before she left Afghanistan. The Sikh community in Jalalabad and in Kabul was a tightly-knit group and it was just not credible that the wife should have had no contact with her parents or brothers for so long, in such a small group of people. Mr McVeety's primary submission was that this couple were indeed Sikhs, but from another country than Afghanistan, most probably India or Pakistan.
40. In the alternative, the appellant's evidence was that he still had family members in Jalalabad, although he would not specify who, or where. If his family members were safe, these appellants would not be at risk either. The real problem was the family's wealth, not their religion, and nothing had happened in Jalalabad until the Taliban were not in control. The appellant would be able to return with his family and link up with family members in Afghanistan.
41. Mr McVeety asked me to remake the decision by dismissing the protection appeal.
42. For the appellant, Mr Akram relied on the appellant's interview and that of his wife, and also on their witness statements. Sikhs had always suffered in Afghanistan at the hands of the Taliban, who teased and tortured the appellant and his relatives from childhood and damaged his business in 2017.
43. If returned, they would not be wealthy Sikhs now. Jobs were not available for Sikhs from the government, or from Muslims, and the only option was for Sikhs to have their own business. The family jewellery had been given to the agent, they would be unable to set up another business, and they would have to live in a Gurdwara. The hardship and destitution which that would entail was not in the best interests of the children, who had settled well in the United Kingdom and were thriving here. Help from Gurdwaras was limited.
44. The appellant would rely on the guidance in *TG and others* (Afghan Sikhs persecuted) (CG) [2015] UKUT 595 (IAC) and in particular paragraphs [109]-[111] and [94] thereof, which supported the appellant's account. The appellant's daughters had now spent almost two years of their young lives in the United Kingdom, with the younger girl in reception class, ready to begin primary school, and the elder in the penultimate year of primary school, almost ready for secondary school. The older girl was doing very well and there was some evidence of educational progression and integration. Although *TG* indicated that private education was available, it was unlikely that they would be able to afford the fees on return.
45. I reserved my decision, which I now give.

Country guidance

46. The guidance given in TG (*Afghanistan*) CG is summarised in the judicial headnote:

“(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 country 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."

47. At [19], the Upper Tribunal said that it was not possible to make a clear finding as to the exact figure of Sikhs and Hindus currently remaining in Afghanistan, due to lack of evidence, but that it was not disputed that it was about 3000 (down from 250,000 in the 1940s) and that it continued to shrink. The Tribunal relied on a report published by the Centre for Applied South Asian Studies in 2011, entitled *The History and Current Position of Afghanistan's Hindu and Sikh population: 2011* which said that 'as numbers shrink, [the Sikh and Hindu minority's] remaining members are finding themselves ever more vulnerable to aggressive exploitation, against which they have no meaningful defence. Hence the exodus can only be expected to continue'.
48. The paragraphs relied upon by the appellant are at [94] and [108]-[110]. Paragraph [94] deals with the education of children:

"94. 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."

49. Paragraphs [109]-[110] relate to employment opportunities for Sikhs and Hindus:
"Employment opportunities

109. As with many aspects of this country the evidence relating to economic reality for Sikhs and Hindus is contradictory. On the one hand there is evidence of members of the Sikh and Hindu community holding positions within the

legislative bodies and various community and other influential groups, holding trading licences and having viable businesses, owners being able to retain land and property or to rent accommodation for themselves and their families and being able to send remittances to families living abroad, in places such as India. On the other hand, there is evidence of poor members of the community being unable to earn a living and having to live in the Gurdwara which, in accordance with the tradition of Sikh and Hindu hospitality, provides food aid, shelter, and a degree of companionship and protection. *The evidence indicates that the declining numbers and economic well-being of those remaining in Afghanistan has an impact on the ability of the Gurdwara to continue to provide such hospitality and support as it is itself dependent upon donations to be able to meet its own financial needs and purchase food and other items.*

110. *A family without adequate resources is unlikely to be able to pay for private education which may be relevant when considering the situation of Sikh and Hindu children in Afghanistan whom it is proposed to return if receiving such education is demonstrated to be fundamental to that person's identity.* There is also evidence that a Muslim is unlikely to employ a member of the Sikh or Hindu community in place of a Muslim, out of fear of potential reprisal or loss of business, indicating difficulties in securing an income with which to fund accommodation or essentials such as food, heating, clothing. The evidence we have been able to consider indicates that there is nothing in the law, the attitude of the Afghan government, or in theory preventing a member of either of these faith groups returned to Afghanistan from being able to set up their own businesses but whether they are able to do so will depend upon the availability of adequate funding, their ability to secure business premises in the light of possible hostility or opposition from Muslim traders who may see them as competition or not wish to rent premises out to them, making it difficult for them to pursue what has now become the remaining traditional trade of shopkeeper/trader. Whether an individual is in such a position is fact specific and they will have to satisfy the Tribunal that they are without economic means especially if they have paid a considerable sum of money to come to the United Kingdom, that they will not be able to re-establish themselves economically, and the impact upon family members as a result. Such individuals may also be required to provide appropriate evidence to show that there are no alternatives such as being supported by NGOs or through the Gurdwara and that any impact upon them, if destitution is alleged, is such that the threshold of Article 3 ECHR will be breached.

111. *In relation to families with children it may be possible to establish that it is not in the best interests of such children to be returned, even if the threshold of Article 3 is not breached, if the degree of hardship and destitution is such that it leads to unjustifiably harsh consequences on return for such family members. As with all cases any assessment of the best interests of children will have to be balanced against the public interest if it is a consideration of a private life argument."*

[*Emphasis added*]

50. The most recent consideration of the circumstances of Afghan Sikhs is in *DSG and others* (Afghan Sikhs: departure from CG) Afghanistan [2013] UKUT 148 (IAC), which deals with the circumstances eight years after the country guidance in *TG*. In *DSG*, the First-tier Judge had departed from the *TG* guidance and the Upper Tribunal

found that he had been entitled to do so. The Judge in *DSG* was erroneously referred to the disapproved guidance in *SL and others* (returning Sikhs and Hindus) Afghanistan CG [2005] UKIAT 00137. Paragraph (vi) of the country guidance in *TG* expressly states that it replaced *SL*. The Tribunal in *DSG* had expert evidence from Dr Antonio Giustozzi, and an article from Dr Ballard, which the Upper Tribunal summarised thus:

“11. ...Dr Giustozzi commented on the numbers, stating that there were no certain figures of the make up of the Afghan population, but it was estimated that by 2001 the Sikh community of Afghanistan had dwindled and was as little as a few hundred members and not more than a few thousand. In Kabul it was estimated that by the end of 2001 only 50 to 100 families were left of the approximately 2,000 who lived there in 1992. Although the numbers of reports of attacks and harassments of Sikhs were not great, it should be considered that the population was now very small and estimates of its size today corresponded to no more than a size of a single village. *Dr Giustozzi went on to say that if the known episodes of harassment and violence (which represented only a proportion of the actual incidents which occurred) were compared to the size of the population it should be considered that there was rampant hostility and discrimination against Sikhs in Afghanistan. He also commented that the Sikhs were targeted with impunity because they did not enjoy protection from any of Afghanistan’s various factions because they were too small numerically to matter politically.*

12. Dr Ballard in his article commented that it was common knowledge that members of the Sikh and Hindu community had found themselves subjected to steadily rising levels of hostility during the course of the past four decades and had consequently had more reason to seek refuge overseas than their Muslim counterparts and that the scale of their presence in Afghanistan had been shrinking steadily, the number being only a small fraction of their former size, and that *as numbers shrank its remaining members were finding themselves even more vulnerable to aggressive exaction against which they had no meaningful defence.*”

[*Emphasis added*]

51. The Upper Tribunal in *DSG* found as follows:

“25. In the circumstances it seems to us entirely clear that the judge was entitled to depart from the country guidance in this case. Inevitably the remaining numbers of Sikhs and Hindus in Afghanistan must be to some extent a matter of speculation, but it is clear if one looks at the evidence as a whole in such documents as Dr Ballard’s report, Dr Giustozzi’s report, the earlier UNHCR report and a more recent UNHCR report of July 2011 handed up by Mr Bazini that the remaining numbers are in the region of a thousand or two. Indeed, the respondent’s Operational Guidance Note on Afghanistan of April 2012 states at paragraph 3.9.2 that there are an estimated 2,200 Sikhs and Hindus remaining in Afghanistan. This, together with the evidence set out in Dr Giustozzi’s and Dr Ballard’s reports, clearly justified the judge in departing from the existing country guidance.

26. This has clear implications for other cases involving claimed risk on return to Afghanistan for Hindus or Sikhs, in the period between now and such time as further country guidance on the subject can be issued. ...”

52. Unfortunately, no further country guidance has yet been issued.

Country evidence

53. Neither party provided any up to date country evidence on Afghanistan and the position of Sikhs there.

54. I indicated that I would have regard to material in the public domain, to test his contention that the appellant's evidence was contrary to what was known about Afghanistan from the 1990s onwards. I have had regard to the Home Office Country Position and Information Note (CPIN) on Afghan Sikhs and Hindus issued in May 2019. It is a statement of the current position in Afghanistan prepared by the respondent, one of the parties to these proceedings.

55. At 3.2 the CPIN notes that before 1992 there were about 22,000 Hindus and Sikhs in Afghanistan but there are now very few remaining, concentrated in the provinces of Nangarhar, Kabul and Ghazni. Community members themselves speculate that the numbers of Hindus and Sikhs in Afghanistan today may be no more than a few thousand. At 3.2.3, the CPIN records an undated note from a contact at Gurdwara Guru Nanak Darbar in Southall that 'the [Sikh] community is disappearing due to the fear of safety in Afghanistan'. An extract from that note appears at 3.4.2:

"... According to the information received from the Gurudwaras in Kabul and Jalalabad approximately 180-200 members of Afghan Sikh and Hindu community remain in Kabul. *The numbers are much less in Jalalabad with an estimated number 65-75 families.* Around 25 to 30 families remaining are in Ghazni and according to the information received there are some families living in Khost, Herat, Paktiya, Khandahar, Herat and Mazar-e-Sharif. The total number will be no more than 1200."

[*Emphasis added*]

56. At 3.3.1, the report says this:

"3.3.1 In January 2016, Al Jazeera reported:

'The most significant Sikh exodus from Afghanistan occurred during the civil war (1989-1996) and during the subsequent Taliban rule (1996-2001), during which thousands, like many other Afghans, sought refuge in neighbouring countries.

'Life under the Taliban was a particularly dark time. Officially, Taliban commanders were ordered by their leadership to respect Sikh and Hindu communities, on the condition they didn't proselytise and paid jizya, a religious tax imposed on non-Muslims. But they also required Sikhs to publicly identify themselves, by wearing yellow patches on their breast pocket or armbands, and to mark their homes and businesses with yellow flags.

'They were allowed to continue daily prayers at the gurdwaras so long as they couldn't be heard from the street, but it also wasn't uncommon for errant Taliban to harass or beat them, Kuljit [an Afghan Sikh] said.

'Even after the fall of the Taliban, however, and promises by both the Karzai and Ghani governments to do more to protect their communities, each year the number of Sikh families continues to shrink.

"'Before the wars we were integrated in local communities,'" said Sivender [an Afghan Sikh]. "But with the passing of time the prejudice against us has increased. People were really radicalised by the civil wars and the Taliban."'"

57. And at 3.3.2, the report quotes the news outlet, The National, as saying that:

"...'Despite official political representation and freedom of worship, many face prejudice and harassment as well as violence from militant groups, prompting thousands to move to India, their spiritual homeland. India has issued long-term visas to members of Afghanistan's Sikh and Hindu communities.'

The same article stated that the Hindus remaining in Afghanistan are those who are too poor to leave."

58. At 3.3.4, the CPIN notes a BBC report in July 2018 that increasing numbers of Sikhs and Hindus had taken up the option of moving to India, 'due to persecution and repeated threats'. In August 2018, UNHCR confirmed that large numbers of Sikhs and Hindus were believed to have left Afghanistan as a result of the severe difficulties they faced. By February 2019, at a meeting between a Foreign and Commonwealth Office official and Narinder Singh Khalsa, Mr Khalsa said that about 75000 Sikhs had left Afghanistan and gone primarily to India. Some had rented out their houses. Only about 40 or 50 families returned during Hamid Karzai's presidency. The majority of remaining Sikhs were settled in Kabul and Nangrahar.

59. Afghanistan Analysts Network recorded that there were 759 Hindus and Sikhs registered to vote in Kabul in the October 2018 national elections in Afghanistan. At 3.5.4, the CPIN records a suicide attack in July 2018, targeting Sikhs and Hindus in Jalalabad, believed to have been carried out by ISIS/Daesh. Hindus and Sikhs shared their temples and there were only a handful of temples left in Kabul city. Sachdeva Omprakash, an Afghan Hindu attending the mass funeral for the Jalalabad killings, said this: "Within a few minutes, a significant part of our fraternity was wiped out: our leaders, elders and mentors".

60. At 3.6.1, the CPIN reports that at home, Afghan Sikhs speak mainly Punjabi, but other quoted evidence suggested that Afghan Sikhs spoke Pashto, with Hindi and Punjabi as supplementary languages, or Dari, 'the nearest thing the country has to a lingua franca'. In April 2018, a history graduate, Sanmeet Kaur, an Afghan Sikh living in the United Kingdom, noted that Afghan Sikhs 'speak a unique dialect known as 'Kabli' which is an amalgamation of Persian Dari and Punjabi.

61. At 3.7.2, the Australian Institute of International Affairs, is quoted as saying that only two Gurdwaras (Sikh temples) remained in Afghanistan, one in Kabul and the other in Jalalabad. However, the anonymous contact at Gurdwara Guru Nanak Darbar in Southall said that there were two Gurdwaras in Jalalabad, one fully functioning and one in partial use, and two functioning Gurdwaras in Kabul, which were used as a

refuge compound by poor Sikh and Hindu families: “Most of the Gurdwaras are being used by the community as a safe resident compound and women spend their life within these compounds like prisoners”.

Analysis

62. The first question is whether, given the withdrawal of the respondent’s concession at the hearing, I should find that the appellant is of a nationality other than Afghan. I note that he and his family travelled on Afghan passports, on his evidence, and that at the hearing in the First-tier Tribunal the respondent relied on that assertion to support her contention that the appellant was an Afghan Sikh.
63. The evidence against his being from Afghanistan relates to the appellant’s lack of knowledge about the extent of the Taliban operation in Afghanistan, and his linguistic issues. Given the lack of clarity in the respondent’s own CPIN about the language spoken by Afghan Sikhs, and in particular, the evidence that there is a hybrid Punjabi/Dari dialect spoken by some Afghan Sikhs, and that Punjabi is the main language for many Afghan Sikhs, I am not satisfied that the difficulty with the Dari interpreter (whose primary language was Farsi) is sufficient to establish that this appellant is not Afghan, having regard to the lower standard of proof applicable to international protection cases.
64. The second point taken against the appellant’s Afghan nationality is his vagueness as to when the Taliban were, and were not, in control in Jalalabad. The appellant is not a highly educated man: on his own evidence, he left school and went into the family clothing business when he was about 14. His assertion that matters got much worse for Afghan Sikhs in 2017 is borne out by the country evidence, as is the continuing difficulties which they are experiencing now. He did describe difficulties at the level of harassment and discrimination from the Taliban for all of his younger life, which fits with the evidence that the Taliban took and retained control of Nangrahar from the late 1990s until the present day.
65. I find, to the lower standard, that the appellant is an Afghan citizen and his wife and daughters are also citizens of Afghanistan. It is not disputed that all of them are Sikhs. I accept the appellant’s account that his family had a clothing business and lost it in the circumstances he describes: that is consistent with the country evidence and the country guidance. I also accept that his family’s resources (the gold jewellery) were used to get them out. The appellant’s account, despite some areas of confusion, is consistent with the country evidence as to what was happening in Jalalabad at the relevant times and I treat it as credible.
66. However neither child is a qualifying child under section 117D of the Nationality, Immigration and Asylum Act 2002 (as amended) as they have spent less than 2 years in the United Kingdom. Their best interests clearly lie in being with both parents, and applying the ‘real world’ test, their parents are not lawfully in the United Kingdom and (unless they are entitled to international protection) would be expected to leave the United Kingdom. In that case it is not unreasonable, having regard to

section 117B(6) of the 2002 Act, to expect their daughters to leave with them. The children's best interests are not determinative of this appeal, one way or the other.

67. The wife's evidence about what happened between her and her family at around the time her younger daughter was born lacks credibility. Her explanation was no explanation at all. I place no weight on that part of her account. I have considered the section 55 best interests of the daughters. Their best interests under section 55 are a primary consideration but not a trump card. Both girls are healthy and prospering at school.
68. As regards the appellant's parents and brothers, again the evidence is scanty but there was an attack on one of the Jalalabad Gurdwaras in July 2018 and many people died then. However, even if the appellant and his wife do still have family in Jalalabad, the community there is very small now and the real question is what would be the risk to them if they returned today.
69. Having regard to the lower standard of proof, and bearing in mind that Afghan Sikh cases are fact specific, as stated in *TG*, I have considered the *TG* factors. The women of this family would have the appellant to protect them on return, but their likely financial circumstances are poor as the family's capital was used for their escape and there is no certainty that they have family members in Jalalabad who could assist them to resettle. The appellant is one of those who was subjected to threats and harm when accessing the Gurdwara in Jalalabad, less than two years ago, and the country evidence does not suggest that this is likely to have improved. The local police are unwilling or unable to assist to Refugee Convention/Qualification Directive standards.
70. I note, in particular, the guidance at (v) in *TG* that:

"(v) ... 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."
71. It is clear from *DSG* that the situation for Hindus and Sikhs in Jalalabad and Kabul has deteriorated further since the decision in *TG* and that very few Afghan Sikhs remain in either city. There are only about 1000 Hindus and Sikhs left in Afghanistan, and only one functioning Gurdwara in Jalalabad and another one or two in Kabul, where the appellant has no contacts. The appellant is no longer a wealthy man and has no business. The evidence is that he would not be employed by Muslims or the government. The country evidence is that women and girls lead enclosed lives in Afghanistan and that this family might well have to live in the Gurdwara while they re-established themselves in Afghanistan. It remains unclear whether they have any family there to help them do so.
72. The evidence before me does not suggest that the appellant and his family would have access to an independent income on return to Afghanistan. They have no family

connections in Kabul, the only other area with any significant Sikh population. I have regard to the evidence of Dr Giustozzi in *DSG* that

“... if the known episodes of harassment and violence (which represented only a proportion of the actual incidents which occurred) were compared to the size of the population it should be considered that there was rampant hostility and discrimination against Sikhs in Afghanistan. He also commented that the Sikhs were targeted with impunity because they did not enjoy protection from any of Afghanistan’s various factions because they were too small numerically to matter politically.”

73. I also have regard to the evidence in *DSG* from Dr Ballard’s article that:

“... it was common knowledge that members of the Sikh and Hindu community had found themselves subjected to steadily rising levels of hostility during the course of the past four decades and had consequently had more reason to seek refuge overseas than their Muslim counterparts and that the scale of their presence in Afghanistan had been shrinking steadily, the number being only a small fraction of their former size, and that as numbers shrank its remaining members were finding themselves even more vulnerable to aggressive exaction against which they had no meaningful defence.”

74. That supports the appellant’s account of his treatment and that of his family in Jalalabad, over the years. Taking all of this evidence together, I am satisfied that for this family of Afghan Sikhs, international protection is appropriate and that they would be at real risk of persecution or serious harm if returned now to either Jalalabad or Kabul, the only options for Sikhs in Afghanistan today. I do not consider that in reaching that conclusion I have departed from the *TG* guidance but to the extent that my conclusion differs from that guidance, for the reasons set out in *DSG*, I consider it appropriate so to do.

DECISION

75. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by allowing the appeal.

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson

Date: 29 July 2019