Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/09152/2015
AA/09659/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 February 2016	**On 21 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

KB
AH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr E Fripp, Counsel instructed by Roelens Solicitors
For the Respondent: Mrs S Sreeraman, Senior Home Office Presenting Officer

Anonymity

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no

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report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellants. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

DECISION AND REASONS

1. This appeal arises from the decision of the respondent to refuse the appellants' application for asylum or humanitarian protection and the subsequent dismissal of their appeal by First-tier Tribunal ("FtT") Judge Oakley.

2. The appellants are citizens of Pakistan. The first appellant was born on 31 December 1979 and the second appellant, his mother, was born on 1 January 1950. Both appellants claim to fear persecution in Pakistan because they are Ahmadi Muslims.

3. The first appellant's case, in summary, is that he has served, and been heavily involved in, the Ahmadi community in Pakistan, his late father having been president of the local area. He claims that in December 2014 two mullahs vandalised his family's shop (which they have owned since 1999). He reported the matter to the police but no action was taken. He and his mother were concerned and therefore travelled to the UK whereupon they claimed asylum. His wife and children remain in Pakistan and live with his wife's parents.

4. The second appellant claimed to have suffered harassment as a consequence of being Ahmadi, although she was never subject to physical assault.

5. The respondent refused the asylum claims and the appellants appealed. In dismissing their appeal, the FtT made a number of findings, which include the following:

    a. Neither of the appellants had any particular problems until the incident in the shop occurred.
    b. They had both been living in the house of the second appellant's brother.
    c. The first appellant operated a shop for about fifteen years without harassment or attack.
    d. In December 2014 the shop was attacked as described by the appellants and the incident was reported to the police.
    e. The first appellant left his wife and children in Pakistan, where they have not faced problems.
    f. The shop continues to be operated. It is overseen by the first appellant's brother but is operated by a non Ahmadi.
    g. The second appellant has experienced no personal attacks although she has experienced harassment and taunts.

6. The FtT's consideration of the religious beliefs and practices of the first appellant is set out in paragraphs [50] and [51] of the decision. At paragraph [50] the FtT stated that it was "clear" he did not preach openly in Pakistan and that "he clearly indicates that any preaching was only done discreetly." The FtT also stated that the first appellant

confirmed that "whilst he continued to preach in the UK, he would always refer any persons for possible conversion to the professionals and his activities in relation to that were more limited." The FtT found, at paragraph [51], that whilst the first appellant regularly attends Ahmadi events in the UK, there is no evidence "that he has any particular responsibility for preaching and conversion".

7. The decision does not include any consideration of the second appellant's religious beliefs and activities.

8. At paragraph [52] the FtT concluded that the first appellant falls into category 2(ii) of the headnote in MN and Others (Ahamdis- country guidance – risk) Pakistan CG [2012] UKUT 00389. No specific finding in respect of whether the second appellant falls into this category is made.

Grounds of appeal and submissions

9. The appellants' grounds of appeal are lengthy and were helpfully summarised by Mr Fripp who, in his submissions, articulated four distinct grounds.

10. The first ground is that the FtT erred in respect of the standard of proof by applying the higher civil standard rather than the lower standard of proof required in asylum appeals. Although at paragraph [10], under the sub heading "burden and standard of proof," the FtT directed itself as to the correct standard, in the substance of the decision, at paragraphs [36] and [39], the FtT made a finding that the event the first appellant described "is likely more than not to have taken place." Mr Fripp submitted that there are no other references to the standard and the implication is that the judge in practice applied the wrong standard throughout the decision.

11. The second ground of appeal, as submitted by Mr Fripp at the hearing before me, is that the FtT failed to take into account the discrimination the appellants have faced, over many years, as Ahmadis, in making a finding that they had not faced any real problems until the incident at the shop in 2014.

12. The third ground concerns the FtT's findings, at paragraphs [39] and [40], about the reporting of the incident at the shop to the police. The FtT stated at paragraph [39] that "it does not appear that the matter has been pressed by those reporting the matter and it is perhaps a result of that fact that the police took no action." At paragraph [40] it then stated that the Country Guidance shows that in general a person can access effective protection "but in this case it appears for reasons known to themselves that the matter was not pressed further with the police". Mr Fripp argued that this is contrary to MN, the findings of which highlight why protection would not be available for the appellants and why they would not necessarily wish to press the matter with the police. He also submitted that the FtT's comment about the police not taking action because the matter was not pressed is merely speculation.

13. The fourth ground is that the FtT has failed to follow MN by focussing on preaching by the appellants. No reason other than the absence of preaching is given for the FtT's conclusion that protection is not required. However, the risk to Ahmadis identified in MN is not limited to individuals who preach and the question the FtT should have considered is whether it is of particular importance to the appellants' religious identity to practice their faith openly. Moreover, the FtT, having acknowledged that the first appellant claimed he preached discreetly in Pakistan, failed to consider whether that was a result of the fear he faced. In respect of the second appellant, Mr Fripp submitted that the FtT failed to explore whether the absence of open expression of her faith in Pakistan was a result of the climate of fear.

14. Mrs Sreeraman argued, firstly, that the FtT had properly directed itself and applied the correct burden of proof. In any event, the findings where a higher standard had been applied were favourable to the appellant.

15. Secondly, with regard to MN and risk on return, Mrs Sreeraman argued the FtT explained, in clear terms, why the appellants would not face risk of persecution and in so doing engaged properly with the applicable Country Guidance. The burden was on the appellants to show they fall into category 2(i) of the headnote to MN and they have failed to meet that burden even to the lower standard in asylum cases. She argued that the evidence before the FtT was consistent with a finding that the appellants could practice their religion upon return without infringing Pakistan law and that they did not have a genuine intention to practice their faith as described in category 2(i).

Consideration

16. I do not accept that the FtT has made an error in respect of the standard of proof it adopted in determining the risk the appellants would face on return to the Pakistan.

17. As noted by Mr Fripp, at paragraphs [36] and [39], the FtT applied the civil standard of proof (more likely than not), rather than the lower standard applicable in asylum claims (reasonable degree of likelihood) in respect of its finding as to whether the incident at the appellant's shop took place.

18. Whilst the ultimate question for the FtT was whether there was a "real risk" or a "reasonable degree of likelihood" of the appellants being at risk on return to Pakistan (ie the lower standard in asylum appeals) that does not mean it could not apply different levels of proof to particular factual findings when evaluating the evidence and find that certain events were "more likely than not" to have occurred. As explained in SR (Iran) [2007] EWCA Civ 460 at [9]:

> *There is nothing wrong with the differential levels of proof or disproof of primary facts found by the tribunal. In §41, for example, they find it likely that the appellant would continue with Christian communion in Iran and that this would bring her to the attention of the authorities, but they do not accept that she would bear witness to her friends. In §46 they find that the fact that her parents are pensioners does not necessarily mean that they would be unable to protect her economically from persecution. The law does not demand, at least in this field, that each finding of fact, whatever its*

> *degree of certainty or uncertainty, be fitted into a single matrix of risk. The fact-finder's task is, to the extent made possible by the evidence, to find facts, and some facts are more certain than others. It would have been as unjust to the appellant to treat as mere possibilities things which, on the AIT's findings, were highly likely as it would have been to the respondent to treat possibilities of hardship as probabilities*

19. At paragraph [10], the FtT directed itself correctly as to the standard of proof. In making its final decision, at paragraphs [56] and [57], the FtT stated that the appellants had not "discharged the burden of proof of having a well founded fear of persecution" and "there is not a real risk they will suffer a breach of their protected rights under Article 3". Read as a whole, it is apparent that the FtT has kept in mind, and applied, in reaching its ultimate conclusion as to the appellants' risk of return, the correct standard of proof.

20. I now turn to the question of whether the FtT failed to correctly apply MN.

21. The country guidance in MN states that if an Ahmadi is able to demonstrate that it is of particular importance to his religious identity to practice and manifest his faith openly in Pakistan, in defiance of the Pakistan Penal Code, by engaging in behaviour prescribed in paragraph 2(i) of the headnote to the decision ("the paragraph 2(i) factors"), he or she is likely to be in need of protection. The paragraph 2(i) factors include:
    - Preaching and other forms of proselytising;
    - Holding open discourse about religion with non Ahmadis; and
    - Openly referring to one's place of worship as a mosque, to religious leaders as an imam, to the call to prayer as azan or to themselves as Muslims.

22. In my view, the FtT has made a material error of law by reaching its finding as to the risk the appellants would face on return to Pakistan without addressing whether the paragraph 2(i) factors were of particular importance to the religious identity of the appellants.

23. The FtT found that the first appellant would not be at risk because he has only preached discreetly, has not been involved in conversions and there is no reason he would be specifically targeted on return to Pakistan. The shortcoming of this analysis is that, firstly, the FtT has failed to address why the first appellant preached discreetly. The first appellant's evidence, as set out in his witness statement, was that he was discreet in his preaching because of anti-Ahmadi laws. This is material to the question of whether it is of particular importance to him to engage in preaching and it was an error for the FtT to not take account of, and make a finding in respect of, the first appellant's claimed reason for not preaching openly. Moreover, the FtT has not taken into consideration whether the other paragraph 2(i) factors are of particular importance to the first appellant. The decision focuses entirely on whether, and the extent to which, he was involved in conversions and preaching and does not engage with the other conduct enumerated in paragraph 2(i), which falls short of preaching and proselytising, but which can still give rise to a risk on return to Pakistan.

24. Similarly, in respect of the second appellant, the FtT has erred by failing to address whether the paragraph 2(i) factors apply in her particular circumstances. The FtT found she is not at risk of persecution because although she has faced taunts and harassment from time to time, she has never been specifically targeted. Although this is relevant to the question of whether she would be at risk on return to Pakistan, the absence from the decision of any consideration of whether engaging in the paragraph 2(i) factors is of particular importance to her religious identity amounts to an error of law.

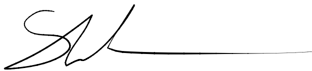
25. Having regard to section 7.2(b) of the President's Practice Statement, it is my view that this case should be remitted to the First tier Tribunal and be heard afresh. I have considered whether the factual findings of Judge Oakley should be preserved but given that further factual evidence and findings will be necessary I consider it preferable that the matter is heard again de novo.

<u>Decision</u>

a. The decision of the First-tier Tribunal contains a material error of law such that it should be set aside in its entirety and the appeal heard afresh.

b. The appeal is remitted to the First-tier Tribunal for hearing afresh before a judge other than First tier Tribunal Judge Oakley.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 11 March 2016