Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13178/2018

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 30 May 2019	**On 07 June 2019**

Before

Deputy Upper Tribunal Judge Pickup

Between

Jaginder [N]
[Anonymity direction not made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Mr M Schwenk, instructed by Legal Justice Solicitors
For the respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Davies promulgated 10.1.19, dismissing her appeal against the decision of the Secretary of State, dated 2.11.18, to refuse her claim for international protection.

2. First-tier Tribunal Judge O'Keefe refused permission to appeal on 30.1.19. However, when the application was renewed to the Upper Tribunal, Deputy Upper Tribunal Judge Norton-Taylor granted permission.

3. Pursuant to the directions of Judge Norton-Taylor, the respondent and the appellant have submitted skeleton arguments, which I have carefully considered and taken into account.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that it should be set aside.

5. In granting permission to appeal, Judge Norton-Taylor identified the arguable errors of law as that the First-tier Tribunal:

   (a) Failed to engage with relevant matters relating to the validity of the husband's passport;

   (b) Failed to engage with arguments relating to the appellant's inclusion within the Refugee Convention and the Upper Tribunal's decision in TG (Interaction of Directives and Rules) [2016] UKUT 374 (IAC); and

   (c) Misapplied the burden of proof in relation to material issues.

6. The relevant background can be summarised as follows. The appellant is an Afghan Sikh married to [HN], who was born in Afghanistan and claims to be an Afghan national. However, the respondent does not accept that the husband is Afghan and contends that as he holds an Indian passport he is a national of India.

7. Judge Davies found that the appellant has a well-founded fear of persecution in Afghanistan for a Convention reason, namely treatment of Sikhs going beyond mere harassment with an unwillingness of the Afghan authorities to provide effective protection. However, the judge dismissed the appeal on the basis that the appellant "could return to India with her husband and live there without risk of persecution." The judge accepted the respondent's contention that the husband is an Indian national and the appellant could return to India with him, where they have previously lived together, without being at risk of persecution or serious harm.

8. At the hearing before me, it was agreed that the appellant's husband had previously claimed asylum, which claim was refused and certified on the basis that he could return to India without risk. Mr Tan also suggested that in his claim the husband had put forward that he was India. However, this was challenged by Mr Schewenk and Mr Tan was unable to produced the refusal decision in respect of the husband. In any event, it is clear that no such information was put before the First-tier Tribunal in the present case.

The Challenge to Indian Nationality

9. Judge Davies stated at [75] that no evidence had been put before him to suggest to the lower standard that the passport is anything other than valid and it was noted that in the appellant's visa application it was stated that the husband is an Indian national, although born in Afghanistan.

10. The appellant's case was that the Indian passport was improperly obtained to enable him to visit the appellant in the UK. It is denied that he is legally

entitled to the passport and denied that he is an Indian national. At [75] Judge Davies observed that no evidence had been put before the tribunal to demonstrate to the lower standard of proof that the passport is anything other than valid. No explanation had been provided as to why the Indian authorities had not been contacted to verify the validity or otherwise of the passport.

11. The grounds complain that the judge ignored the arguments advanced in support of the contention that the passport was not valid. These pointed to various issues including that the date of birth on the document is incorrect, that he does not qualify for Indian nationality, and as he now has an Afghan passport and India does not accept dual nationality he cannot be regarded as Indian. None of these arguments were addressed in the decision of the First-tier Tribunal. Further, given that it is the respondent who makes the positive assertion that the husband is of Indian nationality rather than Afghan, the burden is on the respondent to prove that to the standard of a balance of probabilities. The way in which the judge suggested at [75] that it was for the appellant to establish that the husband is not entitled to the passport indicates a reversal of the burden of proof and is inconsistent with the Home Office Guidance of October 2017, which states under the heading 'Disputed nationality and other cases,' "If the Home Office considers the claimant to be a specific nationality other than that claimed, the burden of proof rests with the Home Office to prove the assertion according to the balance of probabilities standard (this is a higher threshold than the lower standard of proof – reasonable likelihood - mentioned above). The test is met if it is more likely than not that the claimant holds the asserted nationality."

12. Further difficulty arises in the evidence put before the tribunal that the appellant did not meet the criteria for Indian citizenship, which requires seven years' prior residence. It was also argued at the First-tier Tribunal that as the husband now had an Afghan passport this would have invalidated any Indian citizenship as India does not accept dual-nationals.

13. In the circumstances, I find that the judge's approach on this issue amounted to an error of law. I am satisfied that it was for the respondent to demonstrate on the balance of probabilities that the husband is in fact or is entitled to Indian nationality. Mr Tan was unable to counter this assertion. Whilst there was some evidence that could have been relied on, the judge did not engage with the issue and in any event effectively reversed the burden of proof.

14. Even if I am wrong and there was sufficient evidence to demonstrate on the balance of probabilities that the appellant's husband is Indian or at least entitled to Indian citizenship, the evidence that the appellant would be entitled to accompany him and settle there is lacking. At [78] the judge merely stated that he believed "on the basis that the Appellant's husband is an Indian national and on the basis that the Appellant has lived with her husband in India previously that she would have the right to enter India as a dependent of her husband." That is insufficient to discharge the burden of proof on the respondent and for the judge to suggest that there was no

evidence to indicate that she could not do "it is not reasonably likely that she could not return to India with her husband," amounts to an error of law.

If the husband is in fact Indian, does this defeat the protection claim?

15. Even if the appellant's husband is Indian and even if she is entitled to accompany him and settle there, there are further issues that have not been adequately addressed in the decision of the First-tier Tribunal.

16. The appellant relied, in skeleton arguments submitted to both the First-tier Tribunal and the Upper Tribunal, on TG, where the issue was whether a Chinese national from Tibet could relocate to India so as to exclude him from the benefits of the Refugee Convention. That appellant argued that the exclusionary provisions in Article 1E (Refugee convention) and the Qualification Directive (339C) do not apply as he was unable to return to India and would not be recognised as having the same or equivalent rights to an Indian National.

17. Paragraph 334(v) of the Rules provides that refugee status will be granted if "refusing their application would result in them being required to go (whether immediately or after the time limited by any existing leave to enter or remain) in breach of the Refugee Convention, to a country in which their life or freedom would be threatened on account of their race, religion, nationality, political opinion or membership of a particular social group." The determinative issue in TG was whether the appellant could go to India and there receive a sufficiency of protection. The Upper Tribunal held that the burden of demonstrating that the appellant would be readmitted to India and have a level of international protection equivalent to that afforded by refugee status in an EU state lay on the respondent to the standard of a balance of probabilities. This burden was distinguished from MA (Ethiopia) [2009] EWCA Civ 289, where the Court of Appeal had held that to prove her claimed nationality, the applicant was under a duty to take all reasonable steps in good faith to obtain documents from the authorities of her State of nationality.

18. In fact, there appears to have been little cogent evidence, other than the fact of the husband's Indian passport, to support the contention of the respondent that he is Indian and that she could accompany him to India and have adequate protection there. The judge accepted the contention, noting in addition that they had both previously lived in India without apparent difficulty (although the length of such residence being months or years was a matter under challenge); were able to obtain accommodation; and that the husband was able to open a bank account there. The judge also found that the appellant had taken no steps to establish if she would be admitted to India.

19. However, this also begs the question as to whether in India the appellant would be entitled to rights equivalent to those of an Indian national so as to exclude her from protection under Article 1E. The Immigration Rules at paragraph 334(v) provides that the requirements for a grant of refugee status cannot lay down any conditions for a grant of refugee status in the

UK that are "less generous" than or are more restrictive than, or are incompatible with, the conditions for a grant of refugee status in the EU. Effectively, the Tribunal would have had to be satisfied on the balance of probabilities that not only would the appellant be admitted into India but that the rights and protection she would be afforded there were no less than equal to those enjoyed by a refugee in the UK, or any other EU state. No evidence on this issue was put before the tribunal one way or the other.

20. The respondent's skeleton argument at [5] accepts that "the judge did not correctly apply the burden and standard of proof in relation to the issue of the appellant returning to India." However, it was argued that the error was immaterial as application of the correct burden and standard of proof would have led to the same outcome. I do not agree and Mr Tan accepted that he was in some difficulty defending the skeleton argument and the decision of the First-tier Tribunal on this issue. None of this was adequately addressed by the decision of the First-tier Tribunal. In the absence of any cogent evidence to demonstrate that the appellant would be admitted to India and there enjoy sufficient protection, I am satisfied that the respondent could not have discharged the burden of proof on this issue.

21. The decision of the First-tier Tribunal fails to demonstrate that the judge adequately grappled with this second but important issue and that the correct burden and standard of proof was applied in resolving the issue.

22. In all the circumstances, I find that the decision of the First-tier Tribunal was made in error of law on what were material issues, and included at least one instance of a reversal of the burden of proof as to (a) whether the appellant's husband is an Indian national, as claimed by the respondent, and (b) whether in any event the appellant would be admitted to India in conditions where she would be entitled to protection on terms and conditions no less generous than for a grant of refugee status in the EU.

23. On the unchallenged findings of the First-tier Tribunal that the appellant is entitled in principle to refugee status and on the very limited and inadequate evidence put before the tribunal that she could be admitted to India as the spouse of an Indian national and there enjoy sufficient protection, I find that respondent has failed to discharge the burden of proof to the standard of a balance of probabilities. It follows that the appeal must be allowed.

Decision

24. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside aside the decision.

I re-make the decision in the appeal by allowing it.

Signed DMW Pickup

Deputy Upper Tribunal Judge Pickup

Dated

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a whole fee award.

Reasons: The appeal has been allowed.

Signed DMW Pickup

Deputy Upper Tribunal Judge Pickup

Dated