Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/00091/2017**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Decision & Reasons Promulgated**
On 10 August 2017	**On 31 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

Q U Q

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Fripp counsel instructed by Morden Solicitors

For the Respondent: Mr G Harrison Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. An application was made and an order has been made.
2. The Appellant was born on [ ] 1984 and is a national of Pakistan.

3. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.
4. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Davies promulgated on 13 February 2017 which dismissed the Appellant's appeal against the decision of the Respondent dated 26 December 2016 to refuse her protection claim.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Davies ("the Judge") dismissed the appeal against the Respondent's decision.
6. Grounds of appeal were lodged arguing: that the Judge was in error in that:
   (a) There was procedural unfairness in proceeding to determine the appeal without seeing a copy of the Appellants interview record.
   (b) He failed to apply Devaseelan correctly in failing to adequately address the evidence of the Ahmadiyya Muslim Association UK (AMUK) or that of Naeem Bhatti which provided strong support for the claim that her husband had been kidnapped.
   (c) He raised the threshold of for entitlement of protection to 'open preaching' and failed to provide adequate reasons for rejecting the Appellants evidence of sharing her faith with non Ahmadi people.
   (d) He misdirected himself in respect of MN and others (Ahmadis – country conditions – risk) Pakistan CG [2012] UKUT 00389(IAC) in that he failed to adequately address the protected area of manifestation of faith focusing only on preaching; he failed to ask whether by preaching to non Ahmadis even within her open and wearing a hijab that identified her as an Ahmadi did not reflect someone who attached importance to the manifestation of her religious identity;he failed to address why the Appellant was not engaging in open activities.
7. On 24 March 2017 First-tier Tribunal Judge gave permission to appeal on the grounds set out above.

8. At the hearing I heard submissions from Mr Fripp on behalf of the Appellant that:

   (a) The Respondent had failed to provide a bundle in accordance with a direction made by the Tribunal either at the CMR or at the substantive hearing. The

contents of the interview were very relevant to the issue of her commitment to her faith as there were detailed answers on this issue. The Judge was offered a copy of the interview by Mr Fripp but refused this and instead accepted that he would be provided with a copy by the Respondent. No such copy was ever provided and there is nothing in the decision to suggest that the Judge made any effort to obtain the interview before writing his decision. This was unfair.

(b) Ground 2 argued that the Judge was bound to consider Devaseelan as the Appellants husband had previously had an appeal rejected and there was a clear overlap in that she also relied on the account of her husband being kidnapped. The Judge had letters from AMAUK which corroborated the kidnapping and had not been addressed in respect of that aspect of the claim by the previous Judge. This Judge additionally had an AMAUK official give oral evidence. His evidence was largely unchallenged and it is unclear from the decision whether Mr Bhatti was given the opportunity to address the issues raised by the Judge when he determined the weight to be given to Mr Bhatti's evidence.

(c) The Judge reasoning about the credibility of the family suffering such an attack was inadequate and confused plausibility with behaviour that would attract protection according to MN.

(d) Ground 3 was that he wrongly identified public or open preaching, and the use of the word preaching was criticised as misleading by the Tribunal in MJ & ZM (Ahmadis – risk) Pakistan CG 2008 UKAIT 00033 as the key issue rather than the importance of the religious identity and whether this was concealed in order to avoid punishment.

(e) There was some overlap in Ground 4 in that the Judge misdirected himself in failing to recognise that those who wished to express an identity contrary to the penal code were entitled to refugee status. The breadth of prohibitions in respect of this was important. The Judge focused on preaching. A correct understanding of MN was that if the Appellant was an active Ahmadi, had previously been active, her husband preached albeit in private, the lady wore

a style of hijab that identified her as Ahmadi she was entitled to protection in accordance with MN.

(f) The Judge had applied an elevated threshold but even on the basis of the limited findings the Judge had made I could remake the decision and allow the appeal.

9. On behalf of the Respondent Mr Harrison submitted that :

(a) He relied on the Rule 24.

(b) It was a matter of concern that the Judge thought it was acceptable to make the decision when the evidence of the interview was not before him and although it was undertaken by the Respondent that it would be provided it was not.

(c) He accepted that the Judge applied too high a threshold.

(d) He suggested that potentially the Respondent was prejudiced by the Judge making findings without access to the interview.

10. In reply Mr Fripp on behalf of the Appellant submitted :

(a) The Judge did lack important material when he made his decision but the Respondent did not suggest in their response that they were prejudiced by the absence of the documents.

Finding on Material Error

11. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.

12. The first challenge was that it was procedurally unfair of the Judge to proceed without the record of interview given that Mr Fripp had argued that her detailed responses in interview were relevant both to the issue of the kidnapping and how she manifested her faith in Pakistan and the UK. It is difficult to understand why the Judge simply did not accept the offer of a copy of the interview in court as both sides had it. The case proceeded however on the basis that the Judge

would have the opportunity to consider her interview because the Respondent undertook to provide a copy. No copy was provided (and indeed there is still no copy of the interview in this file) and rather than attempting to secure one using court staff from the legal representatives the Judge decided (paragraph 19) that he had 'sufficient evidential material on which to base a decision.' This is not the test to be applied. The Appellant bears the burden of proving her case and she asserted that the interview was an important part of her case. The Judge was therefore required to consider whether it would be unfair to the Appellant to proceed without part of the evidence on which she relied and on which Mr Fripp specifically addressed him in submissions. Given that the interview went to an issue that was at the heart of the case, how she manifested her faith and potentially why she behaved in the way she did this was an important issue to engage with in deciding to proceed without the interview that he knew the Appellants Representatives could have provided if asked. The failure of the First-tier Tribunal to address and determine this issue constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.

13. In relation to the application of Devaseelan I am satisfied that while the Judge set out both the case and how it should be applied in this case at paragraphs 25-27. That he failed to properly engage with the evidence of Mr Bhatti. Given that the Mr Bhatti did not appear before the previous Judge and his evidence 'largely unchallenged' by the HOPO (paragraph 27) and indeed by the Judge, it was procedurally unfair to make an adverse finding on the basis that 'he did not produce any reports relating to the case of Dr Q without giving him the opportunity to address this concern in court when Mr Bhatti apparently had the files relating to the Appellant with him at court.

14. In relation to the third and fourth grounds that the Judge misdirected himself in relation to MN and set too high a threshold for entitlement to refugee protection by apparently focusing only on preaching openly Mr Harrison was correct in my view to concede that this ground was made out. I accept that MN finds that an Ahmadi who wishes to express an identity contrary to the Penal Code is entitled

to refugee status and that the breadth of the prohibitions is significant. The Judge in focusing on open preaching both in Pakistan and the UK which he referred to repeatedly throughout the decision and which formed the basis of his conclusions at paragraph 39 of the decision was applying an artificially elevated threshold of entitlement to protection and failed where he found the Appellants activities to be limited in some way to consider why they were limited as this is also relevant.

15. Mr Fripp argued before me that the Judge made sufficient findings about the Appellants circumstances that I could remake to the decision and allow it. I am satisfied that the findings in this case are too limited and insufficiently clearly reasoned to allow me to proceed on that basis and the approach of the Judge so undermined by procedural unfairness that proceeding on the very limited positive findings made by the Judge (she was active within the Ahmadi community, she wore a hijab that identified her as an Ahmadi and preached to non Ahmadis in her own home) would be unfair to the Appellant. I therefore found that errors of law have been established and that the Judge's determination cannot stand and must be set aside preserving those findings that I have just referred to but all other matters to be redetermined.

16. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

17. In this case I have determined that the case should be remitted as I have found there was an error of law because the Appellant did not have a fair hearing due to the failure to obtain a copy of the asylum interview.

18. I consequently remit the matter back to the First-tier Tribunal sitting at Manchester to be heard before me on a date to be fixed.

19. I made the following directions for the hearing

- There is no copy of the substantive asylum interview. Given the Respondents inability to provide it the Appellants representatives should provide the tribunal with a copy 5 days before the hearing.
- List for 3 hours
- Urdu Interpreter.

CONCLUSION

20. **I therefore found that errors of law have been established and that the Judge's determination should be set aside and the matter remitted to the First- tier tribunal.**

21. **Under Rule 14(1) the Tribunal Procedure (Upper Tribunal) rules 2008 9as amended) the Appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order for anonymity was made in the First-tier and shall continue.**

Signed Date 30.8.2017

Deputy Upper Tribunal Judge Birrell