Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

'The Unlawfulness of "White List" Countries in Light of the Persecutory Treatment of Religious Minorities and Women in Pakistan'

Question(s) at stake:

Whether the continued inclusion of Pakistan on a "White List" of countries considered to be safe countries for asylum purposes is justified.

Outcome of the ruling:

The finding of the court was that the continued inclusion of Pakistan on the "White List" of countries that are considered safe for asylum purposes was invalid.

Topic(s):

- Immigration and Asylum

Keywords:

- Grounds/Reasons of persecution
- Membership of a particular social group
- Refugee status
- Women
- Asylum seeker
- Religion or belief

Tag(s):

- Religious minorities
- Safe country of origin

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Country:

United Kingdom

Official citation:

Secretary Of State For Home Department (SSHD) v Javed and Others [2001] EWCA Civ 789

Link to the decision:

https://www.bailii.org/ew/cases/EWCA/Civ/2001/789.html

ECLI:

No ECLI number / ECLI number unknown

Date:

17 May 2001

Jurisdiction / Court / Chamber:

Supreme Court of Judicature Court of Appeal (Civil Division)

Remedy / Procedural stage:

Appeal to the Court of Appeal

Previous stages:

- Following the Secretary of State's refusal of the applicant's application, the High Court ruled in the applicant's favour.
- In 17 May 2001, the Court of Appeal upheld that decision (*SSHD* v *Asif Javed and Others*).

Subsequent stages:

No information found

Branches / Areas of law:

Administrative law; Asylum law

Facts:

In 1993, Pakistan was included on the “White List” – the list of countries where, the Secretary of State’s held that there was “in general no serious risk of persecution” (paragraph 5 of Schedule 2 to the Asylum and Immigration Appeals Act 1993, as amended by the Asylum and Immigration Act 1996, (“the Act”) and the Asylum (Designated Countries of Destination and Designated Safe Third Countries (Order 1996) ("the Order")). (paras. 1, 3)

Many people from Pakistan therefore had their asylum claims certified, leaving them subjected to an expedited asylum procedure under which, inter alia, there was “no right of appeal against any” unfavourable decision made by an Adjudicator. (para 1) The asylum applicants in question, Asif Javed, Zulfiqar Ali and Abid Ali sought judicial review of their certification. The High Court upheld their claim, ruling invalid the Order, which certified Pakistan as a safe country. An appeal was then made by the Secretary of State against that judgement.

Asif Javed was an Ahmadi, and had applied for asylum in the UK on the grounds that he feared persecution on the grounds of religion. While attending school in his home country, Pakistan, he had explained his religious views to other pupils, an act which led to his expulsion from school. Subsequently he “was attacked and injured by former pupils.” The “police advised him” that if he wished to avoid arrest and a prison sentence, it would be necessary for him” to renounce his faith.” Later, he was the focus of accusations that he had engaged in the preaching of his faith, an illegal act for members of the Ahmadi sect in Pakistan. After an attempt at arrest by the police, he escaped. He was attacked by a man who wounded him with a knife. He then fled to the UK, where he claimed asylum on grounds of religious persecution by non-state agents. (para. 6) His account was found by the Secretary to be not credible. When the “applicant produced a police report naming himself as a wanted person”, the Secretary of State responded by arguing that the issuing police station did not exist – a claim that

was later shown to be incorrect. (para. 7) His claim was refused on the further ground that, despite the discrimination suffered by Ahmadis, Pakistan's judiciary was "independent and there was no systematic persecution of religious minorities." (ibid.) The Country Assessment produced by the Home Office's Country Information and Policy Unit stated that "Ahmadis are recognized as a minority religious group and rights are safeguarded under the constitution" (para. 16), and the official who compiled that Assessment asserted to the Court of Appeal that Ahmadis are not persecuted per se, even if individual Ahmadis may suffer persecution, depending on their particular circumstances. (ibid.)

Abid Ali was a Sunni Muslim, and claimed to be a member of a militant organisation called "Pakistan Force of the Companions of the Prophet". (para. 8) He also claimed to be a member of the Sipa-e-Sahaba, an organisation that "opposed the government". He claimed to have been involved in several demonstrations and protests: his participation in these actions led to him being convicted and sentenced. While in prison, he was beaten up on several occasions, and he had applied for asylum in the United Kingdom on the ground of political opinion. (ibid.) "The Special Adjudicator concluded that [...] his arrest and imprisonment were the result of violent and criminal activity" on his part, and that the sentences he had incurred as a result of his actions were not unreasonable. (ibid.) He also rejected the argument that Sunni Muslims, as a group forming the majority of the population in Pakistan, were subject to persecution by the Shia, a minority group in Pakistan's population. "[F]urther, he concluded that there was no evidence indicating that the Pakistani authorities were unable or unwilling to offer protection to Sunni Muslims". (ibid.)

"Zulfiqar Ali claimed to have been a former supporter of the Mohajir Quami Movement ('the MQM')", a political organisation "opposed to the Pakistan People's Party." (para. 9) Due to his affiliation with this organisation, he claimed, he had been detained and forcibly made a member of an organization called the MQM-H, whose intention was to persecute individuals belonging to the MQM. His "refusal to co-operate with the army in their clandestine use of the MQM-H" led him to fear persecution by these organisations: he therefore claimed asylum on

the grounds of political opinion. While Special Adjudicator accepted that Zulfiqar Ali had suffered ill-treatment at the hands of the army and the police, neither he nor the Secretary of State were prepared to consider that this amounted to torture. (ibid.)

“The main issue, common to all three” asylum applicants (para. 10), was that of the validity, or otherwise, of the “White List” Order which “identified Pakistan as a country in” which there existed “in general no serious risk of persecution”. In the case, this was “the only issue” which the Court of Appeal had to decide. (ibid.) The applicants’ argued “that no reasonable Secretary of State […] could have concluded that there was, in general, no serious risk of persecution in Pakistan” given “ (i) what was known about the position of women in Pakistan and (ii) what was known about the attitude of the Pakistan authorities towards Ahmadis.” (ibid.)

The Secretary of State argued that the Order at issue had “been approved by each House of Parliament”. (para. 11) He submitted “that the Court can only review such an Order if it can be shown that the Secretary of State did not act in good faith.” (ibid.) The Secretary of State submitted, further, that on the basis of the material available to him, he “was entitled to” conclude that it was true, in general, that no serious risk of persecution existed in Pakistan. (ibid.) Finally, the Secretary of State “submitted that nothing has occurred subsequent to the making of the Order during the period relevant to these applications which has required to remove Pakistan from the Order.” (ibid.)

Ruling:

The Court of Appeal ruled that the High Court was correct to hold that “the inclusion of Pakistan in the countries designated in the Order was unlawful.” (para. 77)

The Court of Appeal upheld the view of the High Court that it had “the supervisory power and duty to examine the evidence available to the Secretary of State at the time that the Order was made, and subsequently, in order to determine whether or not the decision to make and maintain the designation of Pakistan in the Order

was lawful. In so doing [the High Court Judge] embraced and adapted to the circumstances of the present case the observation of Simon Brown L.J in *R v Secretary of State for the Home Department Ex parte Turgut* [2001] 1 All ER 719 at p.729: '...the court is hardly less well placed than the Secretary of State to evaluate (the evidence for in-country assessments) once the relevant material is placed before it.'" (para. 12)

The Court of Appeal also noted that, after having considered the evidence on the treatment of "both women and Ahmadis" in Pakistan, Simon Brown L.J "concluded that: 'I have been unable to see upon what basis the Secretary of State reached his initial decision ... The decision of Parliament was a political one, based on a factual proposition determined by the Secretary of State that Pakistan was a country which satisfied the requirements of paragraph 5(2). In that, he was, in my judgment plainly wrong.'" (para. 13)

Before engaging in the reasoning in more detail, the Court of Appeal reviewed the evidence that the Secretary of State considered before making the Order and presenting it to Parliament; this evidence included both the country assessment for Pakistan, and a statement from "the Country Officer with responsibility" for Pakistan. (paras. 15, 16) Afterwards, the court analyzed and based its decision upon several prior relevant cases.

The Court rejected the Secretary of State's argument and preferred the view of then-President of the Immigration Appeal Tribunal, Judge David Pearl in *Kaleem Ahmed v Secretary of State for the Home Department* which was determined on 7 December 1995. In this case, Judge Pearl relied on a Canadian Immigration and Refugee Board report and acknowledged that, although not all Ahmadis could claim to suffer persecution in Convention terms, they "live in Pakistan as a religious minority who are likely to meet examples of intolerance, discrimination and sadly at times blatant persecution in their everyday lives." (para. 17)

Additionally, the certification of Pakistan was reconsidered by the Court of Appeal which now took into account, "*inter alia of* the political situation in" the country. (para. 18) It referred to the decision of the House of Lords in *Islam and Shah.*

(ibid.) *Islam and Shah,* the appeals “raised the question of whether the two appellants”, two married women who had left Pakistan to seek asylum in the UK, met the criteria to be considered refugees within the Refugee Convention definition. (para. 62) The two appellants claimed to have “been abandoned by” their husbands and that this meant that, if returned to Pakistan, they would suffer forms of “abuse involving accusations of sexual” impropriety and physical violence: the possibility of “stoning to death” existed. (ibid.) They argued, further, that the authorities would not protect them. (ibid.) The Secretary of State responded by arguing that these two women did not fall within the definition of a refugee under the Convention, as their fear of persecution was not based on “‘reasons of race, religion, nationality, membership of a Particular Social Group or political opinion’. The majority in the House of Lords held that in Pakistan women constituted a ‘particular social group’” (para 63). This being the case, they did in fact have a right to asylum under the Convention. The Court held that they were discriminated against in matters of fundamental human rights and the state provided them with no protection. (ibid.) This decision by the House of Lords had been based on comprehensive evidence. The Court of Appeal pointed out that it was reasonable to assume that such evidence would have been available to the Secretary of State when deciding whether or not he could properly include Pakistan on the White List in the Order, and he could have informed his decision in that regard. In spite of its availability, the Secretary of State had “made no reference” to this evidence. (paras. 64-72)

In the present case, the Secretary of State argued that he did consider *Islam and Shah,* and he acknowledged that the House of Lords had “found that there was discrimination against women in Pakistan”: “he did not find”, however, that “a serious risk of […] persecution of women” existed in Pakistan. (para. 64) The Court of Appeal recognised that these two concepts – discrimination and persecution – are not synonymous. The connection, the court reasoned, lay in the consequences of discrimination: as members of a particular social group, women were “subject to discrimination on the part of the state and therefore would not be protected” (ibid.) – i.e., they would not be protected against persecution. The Court of Appeal emphasised, therefore, that “the evidence which led the House of

Lords to find that there was, in general, discrimination against women in Pakistan also led them to find that there was in general a risk of persecution of women in Pakistan. Nor are we in any doubt that this was a serious risk. The evidence that founded the conclusion that women were, in general, subject to discrimination in Pakistan was, in large measure evidence of failure to protect them against persecution." (ibid.)

Main quotations on cultural or religious diversity:

Main quotations on the situation of women

Citing the case of *Islam and Shah,* the Court of Appeal quoted the following:

1. "Generalisations about the position of women in particular countries are out of place in regard to issues of refugee status. Everything depends on the evidence and findings of fact in the particular case. On the findings of fact and unchallenged evidence in the present case, the position of women in Pakistan is as follows. Notwithstanding a constitutional guarantee against discrimination on the grounds of sex a woman's place in society in Pakistan is low. *Domestic abuse of women and violence towards women is prevalent in Pakistan.* That is also true of many other countries and by itself it does not give rise to a claim to refugee status. The distinctive feature of this case is that in Pakistan women are unprotected by the state: discrimination against women in Pakistan is partly tolerated by the state and partly sanctioned by the state. Married women are subordinate to the will of their husbands. There is strong discrimination against married women, who have been forced to leave the matrimonial home or have simply decided to leave. *Husbands and others frequently bring charges of adultery against such wives.* Faced with such a charge the woman is in a perilous position. Similarly, a woman who makes an accusation of rape is at great risk. Even Pakistan statute law discriminates against such women." (para. 64)
2. Speech of Lord Steyn at p. 635, quoting evidence in a report of Amnesty International dated 6 December 1995 which stated that "Women in Pakistan

were *often* held under the Zina Ordinance for many years although no evidence was ever produced that they had committed any offence, that men *frequently* brought groundless charges against their former wives, their daughters and their sisters and that *most women* remained in jail for two to three years before their cases were decided, often on the basis of no evidence of any offence." (para. 64)

3. Speech of Lord Hoffmann at p. 647: "My Lords, in Pakistan there is widespread discrimination against women. Despite the fact that the constitution prohibits discrimination on grounds of sex, an investigation by Amnesty International at the end of 1995 reported that government attempts to improve the position of women had made little headway against strongly entrenched cultural and religious attitudes. *Woman who were victims of rape or domestic violence often found it difficult to obtain protection from the police or a fair hearing in the courts.* In matters of sexual conduct, laws which discriminated against women and carried severe penalties remained upon the statute book. The International Bar Association reported in December 1998 that its mission to Pakistan earlier in the year heard and saw much evidence that women in Pakistan are discriminated against and have particular problems in gaining access to justice; (*Report on Aspects of the Rule of Law and Human Rights in the Legal System of Pakistan, p.29).*' Later, at p. 653, he added: 'I turn, therefore, to the question of causation. What is the reason for the persecution which the appellants fear? Here it is important to notice that it is made up of two elements. First, there is the threat of violence to Mrs Islam by her husband and his political friends and to Mrs Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the state to do anything to protect them. There is nothing personal about this. The evidence was that the state would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two elements have to be combined to constitute persecution within the meaning of the Convention. As the Gender Guidelines

for the Determination of Asylum Claims in the U.K. (published by the Refugee Women's Legal Group in July 1998) succinctly puts it (at p. 5): ‘Persecution = Serious Harm + The Failure of State Protection.” (para. 66)

4. Statement of Lord Hope at p.658: “The unchallenged evidence in this case shows that women are discriminated against in Pakistan. I think that the nature and scale of the discrimination is such that it can properly be said the women in Pakistan are discriminated against by the society in which they live. The reason why the appellants fear persecution is not just because they are women. It is because they are women in a society which discriminates against women. In the context of that society I would regard women as a particular social group within the meaning of article 1A(2) of the Convention.” (para. 67)

Main quotations on the situations of Ahmadis

Citing the case of *Kaleem Ahmed v Secretary of State for the Home Department* (p. 13), the court quoted the following:

1. *“*Each case involving Ahmadis must be looked at on an individual basis. It would in our view be wholly wrong to say that the discriminatory legislative provisions relating to Ahmadis means that all Ahmadis can claim asylum under the terms of the Convention. However, the evidence of the various reports referred to above which express an overall correct view of the position of Ahmadis, illustrates that Ahmadis live in Pakistan as a religious minority who are likely to meet examples of intolerance, discrimination and sadly at times blatant persecution in their everyday lives.” (para. 17)
2. “Had the evidence in relation to Ahmadis stood on its own, we would not have found it incompatible with the Secretary of State's conclusion that there was in general no serious risk of persecution in Pakistan. It is, however, a factor that, when considered together with the position of women, adds weight to our conclusion that the Secretary of State's inclusion of Pakistan in the White List was irrational.” (para. 76)

Main legal texts quoted in the decision:

- Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A(2)
- Asylum and Immigration Appeals Act 1993, as amended by the Asylum and Immigration Act 1996
- Designated Countries of Destination and Designated Safe Third Countries (Order 1996)

Cases cited in the decision:

- *Gulzar Ahmed v Home Secretary* [1990] IAR 61 (CA)
- *Tahir v Home Secretary* [1994] (11032) (IAT)
- *Kaleem Ahmed v Secretary of State for the Home Department* [1995] HX 72861/94 (12774)
- *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, ex parte Shah, R v* [1999] UKHL 20; [1999] 2 AC 629; [1999] 2 All ER 545
- *R v Secretary of State for the Home Department ex parte Turgut* [2001] 1 All ER 719

Commentary

'The Unlawfulness of "White List" Countries in Light of the Persecutory Treatment of Religious Minorities and Women in Pakistan'

The phrase 'the White List' refers to a list of safe countries formerly maintained by the U.K. However, at present, according to the Home Office Policy Guidance 2018, safe third country removals take place on an individual basis. The safe third country concept of the safe third country is founded on the assumption that if an individual enjoys a connection with a safe third country, the transfer of that person to that country is not unreasonable.

The case of *Javed* "makes an important point", namely that some countries may not "be considered safe for a certain range of claims". (Musalo 2002: 32) It may,

consequently, be unlawful to include them in lists of safe countries, if that inclusion is based on generalising assumptions that overlook a range of claims for which that country is not safe. (ibid.) In the case of *Javed*, judicial review of a decision by the Secretary of State to include Pakistan on the "White List" of safe countries led to a ruling by the Court of Appeal. This ruling stated that, in including Pakistan on the list of safe countries, the Secretary of State had erred in law and acted irrationally. The decision of the Court of Appeal was mostly reached via a focus on the "position of women" in Pakistan: however, the court, in coming to its conclusion, "also considered the situation of the Ahmadis" in Pakistan. (ibid.)

The literature explains that the Ahmadis are a religious minority in Pakistan, one whose members suffer restrictions of religious freedom and are targeted by extremists. The British courts usually accept that the beliefs and practices of Ahmadis are religious in character. (Good 2009: 37)

Literature related to the main issue(s) at stake:

- Good, Anthony, 2009. "Persecution for Reasons of Religion under the 1951 Convention". In Thomas G. Kirsch and Bertram Turner (eds), *Permutations of Order: Religion and Law as Contested Sovereignties,* 36 – 48. Farnham & Burlington VT: Ashgate.
- Musalo, Karen 2002. "Claims for Protection Based on Religion or Belief: Analysis and Proposed Conclusions". *UNHCR, Legal and Protection Policies Research Series, PPLA/2002/01.*

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