



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/03154/2013

THE IMMIGRATION ACTS

Heard at North Shields
On 8 August 2013

Determination Sent
On 6 September 2013

Before

UPPER TRIBUNAL JUDGE DEANS

Between

Mr MUDASAR IQBAL
(No anonymity order made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss S McEwan, Thompson & Co Solicitors
For the Respondent: Mr C Dewison, Home Office Presenting Officer

DETERMINATION AND REASONS

- 1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Cope dismissing the appeal on asylum and human rights grounds.
- 2) The appellant is a national of Pakistan. He claims to fear persecution in Pakistan by reason of his Ahmadi faith. While it was accepted that the appellant is an Ahmadi his claim that he had been involved in preaching in Pakistan was found not to be credible. He was found not to be at risk by reason only of his faith.

Error of law

- 3) The appellant came to the attention of the immigration authorities in the UK when he attempted at Heathrow Airport to board a flight to Spain relying upon his own passport in which there was a stolen blank Greek visa and a counterfeit Greek entry stamp. This behaviour led to an adverse credibility finding being made against the appellant under section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. Permission to appeal was granted in part because it was arguable that the Judge of the First-tier Tribunal misdirected himself in finding that he was required to draw an adverse inference against the appellant's credibility.
- 4) The second issue on which permission to appeal was granted was that it was arguable that the judge was not entitled to draw an inference that the appellant had not been involved in preaching in Pakistan on the basis of a letter from the Ahmadi community in the UK which did not specify that the appellant had been involved in preaching in Pakistan.
- 5) At the hearing before me, Miss McEwan, for the appellant, submitted that the Judge of the First-tier Tribunal did not look at the evidence when drawing an adverse inference under section 8 of the 2004 Act. The judge did not take into account the appellant's reasons for seeking to travel to Spain. The judge was wrong to disregard a report on this by an Immigration Officer at Heathrow, at A11 of the respondent's bundle. The judge failed to give sufficient reasons for his finding under section 8, particularly as there was significant parts of the evidence where the judge found in favour of the appellant on credibility.
- 6) For the respondent, Mr Dewison submitted there was no error by the judge. Under section 8 the judge was bound to make an adverse credibility finding on the basis of the appellant's behaviour. The appellant was trying to leave the UK using a forged Greek visa with the aim of claiming asylum in Germany.
- 7) In relation to the letter from the Ahmadiyya Muslim Association (AMA), the judge was entitled to find that, if what the appellant said about his activities Pakistan was true, then there would be more information in this letter about these activities than there was. If the judge felt that a piece of evidence was insufficiently weighty then the judge was entitled to reject it. The judge identified further difficulties in the appellant's evidence at paragraphs 60-79, where the judge gave a lengthy explanation of why the appellant's evidence was not credible.
- 8) The consideration by the judge of section 8 of the 2004 Act followed upon section 8(2) of the 2004 Act having been founded on by the respondent in the reasons for refusal letter of 15 March 2013. The relevant parts of section 8 read as follows:

“(1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding

authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies.

(2) This section applies to any behaviour by the claimant that the deciding authority thinks -

(a) is designed or likely to conceal information,

(b) is designed or likely to mislead, or

(c) is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant."

9) The application for permission to appeal relies upon the decision of the Court of Appeal in IT (Cameroon) [2008] EWCA Civ 878, in which guidance was given as to the meaning and effect of this provision. In that decision section 8 is described as "a reminder to fact-finding tribunals that conduct coming within the categories stated in section 8 shall be taken into account in assessing credibility". The decision, at paragraph 21, then states that "at one end of the spectrum, there may, unusually, be cases in which conduct of the kind identified in section 8 is held to carry no weight at all in the overall assessment of credibility on the particular facts". The weight to be given to section 8 matters was entirely a matter for the fact-finder.

10) On behalf of the appellant it is argued that in the present appeal the judge misdirected himself as to the meaning and effect of section 8. At paragraph 103 of the determination the judge summarised the meaning of section 8 as requiring that the Tribunal "must draw adverse inferences against the credibility of an appellant in relation to certain prescribed factual circumstances." This is going too far. The provision requires the section 8 matters to be taken into account as damaging to the claimant's credibility but this will not necessary result in an adverse inference on credibility being drawn. As pointed out by the Court of Appeal in IT (Cameroon), there is a spectrum of possibilities between one extreme, where the section 8 matters may carry no weight, and the other, where they may indeed lead to the drawing of an adverse inference as to credibility in relation to crucial issues in an appellant's evidence.

11) To ascertain properly whether the judge's misdirection affected the outcome of the appeal, it is necessary to have regard to the reasons given by the judge for drawing an adverse inference from the section 8 matters. The judge refers at paragraphs 104-106 to the appellant having obtained and used a stolen visa and forged immigration stamp. Because of this the judge finds that "the use of such documentation points strongly to the appellant not being genuine in his claim to have left Pakistan to seek asylum abroad." The judge then says that consequently he has "no alternative but to draw a statutory adverse credibility finding against the Appellant" and that "the weight to be attached to such a statutory adverse credibility finding is considerable".

- 12) The main difficulty I have with this reasoning is that it completely disregards the appellant's account of why he was seeking to leave the UK to travel to Spain. Before the judge can assess the weight to be given to the appellant's relevant behaviour under section 8, the judge must have regard to any evidence given by the appellant to explain that behaviour. In this appeal the judge failed to do this.
- 13) One of the reasons the judge fell into this error was that he decided to disregard the report by the Immigration Officer at A11, already referred to, describing the way in which the appellant came to the notice of the immigration authorities at Heathrow.
- 14) The judge noted that this report bears the date 15/04/2013 but it purports to have been sent by fax on 16/02/2013. The incident giving rise to the detection of the appellant took place on 15 February 2013 and this date is not disputed. Largely because of the inconsistency over dates on the face of the report, the judge found the document was not a reliable document on Tanveer Ahmed [2002] UKIAT 00439.
- 15) The judge does not appear to have considered the obvious explanation that the date of 15/04/2013, although it appears twice on the document, was a simple typing error and that the report's correct date should have been 15/02/2013. In addition, the judge appears to have been confused about the meaning and application of the decision in Tanveer Ahmed. This decision applies principally to documents whose origins are such that their provenance cannot be checked or verified. Accordingly, an assessment has to be made of the reliability of such a document based upon the evidence in the round.
- 16) The document dated 15/04/2013, however, was not a document whose veracity could not be checked. It purports to be a report by a named UK Immigration Officer. If necessary, inquiries could have been made with that officer as to whether he wrote the report. It is unlikely, however, that such inquiries would have been necessary because the report was accompanied by other evidence from the Home Office relating to the detection of the appellant at Heathrow on 15 February 2013. Not only did the judge misdirect himself as to the law in assessing the reliability of the document in question, but even in terms of his manner of assessment he adopted, he failed to take into account of the evidence in the round, namely the other evidence emanating from the Home Office tending to show that this was a genuine document.
- 17) Partly as a result of these errors, the judge failed to have regard to the explanation given by the appellant as recorded in the document in question. When detected the appellant told the Immigration Officer that he could not go back to Pakistan because his life was in danger and he wanted to claim asylum in Germany. The appellant, along with another passenger, with whom he was travelling, believed that his Greek visa was a Schengen visa which would entitle him to travel to Spain and then on to Germany.
- 18) There was an explanation in the appellant's witness statement of why he wanted to travel to Germany and this was because his brother was living there. His brother has

an asylum claim in Germany. As was pointed out on behalf of the appellant, the judge did not take into account that it would be possible for a genuine asylum seeker to wish to claim asylum in a particular country and it did not necessarily follow from an asylum seeker trying to reach that country that the claim was not credible.

- 19) The error of law by the Judge of the First-tier Tribunal consists not merely in misconstruing the effect of section 8 of the 2004 Act but also, and perhaps more significantly, failing to take into account the appellant's explanation for the behaviour taken into account under section 8. For this reason, I consider that the decision of the Judge of the First-tier Tribunal must be set aside and re-made.

Submissions on re-making the decision

- 20) Both parties were of the view that the decision might be re-made at the same hearing as I made the decision on error of law. Accordingly I invited submissions from them.
- 21) For the respondent, Mr Dewison relied on the reasons for refusal letter. He submitted that the judge was entitled to draw the inference he did from the AMA letter. He pointed to an adverse finding made by the First-tier Tribunal at paragraph 73 of the determination. It was the appellant's evidence that used to attend camps for people of the Ahmadi faith. Those who were not Ahmadis were invited to some of these camps but this stopped after a terrorist bombing in Lahore on 28 May 2008. The judge referred to the background evidence in which it was stated that a considerable number of Ahmadis were killed in a bombing at a mosque in Lahore on 28 May 2010. At interview the appellant denied that the incident had taken place in 2010 and reiterated that it was 2008. The judge considered that given the importance and the impact of this incident it was very surprising that the appellant should have made this mistake and did not accept his explanation that he was mixed up about dates. Mr Dewison submitted that this was such a significant event, which attracted worldwide publicity, if the appellant was a long-standing and involved member of the Ahmadi community he would not have made this mistake.
- 22) For the appellant, Miss McEwen pointed out that the determination of the Judge of the First-tier Tribunal relied heavily on the record of the asylum interview and the judge did not refer to the appellant's evidence at the hearing.
- 23) Reference was made to the decision in MN & others (Ahmadis - country conditions - risk) Pakistan CG [2012] UKUT 00389. In relation to this Mr Dewison submitted that the AMA letter did not support the appellant's claim about his activities in Pakistan and did not support the proposition that he would behave any differently were he to return there. He submitted that to qualify as a refugee any preaching must be to "non-believers". Ahmadis in Pakistan could practise their faith and problems only arose for people who openly proselytized. The Judge of the First-tier Tribunal found the appellant could live in Pakistan as he did before.

- 24) For the appellant, Miss McEwen responded that the appellant dropped his activities because of the attack on the mosque in Lahore. His activities were curtailed because of fear of persecution. The Judge of the First-tier Tribunal accepted that the appellant had been practising his faith in the UK but did not accept this was enough. An example of the appellant's behaviour in the UK, however, was his involvement in distributing leaflets to non-Ahmadis.

Discussion

- 25) In order to succeed the appellant must show that he falls within the country guideline decision of MN & others. This decision sets out the current position for Ahmadis in Pakistan. It states that it is 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. The background to the risk faced by Ahmadis is legislation that restricts the way in which they are able to practise their faith openly. This legislation not only prohibits preaching and other forms of proselytizing but also in practice restricts other elements of manifesting religious belief, such as holding open discourse about religion with non-Ahmadis, even where these do not amount to proselytizing. The prohibitions include referring openly to one's place of worship as a mosque and to one's religious leader as an Imam. Ahmadis are not allowed to refer to the call to prayer as "azan", or to call themselves Muslims, or to refer to their faith as Islam. Sanctions include a fine and imprisonment and, if blasphemy is found, there is the possibility of the death penalty, although to date this has not been carried out. If the death penalty is imposed there is a risk of lengthy incarceration. This legislation is used by non-state actors to threaten and harass Ahmadis.
- 26) The decision proceeds to state that 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 Penal Code, 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 for blasphemy. It is no answer to expect an Ahmadi who fits this description to avoid engaging in behaviour to avoid a risk of protection.
- 27) According to MN, the first question the decision maker must ask is (1) whether the claimant genuinely is an Ahmadi. This is likely to include an inquiry as to whether the claimant is registered with an Ahmadi community in Pakistan and worshipped and engaged there on a regular basis. Post-arrival activity will also be relevant, as well as evidence from the UK AMA headquarters regarding activities in Pakistan. The next step (2) involves an inquiry into the claimant's intentions or wishes as to his or her faith if returned to Pakistan. There is a need to establish whether it is of particular importance to the religious identity of the Ahmadi concerned to engage in behaviour contrary to the Penal Code. The burden is on the claimant to demonstrate that any intention to practice or manifest their faith in this way is genuinely held and of particular importance to the claimant to preserve his or her religious identity. All the evidence must be evaluated including behaviour since arrival in the UK, where

relevant. If the claimant discharges this burden, he or she is likely to be in need of protection.

- 28) In this appeal it was accepted by the Judge of the First-tier Tribunal that the appellant is an Ahmadi. It was further accepted that he has been involved in activities in the UK manifesting his Ahmadi faith. He has received awards from the Ahmadi community in Bradford and Dewsbury.
- 29) The judge had before him a letter from the AMA in the UK containing information supplied by the AMA headquarters in Rabwah (Chenab Nagar) as well as information about his activities in the UK. The letter states that the appellant was born to 2 Ahmadi parents. His contact and co-operation with the Ahmadiyya Muslim community in Pakistan was very good and he discharged his financial obligations and the duties assigned to him. More particularly he was connected with an auxiliary organisation called Majlis Khuddamul Ahmadiyya, which looks after the affairs of males under the age of 40. He served as assistant guide for this organisation, the name of which is abbreviated to Khuddam, from 2007 to 2008. He served as assistant organiser of Tarbiyyat Nau Mubeen (reformation of new converts) from 2008 to 2009 and as assistant organiser of Tarbiyyat (self-reformation and improvement of moral values) from 2008 to 2009. The letter further states that there was no case registered against him (by another member of the community). It is not clear whether this refers to a case registered by a member of the Ahmadiyya community or a member of the wider Islamic community in Pakistan but it is not part of the appellant's claim that any cases were registered against him.
- 30) The letter continues that in the UK he has attended congregational prayers and Friday sermons in Newcastle. He has participated in the preaching programmes for the branch including door-to-door distribution of leaflets creating an awareness of Islam and inviting members of the public to the message of the Ahmadiyya Muslim community. He has also performed general duties assigned to him by community officials.
- 31) The Judge of the First-tier Tribunal pointed out that the AMA letter does not state that the appellant was involved in preaching activities to non-Muslims in Pakistan. In his witness statement the appellant said he would not preach to a group of mullahs outside a mosque but if he saw three men and found out by speaking to them that they were all Shia or non-Muslim he would speak to them to find out their views and then preach to them. He seems to have done this sometimes in groups with friends.
- 32) The witness statement does not describe preaching so much as the type of discourse about religion with non-Ahmadis which is specifically referred to in MN as being contrary to the Penal Code. This is not preaching in the sense of standing in a public place and addressing the public at large but it does appear to fall within the prohibition on open religious discourse.

- 33) The judge considered that the appellant's credibility was damaged because this was not referred to in the AMA letter. It was pointed out on behalf of the appellant, however, that this type of activity would not necessarily have come to the attention of the AMA headquarters in Pakistan. It was an activity carried out informally by the appellant, either with himself or with friends, in discussion with other individuals. The appellant explains that in these discussions he would start by trying to identify the religious persuasion of the people he was talking to and would only proceed if those he was addressing were either Shia or non-Muslim and clearly not members of the majority Sunni community. The obvious reason why the appellant was concerned about this was because he did not want to face either persecution from non-state actors in the Sunni community or prosecution.
- 34) The Judge of the First-tier Tribunal did not accept the appellant's explanation at his asylum interview of the mix up over dates of the bombing in Lahore as to whether this took place in 2010 or 2008. I do not think the judge gave adequate reasons for this conclusion. Mr Dewison submitted that this was an event which attracted world-wide publicity. He further submitted that the appellant would not have forgotten the date if he was genuinely committed to his faith.
- 35) The reasoning of the judge appears to ignore the difference between the Gregorian calendar and the Islamic calendar used in Pakistan. At his asylum interview the appellant does not appear to have been asked the date of the bombing in the Islamic calendar but in the Gregorian calendar. It seems to me that this point was not adequately considered by the judge in rejecting the appellant's explanation. Furthermore, I note from the letter from the AMA association that the appellant limited his activities after 2009 and this corresponds to some extent with his description of Ahmadi activities in Pakistan being reduced after the bombing, although it also corresponds to the onset of health problems affecting the Appellant's voice. The Judge of the First-tier Tribunal identified a further apparent inconsistency in the appellant's evidence. According to the judge the appellant said at Q52 of his asylum interview that he preached in Pakistan in 2010 but in his oral evidence he said that his fear of persecution started in 2012 "after he left the Ahmadi religious school in order to stop preaching" (paragraph 74).
- 36) It seems that the judge misapprehended the question at interview recorded as Q52. This does not ask when the appellant preached but when he "first ever" preached, to which the appellant gave the answer 2010 and then confirmed in response to the next question that he preached for the first time in 2010. He does not state that he stopped preaching in 2010 and there is no inconsistency as described by the judge.
- 37) The judge further states that in his oral evidence the appellant was less than clear about why it was that he was not targeted when he was preaching. It is clear from his witness statement, however, that according to the appellant he preached very cautiously to small groups and, as already explained, found out in discussion what religion they were before he talked to them about his faith. The judge should have had regard to this explanation.

- 38) In addition the judge referred to the appellant's evidence as to his activities in Pakistan as vague but this is quite a subjective assessment and cannot be sustained having regard to the way in which the judge misapprehended the evidence, as set out above.
- 39) So far as the findings of the Judge of the First-tier Tribunal are concerned, many of these are favourable to the appellant. Those which are unfavourable are, for the reasons given above, not soundly based. Of course, the section 8 matter already discussed weighs against the appellant in the assessment of credibility but this appears to be the only potentially significant factor weighing against the credibility of the appellant's evidence as to his activities and his intentions. Accordingly, I consider that the section 8 matter should be given little weight.
- 40) Having regard to the evidence and to the findings made, I am satisfied that the appellant has in the past in Pakistan held open discourse about religion with non-Ahmadis, contrary to the Penal Code. Whether this discourse would amount to proselytizing may be to some extent a matter of opinion. It was the appellant's intention to tell suitable non-Ahmadis about his faith in the hope that they would be interested in conversion. That this was the appellant's intention is supported by his record in Pakistan of working with new converts and by his record in the UK of delivering leaflets about the Ahmadi faith to houses of non-Ahmadis. These activities are a manifestation of the importance to the appellant of engaging in behaviour which would be contrary to the Penal Code in Pakistan. The appellant's evidence in his witness statement was that the reason he did not preach or proselytize entirely openly in Pakistan was because of a fear of the consequences and, in particular, a fear of having cases registered against him or being persecuted by non-state actors. Accordingly, I am satisfied that it is the appellant's genuine intention, and it is a matter of particular importance to him, to manifest aspects of his faith openly against the provisions of the Penal Code. Where he has restricted his activities in this regard in the past, it has been because of a fear of persecution but he has nevertheless taken part in such activities so far as he dared and his intention would be to continue to do so. Accordingly, his asylum appeal will succeed.

Conclusions

- 41) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.
- 42) I re-make the decision in the appeal by allowing it.

Anonymity

- 43) The First-tier Tribunal made an order for anonymity. As the appeal has now been successful I see no reason to continue that order and accordingly it is lifted (pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Fee Award

Note: this is not part of the determination.

As no fee is paid or payable there can be no fee award.

Signed

Date

Judge of the Upper Tribunal