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IN THE HIGH COURT OF JUSTICE CO/16/2001
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 1st August 2001

Before:

MR JUSTICE MUNBY

- - - - - - - - - - - - - -

ASIF MAHMOOD CHOUDHREY

v

IMMIGRATION APPEAL TRIBUNAL

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(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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MR U. COORAY (instructed by Thompson & Co Solicitors) for the Appellant

ASHLEY UNDERWOOD QC & MR ADRIAN DAVIS (instructed by the Treasury Solicitors), for the Respondent.

Judgment
As Approved by the Court

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MR JUSTICE MUNBY:

1 The claimant Asif Mahmood Choudhrey is a Pakistani Ahmadi. He was born on 20 February 1975. He arrived in the United Kingdom on 20 October 1997 and made, on his arrival, an application for asylum. For reasons contained in a letter dated 15 March 2000 the Secretary of State refused him asylum. On 30 August 2000 his appeal was dismissed by the Special Adjudicator (Miss Ann Louise Sawetz). The claimant applied for leave to appeal to the Immigration Appeal Tribunal. On 28 September 2000 the Tribunal (Mr R E Maddison) refused him leave to appeal. On 26 February 2001 Newman J granted the claimant permission to apply for judicial review to quash that decision. The application came on for hearing before me on 12 June 2001. I now (1 August 2001) give judgment.

2 The claimant bases his claim for asylum on his fear of persecution as an Ahmadi if he is returned to Pakistan. The nature of the Ahmadi faith is well known. It is explained in detail by the Chief Adjudicator, His Honour Judge David Pearl, in his judgment on 26 June 1995 in *Mohammad Suleman Malik v Secretary of State for the Home Department* TH/40604/93. It was considered by the Court of Appeal in *Ahmad v Secretary of State for the Home Department* [1991] Imm AR 61 and again in *Secretary of State for the Home Department v Iftikhar Ahmed* (1999) November 5. I need not set it out again here. The claimant asserts, and the Special Adjudicator seems to have accepted, that he was beaten and harassed by a group called Khatm-e-Nasuwat and as a result was forced to abandon his studies at a college in Rabweh where he lived. According to the 1999 Country Report on Human Rights Practices for Pakistan published by the United States of America Department of State, Rabweh is a predominantly Ahmadi town and spiritual centre which has often been a site of violence against Ahmadis.

3 The claimant was injured on at least two occasions. According to the account he gave, both to the interviewing officer on arrival and subsequently in a written statement dated 8 August 2000, his troubles began after he told one of his school mates that he was an Ahmadi. His friend was interested in Ahmadiyya and found out that the claimant was an Ahmadi. They started talking about the Ahmadiyya movement. On 20 September 1995 they were overheard by another student, a member of Khatm-e-Nasuwat. Later the same day the claimant suffered a severe beating by a group of about 10 or 12 students from Khatm-e-Nasuwat. He was threatened that if he did not change his religion and stop preaching the Ahmadi religion they would kill him. The other incident, which took place late at night on 18 November 1995 on the road between Faisalabad, where the claimant was by then working in his brother's business, and Rabweh, some 50 kilometres away, where they lived and from which they commuted every day on the brother's motorbike, resulted

in him being wheelchair bound for six months. He left Pakistan on 1 October 1997.

4 In paragraphs 9.1-9.97 of her Determination and Reasons the Special Adjudicator made the following findings about the treatment of Ahmadis in Pakistan:

★ The 1974 constitution of Pakistan guarantees the rights of religious minorities. It declares Ahmadi as a non-Muslim minority group. The practical effect of the constitution is to allow Ahmadi freedom to practise religion amongst themselves providing they do not represent themselves as Muslim. The Ahmadi are therefore not discriminated against as a religious minority under the constitution but are discriminated against because they are prevented from declaring themselves Muslim.

★ Discriminatory legislation has encouraged an atmosphere of religious intolerance which has led to acts of violence against Ahmadi. Ahmadis can be prosecuted for their normal daily behaviour though this is not always the case. Ahmadi have been prosecuted for using Islamic symbols and practices. They suffer a variety of problems including violation of their place of worship, denial of burial in Muslim graveyards and denial of their freedom of faith, speech and assembly. Laws added to the Pakistan Penal Code make it easy for complaints to be made against Ahmadi by those who oppose them.

★ "It is clear that Ahmadi suffer a variety of restrictions, provocation and harassment. There is no doubt on the basis of the objective evidence that minority religious groups do suffer discrimination and other difficulties in Pakistan mainly instigated by religious extremists."

5 She concluded, however, in paragraph 9.7:

> "I am satisfied that the government of Pakistan does not actively or systematically persecute religious minorities."

6 Having made these general findings the Special Adjudicator then returned to the claimant's own case. Her essential reasoning is to be found in paragraphs 9.8-10.3 of her Determination and Reasons:

> "9.8 I am satisfied that adherence to the Ahmadi faith in itself does not constitute grounds for granting refugee status under the terms of the 1951 United Nations Convention and its 1967 Protocol. In order to bring himself within the scope of the Convention the appellant must show that these incidents were not simply the random actions of individuals but were a sustained pattern or campaign of persecution directed at him which was knowingly tolerated by the authorities or

that the authorities were unable or unwilling to offer effective protection.

9.9 I have no doubt that there are serious problems in Pakistan for religious minorities as a result of the actions of religious extremists. I have no reason to doubt the problems suffered by the appellant but that treatment even taken together with the general difficulties suffered by Ahmadis in Pakistan was not sufficient to give rise to a well-founded fear of persecution for a convention reason at the time the appellant left Pakistan. I take into account the fact that the appellant delayed leaving Pakistan for a period of two years from the date of the first alleged attack as a result of his religious beliefs in October 1997 and I do not believe he has provided a reasonable explanation for this. Even after recovering from his severe injuries resulting in him being wheelchair bound the appellant remained in Pakistan for a very long time claiming that arrangements to leave Pakistan had to be made. I do not consider this a reasonable explanation and it casts doubt on the genuine nature of his fear of persecution. A genuine asylum seeker would have left his country at the earliest opportunity. I further take into account that the appellant joined his brother in Faisal-Abad where he was able to live peacefully and yet returned willingly to Rabweh at night and it was likely that he would be conspicuous to those who opposed him. I do not therefore accept that the incidents to which the appellant refers when taken as a whole give rise to a well-founded fear of persecution for a Convention reason.

9.10 I have considered the option of internal flight and note from the appellant's evidence that he was able to live in peace with his brother in Faisal-Abad and yet returned to his parents address in Rabweh every night, an area which he considered to be in his words "very safe there are all Ahmadis living around us."

9.11 I note from the objective evidence that the police in Pakistan failed to intervene or to investigate correctly allegations of harassment and violence against the Ahmadi and it is suggested that they connive with religious groups. For this reason the appellant submits that he is unwilling to avail himself of police protection having experienced the police slapping him when he reported an incident against him and basically asking him to leave suggesting that he deserved the treatment he had received. The appellant was only able to refer to one incident of this kind.

Conclusion

ConclusionConclusionConclusion

10.1 In considering both the objective and subjective evidence and applying the appropriate standard of proof I am not satisfied that the problems experienced by the appellant amount to persecution for a

Convention reason. I am not satisfied that he has discharged the burden of proof upon him.

10.2 I am satisfied that it would not be unreasonable for him to return to Pakistan where he could live peacefully and his life would not be at risk.

10.3 The appellant is a member of a minority religious group as are many other persons. I see nothing in his evidence to persuade me that he comes within the definition of refugee."

7 In his grounds of appeal to the Tribunal the claimant made four complaints. First he said that the Special Adjudicator erred in law in concluding in paragraph 9.9 that his treatment, even taken together with the general difficulties suffered by Ahmadis in Pakistan, was not sufficient to give rise to a well-founded fear of persecution for a Convention reason at the time he left Pakistan. Secondly he said that her conclusion in paragraph 9.9 that his explanation cast doubt on the genuine nature of his fear of persecution, for a genuine asylum seeker would have left his country at the earliest opportunity, was 'Wednesbury' unreasonable. Thirdly he said that the Special Adjudicator misdirected herself on the facts when she referred in paragraph 9.10 to him being "able to live in peace with his brother in Faisal-Abad". She had, he said, misunderstood his evidence that he lived in Rabweh and worked (but did *not* live) in Faisalabad. Fourthly he said that the Special Adjudicator's decision was unfair, insofar as it was based on internal flight, for the issue was never raised at the hearing. Finally he said that the Special Adjudicator's overall conclusion was irrational.

8 In dismissing the claimant's application for leave to appeal the Tribunal said this:

"The Adjudicator heard oral evidence briefly from the Applicant. She concluded and was entitled to conclude – that the treatment of which the Applicant complained did not amount to persecution, which is a matter of fact. She did not misunderstand the evidence in any material aspect.

The Adjudicator appears to have considered all the evidence before her, properly directing herself as to the proper standard of proof. The Adjudicator came to clear findings of fact, after giving to each element in the evidence the weight she considered appropriate.

The Tribunal has studied the papers on file. It considers that the conclusions of the Adjudicator are fully supported by the evidence. There is no misdirection in law. Read as a whole the determination is a full, fair and reasoned review of the Applicant's case.

> In the opinion of the Tribunal this is not a proper case in which to grant leave, and such leave is refused."

9 The grounds upon which the Claimant seeks judicial review are in large measure the same as those upon which he sought leave to appeal to the Tribunal. One additional ground of complaint against the Special Adjudicator has been added, namely that the Special Adjudicator's conclusion that the constitution of Pakistan guarantees the rights of religious minorities is perverse. So far as concerns the Tribunal the claimant says that it appears from its Determination that the Tribunal failed to consider the specific grounds of appeal and that in refusing leave to appeal it failed to take advantage of the opportunity it had to rectify the Special Adjudicator's errors.

10 In his Acknowledgment of Service the Secretary of State set out in summary his grounds for opposing the claim for judicial review. Included were two of particular significance. He asserted that the Special Adjudicator's findings in paragraphs 9.1-9.7 as to the discrimination suffered by Ahmadis "does not however prevent a finding that the *"constitution"* of Pakistan which recognises the Ahmadi as a non Muslim minority group is not the source of the discrimination." He also sought to draw a distinction between the claimant in this case and the asylum seeker in *Iftikhar Ahmed*. In that case, says the Secretary of State, the claimant "was persecuted directly from the practising of his religion and because of a need to spread the word of his faith. In this case, the Claimant was beaten because he discussed his religion with a non-Ahmadi at college who had asked him about the Ahmadi faith out of interest."

11 In granting the claimant permission to apply for judicial review Newman J observed that he had done so because "I regard the distinctions drawn in the Acknowledgment of Service, in connection with the Constitution and the persecution of Ahmadis, to be fine - that is not to say wrong, but worthy of full consideration."

12 Before turning to deal with the claimant's specific complaints I must first consider the nature of the task upon which I am embarked. I start with what Sullivan J said in *R (Puspalatha) v The Immigration Appeal Tribunal [2001] EWHC Admin 333* at para 48:

> "The challenge is a challenge to the decision of the Immigration Appeal Tribunal to refuse leave. The question is not whether on the merits I consider that it would have been appropriate to grant leave. The expert tribunal is the Immigration Appeal Tribunal. The claimant has to show that the tribunal erred in law in refusing leave. Save in cases where the error of law on the part of the special adjudicator should have been plain and obvious, the Immigration Appeal Tribunal is not obliged to root around for alternative ways of putting grounds of appeal. It is obliged to consider the grounds of appeal as they are presented to it."

I respectfully agree. The decision whether in a particular case leave to appeal ought to be granted is a task entrusted not to this court but to the Tribunal. This court can interfere with the Tribunal's decision only if satisfied that the Tribunal has fallen into judicially reviewable error.

13 Earlier in its starred decision in *Slimani v Secretary of State for the Home Department (2000) HX/70205/1998* the Tribunal, on that occasion presided over by the President, Sir Andrew Collins, had said this (para 8):

> "In deciding whether or not to grant leave to appeal, the tribunal will consider the adjudicator's determination and the reasons given by him or her. It will recognise the need for the most careful scrutiny of any asylum claim but will also, as an expert tribunal, have regard to the evidence put before the adjudicator (and before it if there is any additional evidence which can properly be considered within the Rules). If it decides that, whatever shortcomings there may have been in the adjudicator's determination, there is no real prospect of success, it will refuse leave. All too often, when applications for judicial review are made, the claimant and the judge concentrate on the adjudicator's reasons. Where the tribunal has not assisted by adopting a formulaic approach to its reasons for refusing leave, such a concentration is not only understandable but inevitable and the tribunal has only itself to blame. But where the tribunal has obviously considered the grounds and the appeal, such an approach is with respect less appropriate. In particular the tribunal expresses the hope that in every case the judge should ask himself whether any arguable error of law may have vitiated the tribunal's conclusion that there was no real prospect of success in any particular appeal and only grant permission if that is the position."

That passage was referred to with approval by Sullivan J in *Puspalatha* at para 38. If I may respectfully say so, I agree entirely with and would wish to endorse everything said by Sir Andrew.

14 So the primary focus of my consideration must be the legality of the decision not of the Special Adjudicator but of the Tribunal. That said, in the present case the Tribunal's reasons seem to me, with all respect, to be largely formulaic. Therefore inevitably it has been necessary for me to focus, as indeed did counsel in their arguments before me, not so much on the Tribunal's reasons but rather on the Special Adjudicator's reasons.

15 In approaching this task I think it useful to recall the passage in the speech of Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360 at p 1372G where he said that judicial reasons

> "should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true

> when the matters in question are so well known as those specified in section 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

That was an appeal relating to matrimonial ancillary relief, hence Lord Hoffmann's reference to section 25(2) of the Matrimonial Causes Act 1973. But the principle is of general application to all courts exercising appellate functions and in similar fashion to courts exercising the supervisory role of judicial review.

16 I recognise, of course, that every asylum case demands the most anxious scrutiny from the court. But that does not mean that the court should strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. As Sullivan J said in *Puspalatha*, when referring (at para 43) to the Special Adjudicator:

> "In my judgment it is very important that special adjudicators' determinations are read as a whole in a common sense way. It is not appropriate to focus on particular sentences and to subject them to the kind of legalistic scrutiny that might perhaps be appropriate in the case of a statutory instrument, charter party or trust deed. The special adjudicator is obliged to consider all of the relevant evidence ... But it is most undesirable to try to prescribe the order in which that evidence has to be dealt with in the special adjudicator's determination. [Counsel] denies that he is intending to be prescriptive in that way, but in my judgment his criticisms of the special adjudicator's determination are really matters of semantics rather than substance."

I agree.

17 There is a further point. Mr Upali Cooray, who appeared on behalf of the Claimant, referred me to *R v Immigration Appeal Tribunal ex p Mohd Amin* [1992] Imm AR 367 where Schiemann J at p 374 said:

> "In my judgment adjudicators should indicate with some clarity in their decisions:
>
> (1) what evidence they accept;
>
> (2) what evidence they reject;
>
> (3) whether there is any evidence as to which they cannot make up their mind whether or not they accept it;

(4) what, if any, evidence they regard as irrelevant.

This the present decision fails to do even in relation to the evidence given in front of the adjudicator."

18 Mr Ashley Underwood QC, appearing on behalf of the Secretary of State, however points to what Sir Andrew Collins said in *Slimani* at paras 9-10:

> "We have dwelt on the issue of judicial review because there has in the past - and the tribunal must take some of the blame for this - been too great a concern to see that every matter is dealt with by an adjudicator however unimportant or peripheral. The observations of Schiemann J in *R v IAT ex p Amin* [1992] Imm AR 367 at 374 are all too often cited as if they were a statutory requirement and are regularly misunderstood. What Schiemann J said was this:-
>
> > "But it is not clear to me on reading the adjudicator's decision what precisely it is that she is describing as 'an incredible arrangement'. ... [P]arts of the story the adjudicator appears to accept. In my judgment ... ""

and the passage quoted then continues as I have set it out above. Sir Andrew continues:

> "Those observations were in the context of a failure by the adjudicator to give adequate reasons for her findings on primary purpose in relation to a marriage application and the headnote in the report correctly refers to the observations under that heading: see [1992] Imm AR 367 Heading 3. They do not mean nor could the learned judge have intended that they should mean that an adjudicator must carry out the exercise specified in them in relation to all the evidence given before him.
>
> But even in relation to specific issues which are material and which have to be properly reasoned, they go too far. The reality is that it is quite impossible to set out a detailed check list of what must be done in all cases. It will in many cases be quite unnecessary to set out evidence regarded as irrelevant; indeed, very few judges would recognise that as an exercise they carry out in giving judgment following a trial. Equally, the circumstances will dictate whether there is a need to identify the evidence upon which they cannot make up their minds, although in deciding on credibility it may be necessary to deal with such evidence. The only guidance needed is that the conclusions reached must be justified and it must be clear that any adverse findings in particular are based on evidence put before the adjudicator or the tribunal and a proper explanation must be given to show why the conclusions on the issues of substance have been reached. We have no wish to encourage

> lengthy decisions. Succinctness is a virtue provided that the guidance given by Lord Bridge [in *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153 at p 166H] which we have already cited is followed and the decision does show why the findings of material fact have been made and the important conclusions have been reached."

I respectfully agree.

19 Finally in this context it is useful to bear in mind what Keene J said in *R (Roszkowski) v Special Adjudicator* (2000) October 31 at paras 54-55:

> "I cannot accept that in such a situation an adjudicator is required to spell out a detailed analysis of the numerous reports and documents produced by way of background material in such a case. It would, as Mr Hunter submitted, place an intolerable burden on adjudicators. It is to be borne in mind that the duty is to give reasons for the decision reached, not to give reasons for every individual conclusion arrived at in the course of the decision. As was said in *R v Criminal Injuries Compensation Board ex p Cook* [1996] 1 WLR 1037, the reasons should contain sufficient detail to enable the reader to know what conclusion has been reached on the principal important issue or issues, but it is not a requirement that they should deal with every material consideration to which they have had regard. It is not necessary to demonstrate that "the conclusion has been reached by an appropriate process of reasoning from the facts": per Aldous LJ at 1043C-D and 1045B.
>
> That approach was in accordance with that of the House of Lords in *Bolton MDC v Secretary of State for the Environment* [1995] 71 P&CR 309, and has been followed in immigration matters by the Court of Appeal in *Selliah Arulanandam v Secretary of State* [1996] Imm AR 587. Applying that approach here, one can see that the Special Adjudicator took into account the background material and one is told the conclusions which she reached on that aspect of the case. In my judgment, her decision was not vitiated by a failure to give inadequate reasons."

20 Applying these principles I am satisfied that there is no substance in the claimant's complaint that the Special Adjudicator misdirected herself on the facts when she referred to him being "able to live in peace with his brother in Faisal-Abad". Reading her reasons in a common sense way I can see nothing to suggest that the Special Adjudicator in any way misunderstood the facts or the claimant's evidence. She correctly understood, as indeed she made clear in paragraph 9.10, that the claimant travelled "every night" back from Faisalabad to Rabweh. She found that the claimant was "in peace" in the one place and "safe" in the other. Her use of the word "live" in the phrase "live in peace ... in Faisal-Abad", which is the only thing that makes this argument even remotely

plausible, is, it seems to me, neither here nor there. As the Secretary of State correctly points out, it does not affect the relevant finding, namely that the claimant felt safe in Rabweh and could return there. Be that as it may, the Tribunal was plainly entitled to hold that an appeal on this particular point stood no real prospect of success. I can detect no error of law in the Tribunal's decision. Accordingly I reject this part of the claimant's case.

21 I am equally satisfied that there is no substance in his complaint that the Special Adjudicator's decision was unfair insofar as it was based on internal flight. The Special Adjudicator, as I read her reasons, made no express finding that there was a place of internal flight. She merely proceeded on the basis that the claimant was "safe" in Rabweh and therefore would be safe if returned to Pakistan. Insofar as there was any issue for the claimant to address there was no need for the Special Adjudicator to raise it with him for the Secretary of State's decision letter put the claimant on notice of the point. The Tribunal was plainly entitled to hold that an appeal on this particular point stood no real prospect of success. I can detect no error of law in the Tribunal's decision. Accordingly I reject this part of the claimant's case also.

22 I turn now to what in my judgment are the central issues in this case.

23 The starting point, as Mr Underwood observes, is that the Special Adjudicator was plainly right as a matter of law when she said in paragraph 9.8 that "adherence to the Ahmadi faith in itself does not constitute grounds for granting refugee status". That emerges clearly from *Iftikhar Ahmed* where Simon Brown LJ said:

> "Following *Ahmad* it has always been accepted that there can be no blanket recognition of Ahmadis as refugees. Each case has to be considered on its own individual facts and merits."

I stress those last words because Mr Underwood was also at pains to emphasise that the successful asylum seeker in *Iftikhar Ahmed* succeeded because what Simon Brown LJ called his proselytising zeal, what the Tribunal in that case had referred to as his "urge to speak out and to spread the word of the Ahmadi faith", had exposed him to what the Special Adjudicator called "the most appalling treatment." No doubt, but it does not follow, as Mr Underwood seemed at times to be suggesting, that only an Ahmadi who feels the need to spread the word of his faith and is vocal in propagating his religious beliefs can satisfy the Convention test. As Simon Brown LJ went on to say, applying what the Court of Appeal had held in *Danian v Secretary of State for the Home Department* [2000] Imm AR 96:

> "in all asylum cases there is ultimately but a single question to be asked: is there a serious risk that on return the applicant"

I emphasise, *this* applicant

> "would be persecuted for a Convention reason? If there is, then he is entitled to asylum."

24 That reflects what Simon Brown LJ had earlier said in *Ravichandran v Secretary of State for the Home Department* [1996] Imm AR 97 at p 109 in a passage cited by Brooke and Sedley LJJ in *Karanakaran v Secretary of State for the Home Department* [2000] INLR 122 at pp 144A and 155D and relied on in front of me by both Mr Cooray and Mr Underwood:

> "the issue whether a person or group of people have a "well-founded fear ... of being persecuted for [Convention] reasons" ... raises a single composite question. It is, as it seems to me, unhelpful and potentially misleading to try to reach separate conclusions as to whether certain conduct amounts to persecution, and as to what reasons underlie it. Rather the question whether someone is at risk of persecution for a Convention reason should be looked at in the round and all the relevant considerations brought into account."

Although in the final analysis there was a single composite question for the Special Adjudicator that does not absolve me from the responsibility of unravelling her reasoning and examining what may be a number of discrete questions wrapped up in it.

25 The starting point is, as it seems to me, that the Special Adjudicator accepted the claimant's account both of the violence he had suffered at the hands of Khatm-e-Nasuwat and also of what had brought that violence about. As she said in paragraph 9.8, "I have no reason to doubt the problems suffered by the appellant." The reason why she rejected the claimant's appeal was because, as she put it, "that treatment ... was not sufficient to give rise to a well-founded fear of persecution for a Convention reason" or, as she put it in paragraph 10.1, because "I am not satisfied that the problems experienced by the appellant amount to persecution for a Convention reason".

26 Now if the claimant's account of what happened to him is accepted, and the Special Adjudicator did accept his account, it must follow, as it seems to me, that the claimant has established that the violence he suffered was violence inflicted for a reason of a kind which in principle brings the Convention into play. He was attacked because he was an Ahmadi and because he had been overheard talking about the Ahmadi faith to someone else. As Mr Cooray correctly put it, the physical attacks to which the claimant was subjected were directly attributable to his membership of the Ahmadi faith. I reject as over-refined and inconsistent with the facts as here found by the Special Adjudicator the distinction which in this respect the Secretary of State in the Acknowledgment of Service and Mr Underwood in his submissions sought to draw between the facts of this case and the facts in *Iftikhar Ahmed*.

27 In other words, the reasons why the Special Adjudicator ultimately rejected the

claimant's case were that what he had suffered did not amount to "persecution" and accordingly (there being no suggestion of any change in circumstances) that he had no reason to fear being subjected to anything amounting to persecution if returned to Pakistan. I do not read the Special Adjudicator's subsequent references to the absence of "reasonable explanation" and to "doubt on the genuine nature of his fear" as going to the credibility of the claimant's account of what had happened to him; rather as going to the evaluative question of whether what had happened to him and what he feared would happen to him again if he returned to Pakistan amounted to persecution. More to the point, this is plainly how the Tribunal read the Special Adjudicator's reasoning, for it opined that she was "entitled to conclude - that the treatment of which the Applicant complained did not amount to persecution."

28 Accordingly Mr Cooray was justified in focussing, as I now do, on the reasoning underlying the Special Adjudicator's conclusion that the violence admittedly inflicted on the claimant by Khatm-e-Nasuwat in the circumstances he described did not amount to persecution.

29 It is at this point, in my judgment, that there emerge real difficulties in understanding just what the Special Adjudicator's reasoning was on this crucial issue and real cause to question whether her reasoning is sustainable.

30 If one asks oneself the question, Why did the Special Adjudicator conclude that what the claimant had suffered did not amount to persecution? the answer, I have to say with all respect to the Special Adjudicator, is not at all clear.

31 Focussing upon the matters she said in paragraph 9.9 she had taken into account in arriving at this conclusion there appear to have been two particularly significant factors. The first was that the claimant had delayed his departure from Pakistan for almost two years following the second and more serious attack when, according to the Special Adjudicator,"A genuine asylum seeker would have left his country at the earliest opportunity." The second was that the claimant "willingly" chose to travel daily from Faisalabad to Rabweh, that is in the period after the first attack and before the second attack. As I read what the Special Adjudicator was saying, she treated the claimant's actions (and inaction) as illuminating his own perception of the nature and degree of the risk to which he was exposed, as illuminating the nature and degree of the risk to which he was in fact exposed and ultimately as illuminating whether the risk was of persecution or only of discrimination.

32 Now there are difficulties in saying that, of itself, this is 'Wednesbury' unreasonable, but I confess to considerable concerns about the Special Adjudicator's approach. What the claimant felt about his safety after the first attack and before the second is but an imperfect guide to what he either actually felt or ought reasonably to have felt after the second and much more serious attack. Moreover, the bald assertion that "A genuine asylum seeker

would have left his country at the earliest opportunity" seems to me neither to accord with historical experience - one has only to think of the Jews who delayed their flight from Nazi Germany until almost the last moment - nor to reflect what, if he was a credible witness, was the reality of the position in which the claimant found himself after the second attack, physically incapacitated for six months and, as described in paragraphs 12-13 of his statement, in hiding behind the walled security area of Rabweh.

33 But giving her Determination and Reasons what I hope is a fair and common sense reading, it seems to me that there were other important elements in the Special Adjudicator's reasoning in relation to which there are serious grounds for believing that she misdirected herself in law. In paragraph 9.8 she says that it is for the claimant to show "a sustained pattern or campaign of persecution directed at him" and in paragraph 10.2 she uses words suggesting that the claimant's *life* has to be at risk if he is to establish persecution. In my judgment this sets the test too high. It is impossible to define persecution for this purpose but Mr Cooray has referred me to a number of authorities which show that, however it is to be understood, there can be persecution without threat or risk to life: see paragraph 51 of the *UNHCR Handbook*, Professor Hathaway's *The Law of Refugee Status* p 112, *R v Immigration Appeal Tribunal ex p Jonah* [1985] Imm AR 7 (not affected on this point by *Karanakaran*) and the passage in *Ravichandran* which I have already quoted. Quite apart from this, the suggestion that there is only persecution if there is "a sustained pattern or campaign" directed at the individual is difficult to reconcile with what Taylor J said in *R v Secretary of State for the Home Department ex p Selladurai Jeyakumaran* [1994] Imm AR 45 at p 48 and what Lord Hoffmann said in *R v Immigration Appeal Tribunal ex p Shah* [1999] 2 AC 629 esp at pp 653E-654C and 654H-655F. On top of this there is an analysis by the Special Adjudicator of the relationship between what the Constitution of Pakistan says and what actually happens to Ahmadis which, at least as rationalised by the Secretary of State in the Acknowledgment of Service, produces distinctions so fine as itself to suggest misdirection. Finally, as it seems to me, the Special Adjudicator's finding that the government of Pakistan does not "actively or systematically persecute religious minorities" cannot suffice to determine the case against the claimant. It overlooks that there may be persecution if officers of the state, applying a discriminatory policy, allow individuals or groups - in the present case Khatm-e-Nasuwat - to inflict persecution with impunity or even, it may be, if the state is simply unable or unwilling to protect some part of its citizens from such persecution.

34 Given the Special Adjudicator's findings as to the discrimination, religious intolerance, provocation, harassment and violence suffered by Ahmadis generally, her findings as to the violence that the claimant himself had suffered, and the evidence as to the threats of future harm he had received, it seems to me that the claimant had a realistic - indeed on one view quite a strong - case for arguing, as Mr Cooray did before me, that what he had suffered, and, irrespective of what he had already suffered, what he feared he

would suffer in future, was persecution and not merely discrimination, what Lord Hoffmann in *Shah* at p 655D described as "a well founded fear of serious harm". No doubt, even on his own case, the ill-treatment the claimant had received fell far short of that in *Iftikhar Ahmed*. But that of itself cannot be determinative. In this connection one needs to bear in mind Sedley LJ's comment in *Karanakaran* at p 152F that:

> "People who have not yet suffered actual persecution (one thinks of many Jews who fled Nazi Germany just in time) may have a very well-founded fear of persecution should they remain."

Moreover, given the Special Adjudicator's findings it seems to me that the claimant had a realistic case for arguing that in the case of this Ahmadi the rights purportedly granted by the Constitution were illusory.

35 Mr Cooray submits that the Special Adjudicator's conclusions on these matters were perverse and irrational in the 'Wednesbury' sense. That, in my judgment, is going too far. An adjudicator properly directing herself could, as it seems to me, have properly come to the same conclusion as the Special Adjudicator did here. But on the other hand there are, as it seems to me, strong arguments here for contending (a) that the Special Adjudicator in fact misdirected herself and (b) that if she had not misdirected herself she might have come to a different conclusion. In coming to this conclusion I have, I hope, managed to avoid falling into the trap of subjecting the Special Adjudicator's reasoning to an over-refined or merely semantic analysis. But looking to the substance of the Special Adjudicator's reasoning, and reading it in what I hope is a sensible and common sense way, I am left at the end of the day with a very clear impression that something may have gone seriously wrong - in particular that she has, as I have said, misdirected herself.

36 Now that of itself is not of course enough to give Mr Cooray the relief he seeks for as I have already pointed out what he has to demonstrate is not that the Special Adjudicator erred but that the Tribunal, in refusing the claimant leave to appeal, itself fell into judicially reviewable error. Did the Tribunal err in law in refusing the claimant leave to appeal? In my judgment it did. It failed to appreciate that there are serious grounds for believing that the Special Adjudicator misdirected herself in law. It failed to appreciate that the claimant has strong arguments for contending as I have said (a) that the Special Adjudicator in fact misdirected herself and (b) that if she had not misdirected herself she might have come to a different conclusion. In other words this was a case in which the Tribunal ought to have appreciated that the claimant had a real prospect of success in an appeal.

37 It follows, in my judgment, that the claimant is entitled to an order quashing the decision of the Tribunal refusing him leave to appeal.

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MR JUSTICE MUNBY: For the reasons set out in a written judgment, of which I have just handed down copies, I have come to the conclusion that the claimant is entitled to an order quashing the decision of the tribunal refusing him leave to appeal.

MR COORAY: My Lord, may I ask for costs in this case?

MR JUSTICE MUNBY: Mr Davis?

MR DAVIS: My Lord, I cannot resist that application for costs, but what I would say, my Lord, is that I would ask for permission to appeal, first of all, on the basis of the submissions put forward by Mr Underwood QC, and, secondly, on the basis that this is an extremely interesting point and one which no doubt will crop up time and time again in the future.

MR JUSTICE MUNBY: You say this is a very interesting point. I appreciate I may have the advantage of you because you have only had probably thirty seconds to look at the judgment. What do you say is the interesting point which requires to be examined by the Court of Appeal?

MR DAVIS: Well, I have not had the time to read your judgment, my Lord, but I presume that you have decided that the constitution of Pakistan does not guarantee the right of the claimant. Having read the issues in the case, I assume that that is the decision that you have reached. It is rather difficult for me --

MR JUSTICE MUNBY: No.

MR COORAY: My Lord, may I assist?

MR JUSTICE MUNBY: Perhaps the best thing would be -- and am sorry it was not possible to hand the judgment down last night -- if you would like to take it away and read it, you will see that I have not gone quite that far in fact because, bearing in mind

the nature of the issue before me, that is to say, was the judicially reviewable error on the part of the tribunal, it was not actually necessary for me to come to a concluded view on some of the underlying arguments. I have come to the conclusion that the tribunal fell into error in denying that there were properly arguable issues which it should consider. So it may not be that the judgment is as far-reaching as those you represent might fear. I will give you the opportunity to read the judgment.

MR DAVIS: I am grateful, my Lord.

MR JUSTICE MUNBY: It probably will not take you that long to see the thrust of it. The meat comes in the last four or five pages. You can renew your application later on this morning.

MR DAVIS: I am grateful.

(The case was stood down for a short while)

MR DAVIS: My Lord, I am grateful for the time afforded to me.

MR JUSTICE MUNBY: Not at all.

MR DAVIS: My Lord, I renew my application for permission to appeal. The first ground I mentioned earlier, my Lord, was on the basis of Mr Underwood's submissions, and I adopt those submissions. But in particular I would say, with respect, that your Lordship is wrong in relation to paragraphs 31 and 32 of your judgment, which deal with the special adjudicator's opinion and conclusion which appears in paragraph 9.9 in her judgment.

MR JUSTICE MUNBY: Yes.

MR DAVIS: It is in relation to this claimant's delay in leaving Pakistan. What I would say, my Lord, is that the special adjudicator is perfectly entitled to come to the decision that she did, given the evidence which she accepted, and I would say, with the

greatest respect, that my Lord has been rather harsh on the special adjudicator in picking out a single sentence that a genuine asylum seeker ought to have the country at the earliest opportunity. **MR JUSTICE MUNBY:** Yes.

MR DAVIS: Just reading that paragraph in the round, what is clear, in my submission, is that the special adjudicator has considered all the evidence before her and made a decision based on that evidence that this asylum seeker did not have a well-founded fear of persecution, given the fact that is was six months, as I understand it, that he was in a wheelchair and a further 18 months before he left the country. My Lord, unless I can assist you further?

MR JUSTICE MUNBY: So that is the first point, is it?

MR DAVIS: My Lord, I adopt all of Mr Underwood's submissions. I will not trouble your Lordship to go through his skeleton once again, but in particular that point is clear, I would say, on the face of your Lordship's judgment in relation to the special adjudicator's decision. **MR JUSTICE MUNBY:** Yes. Thank you. Mr Cooray, what do you say?

MR COORAY: My Lord, I do not think my learned friend is quite correct. It appears to be that although your Lordship has dealt with that issue, and I think there will be an argument, if necessary, a dispute about the actual number of months, but that is not the most important issue. You have come to your conclusion not on that, but on a number of matters which are fairly detailed in the way you have dealt with in the paragraphs following that, and in particular I think the contradictory position that follows from the learned adjudicator's finding of fact and the conclusion. So I do not think, my Lord, that there is any reasonable prospect of success in an appeal. For that reason I would oppose the application.

MR JUSTICE MUNBY: Yes. Mr Davis, do you want to add anything by way of riposte? **MR DAVIS:** No, my Lord.

MR JUSTICE MUNBY: I am not going to give permission to appeal, bearing in mind the basis upon which, as I have explained in this judgment, this court is concerned to determine whether or not the tribunal's decision to refuse leave to appeal is to be approached. The basis upon which, in the final analysis, I have decided this case is a narrow one. It turns so far as I can see entirely on its own particular facts, and I accept Mr Cooray's submission, despite what Mr Davis has said in support of his application, that there are so far as I can see no reasonable prospects of success on an appeal. Nor are there any wider reasons of public interest or public policy why this matter requires to be considered by the Court of Appeal.

Mr Cooray, Mr Davis, I think in those circumstances it is agreed that the appropriate form of order is: first of all, as in paragraph 37 of my judgment, an order quashing the decision of the tribunal refusing the claimant leave to appeal; secondly, an order dismissing the respondent's application for permission to appeal to the Court of Appeal; and thirdly, an order that the respondent pay to the claimant his costs of these proceedings, such costs to be the subject of a detailed assessment if not agreed. That is the appropriate form of order, is it?

MR DAVIS: Yes.

MR JUSTICE MUNBY: Thank you very much. I am obliged to both of you.