Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/00519/2012
AA/00520/2012

THE IMMIGRATION ACTS

Heard at North Shields	**Date Sent**
on 9th August 2013	**On 27th September 2013**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

CHAUDHARY NAEEM AHMAD
HINA NAEEM

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms McEwan of Thompson & Co Solicitors.
For the Respondent: Mrs Rackstraw – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Sacks, promulgated following hearing at North Shields on 5th April 2013, in which he dismissed the Appellants appeals against a direction for their removal to Pakistan which accompanied the refusal of their claims for asylum or any other form of international protection.

2. Permission to appeal was granted by Upper Tribunal Judge Renton on 17th May 2013 on the basis that when assessing if the Appellants would engage in paragraph 2 (i) behaviour, according to para 6 of the head note to MN [2012] UKUT 00389, it was necessary to consider behaviour since arriving UK which may be relevant. It was found the Appellants had been active in the UK and such evidence was supported by letters from the Ahmaddiya Muslim

Association UK. The Judge erred in not explaining why he rejected this evidence and it was not sufficient for the Judge to speculate that the Appellants had duped a highly reputable and organised body such as the Ahmaddiya Association.

3. Judge Sacks accepted the Appellants are Pakistani nationals of the Ahmadi faith. He stated in paragraph 16 (4) of his determination that the letter from the Ahmaddiya Muslim Association (hereinafter referred to as 'the Association') dated 4th March 2012 did not satisfy him that the Appellants practiced their religious beliefs openly in defiance of the Pakistan Penal Code on the evidence and that, in fact, they were very careful and secretive about the way in which they approached third parties and only within intimate social gatherings within their own home would they turn to a discussion of their faith. Judge Sacks also found there were significant discrepancies and contradictions in the evidence as outlined in the determination.

4. Having considered the determination in detail I find it is infected by legal errors such that it must be set aside and the decision remade. Three particular errors of concern are:

   i. Structural failure in the determination. At paragraph 16 (9) the Judge states that he viewed the letter from the Association against adverse credibility findings made whereas the content of those letter should have been considered as part of the evidence as a whole before any adverse credibility findings were arrived at. To find the Appellant not credible and then compare such a finding against the letters, which are rejected as a result, is contrary to the guidance from the Court of Appeal in relation to how evidence of this nature should be evaluated.

   ii. In paragraph 16 (9) the Judge also found there was no evidence of the sur place claim whereas a letter from the Association dated January 2013 clearly confirmed he had engaged in activities in the United Kingdom. Not only is the statement there was no evidence of such activities not correct, the structural failure referred to above may have led the Judge to disregard evidence which should have properly been taken into account by him.

   iii. Even if the Judge was correct in finding that the Appellants would not practice their faith openly in Pakistan as they had in the United Kingdom the case law establishes that the motive for such behaviour needs to be considered. It is often referred to as the HJ (Iran) point in cases of this nature. The Judge failed to carry out the necessary analysis.

5. I set the determination aside. The findings regarding nationality and religion are not challenged and shall be preserved findings. The determination shall stand as a record of the oral evidence given at that hearing. I was invited by Miss McEwen to remake the decision based upon the evidence available to the Tribunal without the need for any further oral evidence. Mrs Rackstraw raised no objection and submissions were invited from the advocates on this basis.

Discussion

6. In the reasons for refusal letter the Secretary of State notes a number of contradictions and discrepancies in the evidence but accepted that the Appellants passports are genuine and, in light of the information contained therein and especially that relating to their religion [12], it was accepted the Appellants are members of the Ahmadi faith, although the First Appellant's knowledge of the faith is stated not to be of a 'high level' [15]. First Information Report (FIR) documents submitted were not originals, stated to be inconsistent with the account given, and readily available in Pakistan, as a result which it was not accepted that the three FIR were lodged against the First Appellant in September 2009 [21]. In the alternative, if the FIR are genuine, he would not be at risk on return as the police had already dismissed the claims as unfounded [22]. In relation to the requirements of paragraph 339L of the Immigration Rules, it was accepted the First Appellant made a genuine effort to substantiate his claim by attending interview, providing a full response to questions asked, and submitting all material factors and documents at his disposal, as a result the first two of the five requirements of the rule were accepted as being met [38]. The Secretary of State did not accept, however, that all the First Appellants statements were consistent, coherent, or plausible and ran contrary to specific and general information relevant to the Appellants case [339L (iii)]. It is also said the Appellants failed to make their claim at the earliest possible opportunity without demonstrating good reason for not having done so [339L (iv)] and that the general credibility of the Appellants has not been established [339L (v)]. In addition, it is stated that no sur place activities in the United Kingdom had been established.

7. The assessment of risk on return for Ahmadi from Pakistan has to be considered in light of the current country guidance case of MN and others (Ahmadis – country conditions – risk) Pakistan CG [2012] UKUT 00389(IAC). The head note summarises the relevant guidance as follows:

> (ii) (a) The background to the risk faced by Ahmadis is legislation that restricts the way in which they are able openly to practise their faith. The legislation not only prohibits preaching and other forms of proselytising but also in practice restricts other elements of manifesting one's religious beliefs, such as holding open discourse about religion with non-Ahmadis, although not amounting to proselytising. The prohibitions include openly referring to one's

place of worship as a mosque and to one's religious leader as an Imam. In addition, Ahmadis are not permitted to refer to the call to prayer as azan nor to call themselves Muslims or refer to their faith as Islam. Sanctions include a fine and imprisonment and if blasphemy is found, there is a risk of the death penalty which to date has not been carried out although there is a risk of lengthy incarceration if the penalty is imposed. There is clear evidence that this legislation is used by non-state actors to threaten and harass Ahmadis. This includes the filing of First Information Reports (FIRs) (the first step in any criminal proceedings) which can result in detentions whilst prosecutions are being pursued. Ahmadis are also subject to attacks by non-state actors from sectors of the majority Sunni Muslim population;

(ii) (b) It is, and has long been, possible in general for Ahmadis to practise their faith on a restricted basis either in private or in community with other Ahmadis, without infringing domestic Pakistan law;

(iii) (a) If an Ahmadi is able to demonstrate that it is of particular importance to his religious identity to practise and manifest his faith openly in Pakistan in defiance of the restrictions in the Pakistan Penal Code (PPC) under sections 298B and 298C, by engaging in behavior described in paragraph (ii)(a) above, he or she is likely to be in need of protection, in the light of the serious nature of the sanctions that potentially apply as well as the risk of prosecution under section 295C for blasphemy;

(iii)(b) It is no answer to expect an Ahmadi who fits the description just given to avoid engaging in behaviour described in paragraph (ii)(a) above ("paragraph (ii)(a) behaviour") to avoid a risk of prosecution;

(iv) The need for protection applies equally to men and women. There is no basis for considering that Ahmadi women as a whole are at a particular or additional risk; the decision that they should not attend mosques in Pakistan was made by the Ahmadi Community following attacks on the mosques in Lahore in 2010. There is no evidence that women in particular were the target of those attacks;

(v) In light of the above, the first question the decision-maker must ask is (1) whether the claimant genuinely is an Ahmadi. As with all judicial fact-finding the judge will need to reach conclusions on all the evidence as a whole giving such weight to aspects of that evidence as appropriate in accordance with Article 4 of the Qualification Directive. This is likely to include an enquiry whether the claimant was registered with an Ahmadi community in Pakistan and worshipped and engaged there on a regular basis.

Post-arrival activity will also be relevant. Evidence likely to be relevant includes confirmation from the UK Ahmadi headquarters regarding the activities relied on in Pakistan and confirmation from the local community in the UK where the claimant is worshipping;

(vi) The next step (2) involves an enquiry into the claimant's intentions or wishes as to his or her faith, if returned to Pakistan. This is relevant because of the need to establish whether it is of particular importance to the religious identity of the Ahmadi concerned to engage in paragraph (ii)(a) behaviour. The burden is on the claimant to demonstrate that any intention or wish to practise and manifest aspects of the faith openly that are not permitted by the Pakistan Penal Code (PPC) is genuinely held and of particular importance to the claimant to preserve his or her religious identity. The decision maker needs to evaluate all the evidence. Behaviour since arrival in the UK may also be relevant. If the claimant discharges this burden he is likely to be in need of protection;

(vii) The option of internal relocation, previously considered to be available in Rabwah, is not in general reasonably open to a claimant who genuinely wishes to engage n paragraph (ii)(a) behaviour, in the light of the nationwide effect in Pakistan of the anti-Ahmadi legislation;

(viii) Ahmadis who are not able to show that they practised their faith at all in Pakistan or that they did so on anything other than the restricted basis described in paragraph 2(ii) above are in general unlikely to be able to show that their genuine intentions or wishes are to practise and manifest their faith openly on return, as described in paragraph 2(a) above;

(ix) A sur place claim by an Ahmadi based on post-arrival conversion or revival in belief and practice will require careful evidential analysis. This will probably include consideration of evidence of the head of the claimant's local United Kingdom Ahmadi Community and from the UK headquarters, the latter particularly in cases where there has been a conversion. Any adverse findings in the claimant's account as a whole may be relevant to the assessment of likely behaviour on return;

(x) Whilst an Ahmadi who has been found to be not reasonably likely to engage or wish to engage in paragraph 2(a) behaviour is, in general, not at real risk on return to Pakistan, judicial fact-finders may in certain cases need to consider whether that person would nevertheless be reasonably likely to be targeted by non-state actors

on return for religious persecution by reason of his/her prominent social and/or business profile.

8. The case identified two critical questions the first of which is that the decision-maker must ask whether the claimant genuinely is an Ahmadi. In this appeal this is conceded by the Secretary of State in the refusal letter and supported by the available evidence.

9. The next step involves an enquiry into the Appellants intentions or wishes as to their faith if returned to Pakistan. As stated above, the burden is on the Appellants to demonstrate that any intention or wish to practise and manifest aspects of their faith openly that are not permitted by the Pakistan Penal Code (PPC) is genuinely held and of particular importance to them to preserve their religious identity.

10. In relation to the First Appellant's activities in Pakistan the letter from the Association dated 4th March 2012 states that he served voluntarily in their Sabzazar Branch in Lahore as:

    i. The guide of males under the age of 40 years from 2002 to 2005;

    ii. The organiser of the financial donations of the youngsters from 2005 2006 and

    iii. The general organiser of the youngsters of the branch from 2007 to 2011.

11. In his witness statement dated 26th January 2012 the First Appellant confirmed he is from an Ahmadiyya family and claims to have had several positions of responsibility and posts. He claims his father was targeted as a result of being a preacher and their house entered and burned as a result [6]. The family were forced to relocate [7]. The First Appellant claims to have been involved with the following activities:

    i. Zaeem Khudam-Ulahmadiyya (local youth) from 2002 -2005 [8].

    ii. Nazim Maal (Financial Secretary) in 2006 [9].

    iii. Nazim Ammumi (Head of Security) from 2007 to present [10].

12. The first thing to note therefore is an inconsistency between activities the First Appellant claims he was involved in in Pakistan and the activities mentioned in the Association letter. These discrepancies are on the face of it material although the evidence does not assist in assessing whether a youth group is likely to be composed of those under forty or whether the post of organiser of financial donations and financial Secretary are the same. The claim the post was held

from 2005 to 2006 differs from the claim it was only held in 2006. Of more relevance is the claim to have been head of security from 2007 whereas the Association letter states he was general organiser of the youngsters in the branch from 2007 to 2011.

13. There is no reference in the letter to either appellant converting individuals to the faith in Pakistan or undertaking other activities as an outward expression of their faith or which were restricted due to a fear of persecution.

14. The First Appellant claimed he collected subscriptions and distributed religious journals [12] but did not preach his faith openly in public and did so discreetly as a result of the restrictions imposed by the blasphemy laws. He claims he has a religious obligation to preach [13].

15. It is noted in the refusal letter that the First Appellant had some knowledge of the Ahmadi faith but not at a high-level which is said to be indicative of a follower of the faith but not of somebody who had studied it to any depth or degree. Drawing an adverse conclusion from such a finding is something that requires caution for if similar questions were asked of members of the population of the United Kingdom, who declare themselves to be Christian, one wonders how much actual knowledge of the details of the faith they would have, even though their belief in Christianity could not be challenged.

16. In relation to difficulties that he personally experienced in Pakistan, the First Appellant refers to the three FIRs allegedly taken out against him in 2009 which were dismissed by the police [16] indicating that the authorities accepted any allegations in them were false and without merit. He also claims that on 13th November 2009 whilst riding to the market on his motorbike he was stopped by five or six individuals who he claims had long beards and wore the traditional dress of the Mullah who warned him to stop his preaching and then attacked him. He claims he was able to escape but suffered a broken tooth, bruises to his body and other minor injuries [18 -19]. The First Appellant felt able to approach the authorities as he reported the matter to the police [20] although claims no action was taken.

17. The First Appellant also claims to have been attacked on 5th July 2011. He was working at the family petrol station and when returning from a storeroom a jeep passed by and shots were fired at him. The jeep drove off [26] and the First Appellant claims to have returned to his friend's house and stayed there. He claims the police came to his home on the 11th July 2011 claiming that a FIR had been lodged against him as result of which it was suggested that he should move abroad. The Second Appellant applied for and was granted a student visa with the First Appellants as her dependant, after which they left Pakistan and entered the United Kingdom.

18. In her initial witness statement, to be found at pages 14 and 15 of the appeal bundle, the Second Appellant claims she taught girls under the age of 15 about the Koran in their house for approximately two years [4]. She claims that on 5th July 2011 her husband telephoned her and told her that he had been shot at although had managed to escape. She states that on the 11th July the police came to the property looking for her husband as a result of an FIR lodged against him alleging blasphemy of which she saw a copy [6]. There is however a possible further contradiction in the evidence as the First Appellant alleges in paragraph 30 of his witness statement that they obtained the student visas with the help of a consultant whereas his wife claims that the visas were obtained with the help of a friend. Judge Sacks had the advantage of observing the Appellants give oral evidence and the following is recorded in paragraph 16 (6) and (7) based upon that evidence:

> 16 (6) So far as the first Appellant's actions post 5th July 2011 are concerned there are significant inconsistencies as between the first and second Appellant's evidence and in particular as to how they obtain their visa for the UK.
>
> If the first Appellant is to be believed then he is in hiding from 5th July 2011 until the point in which he leaves Pakistan with the second Appellant for the UK. The visas are obtained with the help of an agent and it is the agent that provides all the appropriate documentation and in particular the bank statement referred to earlier in this determination. The first Appellant if he is to be believed carries out the obtaining of the visa with the help of an agent whilst he remains in hiding.
>
> (7) However, if the second Appellant is to be believed then she and the first Appellant openly take a taxi from the place in which they are staying and go to the FedEx office where they freely obtain the visa and return to the place where they are staying in a taxi. Clearly they have no fear for their safety if they so openly go to the FedEx office. Further the second Appellant states that she personally attends at the bank and obtains a statement.

19. Even though the determination of Judge Sacks has been sat aside it stands as a record of what was said at that hearing by way of oral evidence. The evidence in relation to this element of the case is unreliable, which casts doubt upon the claim to have been shot at and the alleged reason why it was necessary to leave Pakistan. The failure of the Appellants to attend to give oral evidence and face cross examination means that the discrepancies in the evidence must stand at face value. In relation to the claim to have been attacked in the manner alleged in Pakistan, this is dependent upon the First Appellant's claim being accepted as being true. Although there is some support in the county material for what he

says the contradictions in the evidence caste doubt upon whether the Tribunal has been told the truth or not in relation to events in Pakistan.

20. Both Appellants may have been involved in the Association in Pakistan which, if the letter from the Association is accepted as reliable, is at a limited level within the community and there is little evidence that their activities are conducted other than in a discrete manner within the privacy of their homes, bar their own claims to this effect. I do not find that the evidence establishes that the Appellants are credible in relation to the events in Pakistan prior to coming to the United Kingdom or that it has been established that their faith is so important to them that they wanted to take on a more proactive role by preaching openly but failed to do so as a result of a fear of persecution.

21. The statement in the evidence that to get out of the country they decided to apply for student visas at short notice is not fully supported by the fact that to get a visa for the United Kingdom, and in particular to persuade an Entry Clearance Officer (ECO) that it is a genuine application, a lot of information has to be provided. The application for a Tier 4 (General) Student visa was considered by an ECO based in Abu Dhabi but the information would have had to have been lodged with the nominated agent in Pakistan, FedEx. If biometric date was required, as it tends to be for all visa applicants they must have attended in person, which shows the First Appellants claim to have remaining in hiding and to have been reliant upon a third party, doubtful. The information provided in the bundle includes a copy of their UK Pre-Departure TB medical certificate issued on 27th July 2011, University of Ulster English Assessment Certificate completed on 19th July 2011 together with evidence of substantial funds being available to the family and a CAS assigned on 4th August 2011. To obtain the medical certificate the Appellants must have attended a clinic or appropriate medical facility. I accept that the documents were obtained shortly after the alleged shooting, which fits within the stated chronology, although they also appear to be genuine student and student dependent applications which were accepted as such by the ECO.

22. Using the visas the Appellants entered the United Kingdom on 10th October 2011 at Heathrow Airport, but did not claim asylum on arrival despite claiming to have fled in fear of their personal safety and to claim asylum. They actually claimed asylum four days later on 14th October 2011. Whilst a period of four days is not significant in itself the explanation given by the Appellants is. When asked at the interview why they did not claim asylum at the airport their reply was that they did not do so as a result of a fear of being deported. It appears contradictory for a person to come to the United Kingdom to claim asylum yet fail to make the application when there was a clear opportunity for them to have done so.

23. There is also an additional element relevant to the credibility of the Appellants. The applications made to the ECO was to permit the Appellants to come to the

United Kingdom as a student and student dependent. Despite this it is claimed by them that the true reason they came to the United Kingdom is to claim asylum. As noted in paragraph 41 of the reasons for refusal letter, on arrival in the United Kingdom they were questioned by an Immigration Officer and the First Appellant is stated to have provided false information that his wife will be attending college to study for a qualification in London which, if this was not their intention, is indicative of a further and deliberate act of deceit both in relation to a misrepresentation in the visa application form in which it is claimed this is a genuine application made by an individual wishing to study in the United Kingdom who on completion of the course will leave, and in oral representations made to an Immigration Officer, when their real intention was otherwise.

24. Notwithstanding the lack of credibly in relation to the claims of persecution or of suffering attacks in Pakistan, it remains necessary to asses any risk of return as it will be viewed through the eyes of any potential persecutor. The First Appellant states he has involved himself in activities in the United Kingdom. He relies upon a claim, in his witness statement dated 21st March 2013, to be able to be more open regarding his religion in the United Kingdom [12] and has provided photographs of him at a temporary stand in Newcastle town centre and undertaking other activities [A's bundle, pages 54-58]. He also relies upon a further letter from the Association dated 8th January 2013 [A's bundle pages 48-49] which at paragraph 3, on the second page, states the following :

> 3. In the United Kingdom the above named participates in the activities of his local branch (at present Newcastle) and that of the Association. He has
>
> (a) attended congregational prayers, Eid festivals, annual convention of the community, annual gatherings of Khuddam (males under the age of 40 years) and branch's meetings;
>
> (b) participated in the preaching programmes of the branch including door-to-door distribution of our leaflets that create an awareness of Islam and invites members of the public to the message of the Ahmadiyya Muslim community.
>
> (c) helped in holding the Quar'an exhibitions;
>
> (d) performed the duties assigned to him by the community officials.

25. This is evidence of sur place activities. In Danian v SSHD [2002] IMM AR 96 the Court of Appeal said that there is no express limitation in the Convention in relation to persons acting in bad faith, despite Counsel's attempt in Danian to have one implied. In the court's opinion the answer to the 'riddle' lay in the

judgment of Millet J in Mbanza [1996] Imm AR 136. In that case Millet J said "The solution does not lie in propounding some broad principle of abuse of the system….but in bearing in mind the cardinal principle that it is for the applicant to satisfy the SSHD that he has a well founded fear of persecution for a Convention reason. Whether he can do so will largely turn on credibility and an applicant who has put forward a fraudulent and baseless claim for asylum is unlikely to have much credibility left." The Court referred to a letter from the UNHCR which stated that regard should be had to whether the person's actions had actually come to the notice of the authorities in his home country and how they would view such actions. It does not matter whether an appellant has cynically sought to enhance his asylum prospects by creating the very risk he then seeks to rely on, although bad faith is relevant when evaluating the merits/credibility of the claim, as explained in Danian. However, as Bingham J also said in Danian - the actual fear has to be shown to be genuine and not one that was manufactured by conduct designed to give plausibility.

26. In YB (Eritrea) v SSHD [2008] EWCA Civ 360 the Court of Appeal sounded a note of caution in relation to the argument that, if an appellant was found to have been opportunistic in his sur place activities, his credibility was in consequence low. Credibility about what, said the Court of Appeal. If he had already been believed *ex hypothesi* about his sur place activity, his motives might be disbelieved, but the consequent risk on return from his activity sur place was essentially an objective question.

27. Ahmadi cases rarely, if ever, involve the need to find whether an individuals UK based activities will have come to the attention of alleged third party persecutors or the State and this is not argued before me. Such evidence is adduced to support a claim to be active within the faith and in a way in which they are unable to be in Pakistan. Whilst I accept that the evidence from the Association and elsewhere corroborates the claim the First Appellant has been involved in activities in Newcastle this does not, on its own, provide the answer to the second question set out above. The burden is on the Appellants to demonstrate that any intention or wish to practise and manifest aspects of the faith openly that are not permitted by the Pakistan Penal Code (PPC) is genuinely held and of particular importance to the claimant to preserve his or her religious identity. I do not accept that either Appellant is a credible witness. As their representative asked for the appeal to be considered on the basis of the available evidence and that is all I have to consider. There are material discrepancies referred to above and when considering all the available evidence with the degree of care required in an appeal of this nature, that of anxious scrutiny, I do not find that the Appellants have discharged the burden of proof upon them to the required standard to show that it is of particular importance to their religious identity to engage in the type of behaviour in Pakistan referred to in paragraph (ii) (a) of the head note of MN. I do not find they have demonstrated an intention to practice and manifest aspects of the faith openly that are not permitted by the Pakistan penal code or that their wish to do so

represents a genuinely held belief of particular importance to enable them to preserve their religious identity. I find the sur place aspects are opportunistic and designed to bolster what is otherwise a very weak claim riddled with inconsistencies and elements that damage the overall credibility.

28. The country guidance case makes it clear that not all Ahmadi are at risk in Pakistan and I find it has not been shown that the profile of these Appellants, in Pakistan or since they entered the United Kingdom, is such that they face a real risk sufficient to warrant a grant of international protection based upon their own individual profile, religious identity, manifestations of that religious identity in Pakistan in the past, how such religious identity would be manifested on return to Pakistan, or any family or other related profiles.

Decision

29. **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 dismissed.**

Anonymity.

30. 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 no such order as no application was made for anonymity and such an order is not warranted on the facts.

Signed…….
Upper Tribunal Judge Hanson
Dated the 26th September 2013