Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/08422/2011

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th May 2016	**On 19th May 2016**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

L S G
(Anonymity order in force)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Jones instructed by Simman Solicitors
For the Respondent: Mr Tarlow Senior Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge S Hall, promulgated on the 2 September 2011 following a hearing at Newport on the 31 August 2011, in which the judge dismissed the appellants appeal against the refusal of his claim for asylum and direction for his removal to Afghanistan.

2. Permission to appeal was granted by Upper Tribunal Judge Pitt sitting as a Judge of the First-tier Tribunal on the 27 September 2011. Thereafter the case was stayed pending the publication of the country guidance case relating to Afghan Sikhs

which has been handed down as TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595. Since that decision there have been further hearings including a CMR on the 8 April 2016 and today's hearing.

Background

3. The appellant is a national of Afghanistan and follower of the Sikh religion. He lives in the UK with his wife and two children. The eldest child, a son, was born in Afghanistan in July 2009 and a daughter in the UK in April 2014.

4. At the hearing on the 8 April 2016 there was discussion in relation to the prospects of the case proceeding resulting in a direction in the following terms:

> "The respondent shall notify the Tribunal and appellant's representative if the appellant is to be granted status to remain in light of the decision in TG and the presence of two minor children of school age (male 10-07-2009 and female 08-04-2012) and health needs of the youngest child."

5. Simman Solicitors have copied the Tribunal into a number of letters written to the respondent seeking a response to the direction and threatening to make an application for a wasted costs order if the hearing proceeds.

6. Mr Tarlow, when asked his position at the commencement of the hearing, applied for permission to withdraw the original decision on the basis it was proposed that the matter be sent to the case worker based in Cardiff for the matter to be considered further in light of the current country guidance. When asked how long the referral would take he indicated three months but could give no indication that leave would be granted.

7. Miss Jones opposed the application noting that the matter had been live since 2011 and that the respondent has had ample time to reconsider the matter in the interim.

8. Permission to withdraw was refused. I agree with Miss Jones that ample time has passed and that respondent has had a number of opportunities to review the decision if required. These were not taken and it is now inappropriate to permit a further substantial period of delay with an uncertain outcome. This is not unfair to either party or in the interests of justice.

Error of law

9. It was also established that there had been no finding that Judge Hall had made an error of law material to the decision to dismiss the appeal. The hearing therefore proceeded to consider this issue in relation to which it has been found that such legal error has been made.

10. The reasons for this finding can be summarised as follows:

    i. The Judge noted the lack of dispute in relation to the appellants claim to have been the subject of extortion, demands for money with menace, an attempted kidnap of his son which did not occur as he paid those responsible $3,600, which were found to be the actions of a criminal gang. It was found the

appellant failed to seek the protection of the authorities and that a sufficiency of protection exists from the police [49]. The country information available showed, however, that no such protection to a Horvath standard existed for although the police could be approached the evidence was that they were not willing to provide the required level of protection to a Sikh. Although the case of TG was not available at that time the findings therein in relation to the lack of a sufficiency of protection also reflect the position as it was in 2011.

ii. It is also the case that Judge Hall found the appellant had been subject to past persecution yet fails to consider the relevance of this to the issue of future persecution. This is relevant to the ability to properly answer the question "is there a serious risk that on return the applicant would be persecuted for a Convention reason". Paragraph 339K of the Immigration Rules states that "The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated". Essentially paragraph 339K follows the old ruling in Demirkaya [1999] INLR 441.

iii. In relation to the internal relocation, finding there has been inadequate consideration of the question whether this was reasonable in all the circumstances for a Sikh family, who faced additional risk as ethic and religious minorities, with a child. The availability of shelter and support have not been adequately considered or of the existence of other communities in other parts of Afghanistan.

11. The determination is set aside. The findings in relation to the credibility of the appellant's experiences in Kabul are preserved.

Discussion

12. The Tribunal is able to remake the decision which it dos by allowing the appeal. The merits of the appeal have to be considered by reference to the law as it stands at the date of the hearing which now include the decision in TG and others.

13. The key element in this case is the children. In TG it was recognised that Sikh children have been targeted in Afghanistan by way of kidnap, attacks/harassment, forced conversion to Islam, forced marriage, for which there is little redress from the authorities. Education is only available in Sikh schools to primary level after which Sikh children have to return to mainstream education where they face discrimination and the problems identified in TG.

14. In addition, to youngest child has a serious heart condition as set out in the papers for which further surgery will be required.

15. The children are being educated in the UK and it is not in their best interests to be returned to Afghanistan where there is a real risk of a breach of their rights under the Refugee Convention and Articles 2 and 3.

16. On the basis of the needs of the children these appeals are allowed. As the children need their mother and father to provide support and care for them in the UK, I find it will be a breach of the right to family life to remove either parent in all the circumstances of this case.

Decision

17. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

18. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to prevent publication of any material that reveals the identity of the children.

Costs.

19. Miss Jones sought an order for wasted costs limited to the sum of £450 in light of the respondent's delay and the fact the appeals had been allowed which, she submitted, could have occurred had the respondent acted with due diligence after the 8 April 2016 hearing.

20. Although the respondent has not acted as promptly as all involved in this case would have liked, the test for a wasted costs order is whether the conduct of the respondent permits a reasonable explanation - Ridehalgh v Horsfield [1994] Ch 205 considered. In this case the difficulty for the appellant is that there had been no finding of material error of law. Until one was made the respondent was the beneficiary of a finding that the appellant had failed in his appeal. A party to a case is entitled to be heard and in light of the fact an important procedural step had not been resolved the respondent was entitled to refuse to reconsider the matter further.

21. I find in all the circumstances that although the delay has been frustrating for the appellant a reasonable explanation exists for the failure to reconsider the decision. The delay in the proceedings is not as a result of the respondents actions. No order for wasted costs made.

Signed
Upper Tribunal Judge Hanson

Dated the 13 May 2016