Upper Tribunal
(Immigration and Asylum Chamber)

DSG & Others (Afghan Sikhs: departure from CG) Afghanistan [2013] UKUT 00148 (IAC)

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Determination Promulgated**
On 30 January 2013	
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Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DSG AND OTHERS

Respondents

Representation:

For the Appellant: Mr P Deller, Senior Home Office Presenting Officer
For the Respondent: Mr D Bazini, Counsel, instructed by Times Immigration Consultants Limited

1. *A judge may depart from existing country guidance in the circumstances described in Practice Direction 12.2 and 12.4 and the UT (IAC) Guidance Note 2011, no. 2, paragraphs 11 and 12.*

2. *The evidence before the judge in the present case justified his departure from the country guidance in SL & Others (Afghanistan) CG (Returning Sikhs and Hindus) [2005] UKIAT 00137.*

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DETERMINATION AND REASONS

1. The respondents (hereafter referred to as the appellants, as they were before the First-tier Tribunal Judge: the Secretary of State will hereafter be referred to as the respondent) appealed to the First-tier Tribunal against the Secretary of State's decision of 1 February 2012 refusing leave to enter the United Kingdom. The appellants are husband and wife and their two children. Their appeal was heard by First-tier Tribunal Judge Oakley at Hatton Cross on 18 April 2012.

2. The appellants claimed to be at risk in Afghanistan on account of their Sikh faith. The judge noted the relevant aspects of the appellants' history. The first appellant lived in Kabul from around the age of 8 (he was born on 22 February 1971). He said that the situation for Sikhs in Afghanistan deteriorated during the time of the Mujahedeen and became even worse after the Taliban came to power. In around 2001 he and his brother were kidnapped by people who he believed were strongly connected with the Afghan government and they were tortured and deprived of food during the time of detention. Subsequently his father's house and shop were seized by force and he fled to the United Kingdom and claimed asylum in mid-2002. During that time he travelled to India in order to be married to his wife and he remained with her in India for three months and then she returned to Afghanistan and he retuned to the United Kingdom.

3. The first appellant was granted exceptional leave to remain to remain in the United Kingdom for a period and applied for leave to remain for a further period but this was refused by an Immigration Judge in April 2004. His appeal against that decision was dismissed by a panel in December 2005. His appeal rights were exhausted in January 2006 and on 14 January he returned to Kabul and remained in hiding with his wife. His brother-in-law arranged for them to go to Russia and they went there for three months in late January 2006 and overstayed. He was unable to survive without a job and he and his wife and their two children and his brother-in-law travelled to the United Kingdom where they subsequently claimed asylum.

4. The judge observed that in the determination of 6 April 2004 the previous judge had noted that credibility was not in issue and accepted everything the first appellant said had happened to him with regard to his past experiences in Afghanistan. He also accepted that the first appellant had remained in Afghanistan in the hope that things would improve and that he felt he had no choice but to leave following his kidnap and torture by men who arrived in government vehicles. He accepted past persecution for a Convention reason but concluded that although the first appellant would experience difficulties in adapting to his life in Afghanistan and would share the undoubted discrimination suffered by the minority of religions at the hands of the local population he did not believe that there was a serious possibility that he would face harm rising to the level of persecution on return.

5. The judge in the instant appeal was referred by the Secretary of State to the current country guidance of SL & Others (Afghanistan) CG (returning Sikhs and Hindus) [2005] UKIAT 00137, where it was held that Afghan Sikhs were not at risk of either persecution for a Convention reason or treatment contrary to their protected human rights. The judge noted that it was said by the respondent that the fact that the appellant had returned to Kabul and remained for ten days was inconsistent with the actions of a genuine refugee or a person in need of humanitarian protection.

6. The judge had before him an expert report written for the appellants by Dr Antonio Giustozzi, and he also gave consideration to the decision in SL. He also had before him a decision of Collins J in R (On the application of Luthra) v Secretary of State for the Home Department [2011] EWHC 3629 (Admin). He also had before him and referred to a report by Dr Roger Ballard entitled "The History and Current Position of Afghanistan's Hindu and Sikh Population".

7. The judge noted the respondent's argument that if the first appellant had had any fear at all he would not have returned to Afghanistan. The reality was, as the judge considered, he had little choice. All his appeal rights had become exhausted by 11 January 2006 and it was some three days later when he had no right to remain in the United Kingdom and had no other country to which he could return legally that he had returned to Kabul. The judge also found credible the evidence that during the very short time he was in Afghanistan the first appellant was in hiding and therefore did not suffer any specific problems and it was during that time that his brother-in-law made the arrangements for him, the first appellant and his wife to leave Afghanistan. He considered therefore that this did not affect the appellant's credibility adversely.

8. He went on to remind himself that as SL was a country guidance case he was bound to consider it as it had not been overturned although he had the ability to depart from its findings if he decided it was wrongly decided in some way and/or that events had now moved on and were very different from the position considered in SL. He noted that in SL the Tribunal had relied on figures from an UNHCR estimate of the number of Sikhs and Hindu families in Afghanistan which in that report were stated to be 3,500. This led the Tribunal to conclude that the Sikh and Hindu communities were in total in the region of some 20,000 persons of whom a substantial proportion were in Kabul and that against those numbers the specific cases cited to it did not support a risk of persecution in general to the entire community but rather pointed to the conclusion that they were simply victims of random opportunistic acts.

9. The judge noted that the Tribunal was relying upon a report of 2003 when considering the matter at the end of 2005, but he also identified background evidence in Dr Ballard's report that a UNHCR paper dated June 2005 (which was not before the Tribunal in SL) stated that "according to available information there are an estimated 600 Sikh and Hindu families (3,700 persons) living in Afghanistan today with small but steady numbers of individuals and families returning particularly

from India". This led the judge to conclude that the Tribunal in SL had got its figures wrong at the time of promulgation of the decision and he commented that this would make a considerable difference in considering the proportionality of the attacks on Sikhs and Hindus in terms of the small number of the population encountering quite large numbers of attacks and that therefore the attacks would not be considered to be merely random but targeted at this much smaller community.

10. He then went on to note what was said by Collins J in Luthra noting among things the remark that the fact that there had been a drastic reduction in the number of Sikhs in Afghanistan, coupled with the discrimination extending to violence, which meant that there was indeed fresh material which was significantly different and which meant that the claimant in that case had a realistic prospect of success.

11. He then went on to consider Dr Giustozzi's report. 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 then 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.

13. All these matters taken together led the judge to conclude that he was entitled in the circumstances to depart from the country guidance case of SL and as a consequence he allowed the appeal under the Refugee Convention and Article 3 of the Human Rights Convention.

14. The Secretary of State sought permission to appeal against this decision, arguing first that the reasoning advanced to enable the extant country guidance to be disregarded was not adequate and that indeed the reasoning was wholly inadequate to support a

finding that the mere presence of a Sikh in Afghanistan would invariably lead to a reasonable likelihood of persecution. Secondly, it was argued that there was no consideration of the facts of the claim in light of either the extant country guidance or the expert reports relied on to supplant it and no assessments of the appellant's ability to relocate or the possibility of sufficiency of protection. Permission to appeal was granted by a Judge of the First-tier Tribunal.

15. A Rule 24 reply was put in on behalf of the appellants in which it was argued inter alia that the judge had correctly directed himself as to his ability to depart from a country guidance case and had therefore given compelling and cogent reasons as to why the country guidance case was to be departed from and that in any event the circumstances had changed considerably from when that decision was made. It was argued that the vital figure of 20,000 on which the Tribunal relied in SL was hugely wrong in that the UNHCR's position had changed and as of June 2005 it was estimated that there were only around 3,700 Sikhs and Hindus in Afghanistan. Reference was made to the growing number of adverse incidents against Sikhs and Hindus in Afghanistan which it was said had to be measured against the numbers remaining. Reliance was also placed on what was said by Collins J in Luthra, and it was argued also that internal relocation would not assist and there was no sufficiency of protection. It was also argued that the appeal should have been allowed under Article 8 of the Human Rights Convention in that the best interests of the children militated in favour of such a result.

16. In his submissions Mr Deller noted that SL was a comparatively elderly authority albeit still country guidance, and he was aware of the controversy over numbers even at that time. It was the case that country guidance cases were not set in stone but good reasons were needed to depart from a country guidance case. It was true, as was elaborated in the reply, that just because there was a country guidance decision did not mean that the outcome would necessarily follow what was said in the country guidance case. It could properly be said that quite a lot had happened in Afghanistan since 2004. There was an expert report which was specific to the case. The size of the group was of relevance. The judge had given his reasons and these reasons were clearly sound. On the point of why he would return if he feared ill-treatment, whatever the point might be about the legal requirements, it could be said to be contrary to experience although it did not make a significant difference warranting interference with the judge's decision. There were a number of reasons to go against the country guidance in this case and Mr Deller accepted that he was in some difficulty in resisting the decision. There was also the previous finding of past persecution.

17. In his submissions Mr Bazini relied on and amplified points made in the reply. The judge had set out what his task was and followed that. He had set out the evidence and had given reasons for why he was departing from the country guidance. There was no challenge to the material relied on by the judge. There was no suggestion that either Dr Giustozzi or Dr Ballard was wrong. Reference was made to paragraphs 66 and 67 of SL and what was said there about the numbers and risk on return. There

was a very significant difference between the numbers relied on there and the more accurate figures which were very significantly lower. There was also reference in SL to the evidence of returns, so one would expect an increase in that number but that was not the case and in fact the numbers were diminishing. There was reference in the document Mr Bazini handed up from the UNHCR in July 2011 to 1,000 remaining Afghan Sikhs and Hindus. The figures were dropping every year.

18. As to whether all Afghan Sikhs were at risk it had to be accepted that potentially there might be rare exceptions to the general position on risk, but it could properly be said that the generality of Afghan Sikhs and Hindus were at risk on return.

19. We stated that we found no error of law in the determination in light of the very helpful submissions from both representatives, giving brief reasons which we now amplify.

Discussion

20. It is relevant at the outset to set out the terms of Practice Direction 12.2 and 12.4 which are of clear importance to this case. They state as follows:

> "12.2 A reported determination of the Tribunal, the AIT or IAT bearing the letters 'CG' shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later 'CG' determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authority in any subsequent appeal so far as that appeal:-
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> (a) relates to the country guidance issue in question; and
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> (b) depends upon the same or similar evidence.
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> 12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law."

21. In the Upper Tribunal Immigration and Asylum Chamber Guidance Note 2011 No 2, at paragraph 11, it is stated:

> '"If there is credible fresh evidence relevant to the issue that has not been considered in the country guidance case or, if a subsequent case includes further issues that have not been considered in the CG case, the judge will reach the appropriate conclusion on the evidence, taking into account the conclusion in the CG case so far as it remains relevant."

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And at paragraph 12:

> "Where country guidance has become outdated by reason of developments in the country in question, it is anticipated that a judge of the First-tier Tribunal will have such credible fresh evidence as envisaged in paragraph 11 above."

22. In our view the judge in this case directed himself entirely properly albeit by way of paraphrase, at paragraph 30 of his determination. He went on to note what was decided by the Tribunal in SL, including the fact that it was of clear significance to the decision in that case that the numbers of remaining Sikhs and Hindus in Afghanistan were considered to be in the region of 20,000 persons, in respect of which it was said "Against those numbers, the specific cases cited do not support a risk of persecution which is general to the entire community but rather point to the conclusion that they were simply victims of random and opportunistic attacks."

23. He noted that the Tribunal was relying upon a report of 2003, but that it could be seen from Dr Ballard's report that in a UNHCR paper of June 2005, several months before the date of SL, it was said that according to available information there were an estimated 600 Sikh and Hindu families (3,700 persons) living in Afghanistan today with a small but steady number of individuals and families returning particularly from India.

24. We consider it was open to the judge in the light of the glaring difference in the figures (3,700 as opposed to 20,000) to consider that the Tribunal's figures in SL were significantly wrong and that at the date of the hearing before him that remained the case. He went on to note, as we have set out above, what was said by Collins J in Luthra and what was said in the report of Dr Giustozzi which was specifically prepared for this appeal. He also noted and bore in mind what was said by Dr Ballard. Of clear relevance also were the positive credibility findings and the adoption of the earlier finding by the judge in April 2004 that the appellant had experienced persecution in the past in Afghanistan.

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.

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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. A country guidance case retains its status until either overturned by a higher court or replaced by subsequent country guidance. However, as this case shows, country guidance cases are not set in stone (see also HS (Burma) [2013] EWCA Civ 67), and a judge may depart from existing country guidance in the circumstances described in the Practice Direction and the Chamber Guidance Note. That does not amount to carte blanche for judges to depart from country guidance as it is necessary, in the wording of the Practice Direction to show why it does not apply to the case in question. In SG (Iraq) [2012] EWCA Civ 940, the Court of Appeal made it clear, at paragraph 47, that decision makers and tribunal judges are required to take country guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced, justifying their not doing so. To do otherwise will amount to an error of law.

27. For the reasons set out above therefore we consider that the judge in this case did not err in law and his decision allowing the appeal under the Refugee Convention and under Article 3 of the Human Rights Convention is maintained. Mr Bazini did not press an argument today on the Article 8 issue, and in light of our findings it is not a matter with which we propose to deal.

28. We make an anonymity order pursuant to Rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

29. On the basis set out above, the appellants' appeal is allowed.

Signed Date

Upper Tribunal Judge Allen