Upper Tribunal
(Immigration and Asylum Chamber)

Hamat (Article 9 – freedom of religion) [2016] UKUT 00286 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated**
On 18 March 2016	………………………………

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

MR KASHMIR KHAN HAMAT

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr S. Saeed, Solicitor Advocate for Aman Solicitors

For the Respondent: Mr S. Kandola, Senior Presenting Officer

(i) Article 9 - the right to freedom of thought, conscience and religion – is a distinctive feature of the Human Rights Act to be considered separately from Article 8 when it applies.

(ii) Article 9 permits the same structured approach to the assessment of an Article 8 human rights claim identified by Lord Bingham in his 5-stage approach set out in paragraph 17 of Razgar [2004] UKHL 27 save for the omission of the 'economic well-being of the country' criterion in Article 9(2).

(iii) In an appeal where the violation is alleged to occur by reason of removal from the United Kingdom, the test of proportionality governs the exercise of Article 9 rights and not the more stringent approach involving whether the returnee is at risk of a flagrant denial or gross violation in his home country.

(iv) A further distinctive feature is the creation of a statutory right in s.13 of the Human Rights Act 1998, independent of Article 9, enabling a religious organisation to benefit from the Convention right to freedom of thought, conscience and religion alongside its members collectively and individually.

(v) Matters relied on by way of a positive contribution to the community are capable in principle of affecting the weight to be given to the maintenance of effective immigration control and should not be excluded from consideration altogether but are unlikely in practice to carry much weight.

(vi) The operation of the Immigration Rules will not amount to an unlawful interference in the selection of a religious leader when the personality of the appellant has not influenced the decision and where anybody in the same position as the appellant who fails to meet the requirements of the Rules is likely to be refused.

DECISION AND REASONS

Introduction and immigration history

1.
The appellant is a citizen of Afghanistan, who was born on 1 January 1989 and is now aged 27. He was encountered by immigration officials on 8 January 2007 concealed in the back of a lorry and was notified of his liability to be removed. At interview he claimed that he was 17 years of age but an age assessment concluded that he was over the age of 18. He claimed asylum but his application was refused on 29 May 2007. He appealed against that decision on asylum and human rights grounds, his appeal was dismissed and reconsideration was refused. His statutory rights of appeal became exhausted in October 2007. Eventually, in February 2011, the appellant sought judicial review of the respondent's refusal to treat his further submissions as a fresh claim. Those were summarily refused by Thirlwall J on 1 June 2011 who considered that the respondent's decision-making process had been lawful, that the proceedings were bound to fail and that renewal would not operate as a bar to removal.

2.
It was at this stage that the Afghanistan Islamic Cultural Centre (AICC) sought to intervene as an interested party in support of further submissions which resulted in a hearing on 11 November 2011 at which permission to seek judicial review was ordered, it being arguable that the Secretary of State had unlawfully failed to take into account the benefit that the appellant provided to the community and the impact on the community of his removal, demonstrated by numbers of letters of support and a petition, signed by some 945 signatories in terms that the appellant ' contributed to serving our community, maintaining a peaceful and harmonious society '. The Secretary of State agreed to reconsider the claim and a further decision was made on 17 August 2012 refusing his claims both under the Refugee Convention and the ECHR. This was subject to an appeal which was heard on 1 February 2013. At the appeal hearing, the appellant withdrew his asylum claim as well as his claims under Articles 3 and for humanitarian protection.

3.
The appellant then placed reliance on Articles 8, 9 and s. 13 of the Human Rights Act. In support of this application he submitted a report of April 2009 dealing with the Afghan Muslim community in England, a report to which I shall make reference later. Eventually, the respondent conducted a comprehensive reassessment of the case and a further decision was made as long ago as 20 September 2013. On 24 September 2013 the Secretary of State issued removal directions.

4.
The appellant appealed against these decisions repeating the claim that his removal would be a breach of his rights under Articles 8 and 9 of the ECHR and s. 13 of the Human Rights Act 1998.

5.
First-tier Tribunal Judge Petherbridge promulgated his decision dismissing the appellant's appeal on 25 May 2014. Subsequent to a successful challenge in accordance with the principles identified in Cart v The Upper Tribunal [2011] UKSC 28, permission to appeal to the Upper Tribunal was granted

by Mr C. M. G. Ockelton, the Vice President, on 21 May 2015. In granting permission to pursue the Cart challenge, Singh J identified a double failure to address Article 9 of the ECHR as well as s. 13 of the Human Rights Act.

6.
Deputy Upper Tribunal Judge Saini decided on 19 August 2015 that Judge Petherbridge’s decision should be set aside adopting as his reason the Judge’s failure to address Article 9 and s. 13. Both Article 9 of the Convention and s.13 of the Human Rights Act 1998 are largely unfamiliar to practitioners and this is one of the few cases to come before the Tribunal which expressly raises these provisions as a distinct and separate challenge to the respondent’s removal decision. It was only this aspect of the appeal that was pursued before me.

The Afghan Community within the United Kingdom

7.
Reliance was placed by the appellant and AICC on the general conditions in which the Afghan Muslim community lives in the United Kingdom. A report entitled ‘The Afghan Muslim Community in England - Understanding Muslim Ethnic Communities’ is one of 13 reports on England’s Muslim ethnic communities commissioned by the Cohesion Directorate of Communities and Local Government (CLG). It describes the Afghan community in these broad terms:

In Afghanistan the dominant religion has traditionally been the sect of Sunni Islam following the Hanafi School of Jurisprudence. A large proportion of the Sunni population in Afghanistan also adheres to the Deobandi tradition, which is believed to have had a strong influence on the Taliban. The majority of Afghans in the UK are also Sunni Muslims, but there is a significant minority of Shi’a, particularly those of the Hazara ethnic group. There are also reported to be some ‘important Sufi families’ in London and a large Afghan Sikh community. Views about religion are contradictory. Some sources suggest that there is a ‘stricter’ form of Islamic practice driven by people who have arrived during the later stages of the recent conflicts in Afghanistan, as well as a visible tendency towards greater religiosity among young people. Others however suggest that most Afghans in the UK are more culturally Muslim than devout in their religious practice, and that there is a sizeable part of the community with communist sympathies that does not subscribe to any form of religion at all. Culture and ethnicity appear to play a more significant role in the way Afghans identify themselves than religion. Most respondents expressed their relationship with Islam as something personal and in the background, something that informs their values and attitudes to life, but which does not play an outwardly visible role. In the past, Afghans attended mosques established by other communities, including contributing to the building of mosques in collaboration with other Muslim groups. However Afghan cultural practices, particularly funereal rites, differ substantially from those of other Muslim communities, and this factor is thought to have contributed significantly to the development of separate mosques for the community. It certainly seems to have been a strong influential factor in the decision to build the Afghan mosque in Neasden, along with pressure from other communities concerning accepted rituals and forms of worship.

8.
Reliance, in particular, is placed on the passage above which refers to the differences in practice between Afghan Muslims and others: ‘ Afghan cultural practices, particularly funereal rites, differ substantially from those of other Muslim communities ’.

Facts

9.
There is very little dispute about the activities performed by the appellant. These are described in his statement dated 2 May 2014. The appellant described how over the years, he had established strong links with the Afghan community in the United Kingdom. For many years, he had performed the voluntary work for the AICC and has built up strong and close relationships with many people there and in the Afghan embassy. He describes how he performed this voluntary work out of a desire to help others. In paragraphs 20 to 24 of his statement he describes his activities as including helping and advising the community on Islamic issues, organising prayer times, leading the congregation in daily prayers and congregate Friday prayers. In particular, he led prayers during Ramadan reciting the Qu’ran which he has committed to memory in its entirety (a Hafiz, lit. a guardian or memoriser of the Qu’ran). He also assists families with funerals, arranging memorial services, participating in and leading the ceremonies for the dead and visiting families in their homes. He assists in mediating in domestic problems. He conducts Islamic Nikah ceremonies in what he asserts is a somewhat complex procedure for which he is qualified (and has been for the last six years). In addition he teaches over 100 children at the AICC. He works with the young and with the local police on issues concerning youth, street crimes and public disorder. He is concerned with the building of community relations as well as seeking to build a more unified Muslim community in the United Kingdom. At present, he is not permitted to take up paid employment. The above description of his functions is confirmed by a number of witnesses who have made statements.

10.
The material in support of the appellant’s claim included a petition, letters of support from various Afghan community associations, correspondence from, and to, members of Parliament and numerous other supporting letters from councillors, solicitors, friends and supporters. This support included a Note Verbal dated 15 April 2014 from London’s Ambassador at the embassy of the Islamic Republic of Afghanistan.

11.
Although the ambassador is plainly speaking only in a personal capacity, his words echoed much of what others had said. He spoke of his contact with the appellant through the embassy. Embassy staff visited the AICC during the last 10 days of Ramadan in 2013. There, the prayers were led by the appellant who also leads the weekly Friday prayers at the AICC and funeral prayers. He also leads a regular weekly service on Sundays at the AICC. The embassy was so much impressed by the appellant's recitation of the Qu’ran that, in the Note Verbal of 15 April 2014, the ambassador spoke of inviting him to recite suitable verses at large events or anniversaries. The appellant also acts providing advice on issues within the Afghan community and, as a minister of religion, the appellant is appreciated throughout the Afghan community. He teaches at the Madrasa. He speaks Pashtu and Dari fluently, which is said to be rare.

12.
The bundle supplied by the appellant's solicitors on 6 May 2014 contains over 100 pages of witness statements and letters of support. It includes support from the Chairman and the Trustees of the AICC. He is described as having a strong charismatic personality with a good positive influence upon those around him. I have no reason to doubt the high regard in which the appellant is held by the Afghan Muslim community.

13.
More recently there has been unfortunate division amongst the Muslim community and on 6 March 2016, according to the evidence of Mr Zubair Mohammadi, the Secretary of the AICC, a group of its

members attempted to stage a coup against the board of the AICC. He has been locked out of his office. He described how the situation became quite ugly and the police were called. Fortunately no violence ensued. Mr Mohammadi maintains his view that the AICC could not function without the appellant and cites the view of those involved in the attempted coup that, although they tried to depose the appellant, they could not do so because there was nobody to replace him.

14.
Mr Mohammadi describes the AICC placing an advertisement in the Eastern Eye newspaper in which a replacement for the appellant is advertised in these terms:

Wanted: Farsi-Pashto Speaking Imam

Salary - £27,000 per annum

Minimum requirements-the applicant must:

- Be an experienced Hafiz and Qari (i.e. must have memorised all Holy Qu’ran with correct recitation)
- Be fluent in Farsi and Pashto
- Have minimum three years experience as an imam in a mosque
- Have minimum three years of experience in teaching Holy Qu’ran and Islamic Studies to kids
- Possess high degree of Islamic etiquette
- Provide minimum five references from the prominent members of the Afghan Muslim community in London

Main duties

- Leading all daily prayers
- Teaching Holy Qu’ran and Islamic Studies to children
- Carrying out marriage and funeral services etc

15.
Mr Mohammadi told me there had been no response to that advertisement. In addition, in paragraph 10 of his statement of 2 May 2014 [Tab B pages 52-3] he had said that, in response to advertisements, he had received 8 applications and had interviewed 5 candidates from the Afghan community as well as other nationals. The candidates interviewed were either not Hafiz of the Qu’ran or had little knowledge of Afghan cultures and could not speak Pashto and Dari or understand Islamic law.

The Secretary of State’s response

16.
The appellant’s work is not disputed by the respondent. However, the issue arises as to whether the applicant is, in effect, irreplaceable. If he is not absolutely irreplaceable, the respondent contends the appellant and the AICC have failed to establish he cannot be replaced for all reasonable and practical purposes.

17.
The Secretary of State relies upon the appellant’s poor immigration history and the public interest in the removal of those who have flouted immigration law, the fact that the Immigration Rules permit ministers of religion (a wide-ranging term that would include the appellant) to enter the United Kingdom lawfully and that there are in any event some 56,000 Afghans in the United Kingdom as a potential source of recruitment for an individual to replace him. She points out that there has been no extensive national or international effort at recruitment. Further, the respondent noted that the appellant’s educational background is limited: he arrived in the United Kingdom at the age of 17 or 18 and had only previously received 3½ years study at a Madrasa.

The Convention and Statutory Provisions

18.
Article 9 ECHR states as follows:

ARTICLE 9

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

19.
A distinctive feature of the Human Rights Act’s treatment of the right to freedom of thought, conscience and religion is to place it in a distinct category of protection and to create a statutory right which is independent of the Article 9 Convention right. This is found in s.13:

13. Freedom of thought, conscience and religion

(1) If a court’s determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

(2) In this section “court” includes a tribunal.

20.
It is first necessary to consider the relationship between Article 8 and 9. The two Articles are quite separate; nether one is subservient to the other. Any suggestion that the appellant’s Article 8 rights were improperly assessed by reason of the failure to consider his Article 9 rights is misplaced. An individual’s Article 9 rights are free-standing. So much is clear from s. 1 of the Human Rights Act

which incorporates the ECHR into domestic law and does so without creating a hierarchy of rights such that Article 9 rights are seen as a constituent part of the individual's Article 8 rights:

1 The Convention Rights

(1)In this Act "the Convention rights" means the rights and fundamental freedoms set out in—

(a)Articles 2 to 12 and 14 of the Convention,

21.
The Convention rights are domesticated into United Kingdom law by s.6:

6 Acts of public authorities

(1)It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

22.
Turning to s. 13 of Human Rights Act, the reference to the 'importance of the right' to freedom of thought, conscience and religion is striking in that no other Convention right is afforded this treatment.

23.
Secondly the right to freedom of thought, conscience and religion is protected not only for the benefit of individuals but organisations: 'a religious organisation…itself' . This is something of a contradiction in terms: a human right enjoyed by an organisation . This is comprehensible by reference to the members of an organisation enjoying human rights but s. 13 goes further by distinguishing between the human rights of its members and the human rights of the organisation: ' a religious organisation (itself or its members collectively) '. Thus, for example, the Church of England has the Convention right to freedom of thought, conscience and religion alongside its members collectively and individually.

24.
Section 13 of the Human Rights Act appears to be the result of the decision of the ECtHR in X and the Church of Scientology v Sweden (Case 7805/77) in which the Court considered, as a preliminary issue, whether the Church of Scientology, which had legal personality, was capable of exercising Article 9 (1) rights. The Commission, reversing its earlier position, considered that the distinction between Church and its members was essentially artificial. The Court upheld the Commission's revised view: the church in its application was in reality doing so on behalf of its members.

25.
Thirdly, s.13 is itself free-standing. It is entirely separate from the domestication into United Kingdom law of the ECHR. Hence the right to freedom of thought, conscience and religion is protected by two independent sections of the Human Rights Act: s.6 and s.13. In granting permission Deputy Upper Tribunal Judge Saini said

The Tribunal erred in its consideration of Article 8 in relation to the appellant's functions for the Afghan Islamic Cultural Centre ("AICC") and the effect his removal will have upon the Article 9 ECHR rights of the congregation through s. 13 HRA 1998.

26.
Insofar as this passage might suggest there was a correlation between Article 8 and 9 such that the Article 9 claim is advanced through the medium of Article 8 and, further, that Article 9 is the prism

through which s.13 is assessed, I have concluded that this is not the correct analysis of the relationship between these various provisions for the reasons I shall later give. Each is independent of the other and requires separate assessment.

27.
Fourthly, it is directed towards Courts and Tribunals. They alone bear the statutory duty to apply it. Nevertheless, out of a due sense of deference, decision makers themselves might properly take its provisions into effect, if they are not already doing so.

Articles 8 and 9 compared

28.
Both Article 8 and Article 9 are expressed in terms that are not absolute. Each is a qualified right. However, the qualified nature of the right is expressed in different terms. This is best demonstrated by a synoptic version of the two Articles:

ARTICLE 8 **Right to respect for private and family life** 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.	**ARTICLE 9** **Freedom of thought, conscience and religion** 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

29.
It is readily understandable that an individual’s human rights may be outweighed by the economic well-being of the country: hence a claim to remain which operates as a burden upon the state may be a legitimate reason for refusing the claim; it is often expressed as the public interest in maintaining immigration control. The economic well-being of the country is however omitted from the factors that qualify the right to freedom of thought, conscience and religion. Whilst the concept of a right to freedom of thought, conscience and religion can less obviously be seen as operating in the realm of economic activity (the biblical antithesis, perhaps, between God and mammon) the fact that a person who claims the right to exercise his freedom of religion may result in his being a burden on the state or the public at large is just as significant a factor in an Article 9 case as it is in an Article 8 case.

The applicability of the Razgar test

30.
The concept of proportionality nowhere finds expression in the qualified nature of an individual's Article 8 or 9 rights. It is most often articulated in Article 8 cases by reference to Lord Bingham's 5-stage approach identified in paragraph 17 of Razgar [2004] UKHL 27:

In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before [the First-tier Tribunal], as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by [the First-tier Tribunal Judge]. In a case where removal is resisted in reliance on Article 8, these questions are likely to be:

(1)
Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2)
If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(3)
If so, is such interference in accordance with the law

(4)
If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5)
If so, is such interference proportionate to the legitimate public end sought to be achieved?

31.
Such a structured approach to the assessment of a human rights claim has equal force when considering Article 9 save of course for the omission of the economic well-being of the country criterion in Article 9.

The case law

32.
In El Majjaoui & Stichting Touba Moskee v. the Netherlands - 25525/03 [2007] ECHR 1124 the Grand Chamber of the European Court of Human Rights considered an application by the Dutch authorities to strike out the applicant's claim to which the Court acceded. It did not therefore consider that the Court was required to continue to a full examination of the application. The principal applicant was a Moroccan national but the mosque (Stichting Touba Moskee) in which he worked as an imam had legal personality under Netherlands law and joined in the application to the ECHR. Together, they alleged that the refusal to issue a work permit to the applicant to enable him to work as imam for the mosque constituted an unjustified interference with their right to freedom of religion as guaranteed by Article 9 of the Convention and was also in violation of Article 18 of the Convention. Dutch domestic law provided that a work-permit was to be refused where there was an available supply of

‘priority labour’ (loosely similar to the resident labour test) and if the vacancy had not been previously notified to the Dutch equivalent of the Jobcentre. This latter requirement had not been met and, in refusing the application, it was said that insufficient steps had been taken to find priority workers to fill the vacancy. The Dutch government stated that Article 9 could not be construed as entitling a religious community to employ as a teacher and minister of religion a foreign national who did not meet statutory requirements set for the purpose of preserving peace and public order, the rough equivalent of the public interest in maintaining immigration control.

33.
The Dutch government applied to strike out the claim under Article 37 because in the course of the proceedings, the government informed the Court that a new application for a work permit on behalf of the applicant had been successful; a work permit had been issued because the foundation had established that the statutory requirements necessary which included that the mosque had then established it had made sufficient efforts to fill the position with priority labour and had notified the authorities in due form of the vacancy. Indeed, the applicant had been granted a residence permit. In resisting the attempt to strike out the claim, the applicants relied on the fact that the principal applicant had effectively been deprived of his work as an imam, and the local Moroccan community had been deprived of an imam, until the work permit was finally issued.

34.
In its decision to strike out the claim without a full consideration of the merits, the Court asked itself two questions, the second of which was whether the applicants had been provided with sufficient redress. The Court stated in paragraph 31 of its decision:

As regards the second question, the Court considers that the mere fact that the applicant foundation had to comply with certain requirements before it was able to employ the applicant does not as such raise an issue under Article 9. The Court agrees with the former Commission that that provision does not guarantee foreign nationals a right to obtain a residence permit for the purposes of taking up employment in a Contracting State, even if the employer is a religious association (see Hüsnü Öz v. Germany , no. 32168/96, Commission decision of 3 December 1996). After all, the Convention does not lay down for the Contracting States any given manner for ensuring within their internal law the effective implementation of the Convention. The choice as to the most appropriate means of achieving this is in principle a matter for the domestic authorities, who are in continuous contact with the vital forces of their countries and are better placed to assess the possibilities and resources afforded by their respective domestic legal systems (see Swedish Engine Drivers' Union v. Sweden , judgment of 6 February 1976, Series A no. 20, p. 18, § 50; Chapman v. the United Kingdom [GC], no. 27238/95, § 91, ECHR 2001-I; and Sisojeva and Others , cited above, § 90).

35.
Thus, in a somewhat oblique way in the course of an application to strike out, the ECtHR gave its view on the scope of, and limitations upon, the right to freedom of thought, conscience and religion. The decision had followed the decision using its earlier procedure in Cha'are Shalom Ve Tsedek v. France 27417/95 [2000] ECHR 351 in which a Jewish liturgical association, Cha'are Shalom Ve Tsedek, alleged a violation of Article 9 of the Convention on account of the French authorities' refusal to grant it the approval necessary for access to slaughterhouses with a view to performing ritual slaughter in accordance with the ultra-orthodox religious prescriptions of its members. The French authorities had granted approval to an organisation (the ACIP) that satisfied the majority of the Jewish community in France but the applicants were not satisfied this resulted in the slaughtered meat being ritually pure. In France, as in many other European countries, the ritual slaughter required by Jews and Muslims

for religious reasons came into conflict with the principle that an animal to be slaughtered, after being restrained, must first be stunned in order to spare it any suffering. Ritual slaughter was nevertheless authorised under French law but might only be performed by authorised slaughterers and the applicant had not obtained that authorisation.

36.
The Conseil d'Etat had in another earlier case held:

In requiring ritual slaughter performed under conditions derogating from the provisions of ordinary law to be carried out only by ritual slaughterers authorised by religious bodies approved by the Minister of Agriculture on a proposal by the Minister of the Interior, the Prime Minister did not interfere in the affairs of religious bodies and did not infringe the freedom of worship but took the measures needed for exercise of that freedom in a manner consistent with public policy .

37.
The de facto monopoly enjoyed by the ACIP with regard to ritual slaughter was not, however, the result of any deliberate intention on the part of the State, which would not have failed to grant the approval sought by the applicants if it had been able to prove that it was essentially a religious body and had wider support within the Jewish community. The fact that the exceptional rules designed to regulate the practice of ritual slaughter permit only ritual slaughterers authorised by approved religious bodies to engage in it did not in itself lead to the conclusion that there has been an interference with the freedom to manifest one's religion. The Court considered, like the Government, that it was in the general interest to avoid unregulated slaughter, carried out in conditions of doubtful hygiene, and that it was therefore preferable, if there is to be ritual slaughter, for it to be performed in slaughterhouses supervised by the public authorities. Importantly, the Court held:

In the Court's opinion, there would be interference with the freedom to manifest one's religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable.

38.
That was not the case because the applicants would easily obtain supplies of ritually pure meat in Belgium. Furthermore, there was evidence that a number of butcher's shops operating under the control of the ACIP made ritually pure meat available to Jews. Two strands might be detected in this decision. First, the Convention right to freedom of thought, conscience and religion includes the practical implementation of that belief in the form of religious practice or ritual (that is, it was not simply a freedom of thought) and secondly a distinction was drawn between circumstances where the domestic regulation rendered the observance of religious practice or ritual impossible and those where practical observance remained possible, through constrained by domestic legislation lawfully imposed.

A flagrant denial or gross violation test? Ullah and Do

39.
In Ullah and Do, R (on the Application of) v Special Adjudicator [2004] UKHL 26, the specific right in question in the conjoined appeals was the right to freedom of thought, conscience and religion guaranteed by Article 9 of the Convention and in particular the freedom "either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance".

40.

Mr Ullah had applied for asylum, claiming that, as an active member of the Ahmadhiya faith, he had a well-founded fear of persecution in Pakistan as a result of his religious beliefs. His asylum claim failed. He also relied on Article 9 but this, too, was rejected by the Adjudicator. She found that although Articles 9, 10 and 11 of the Convention could be engaged in a situation of this kind, Mr Ullah would suffer no serious infringement of these rights in Pakistan; the Secretary of State was acting lawfully in pursuance of the legitimate aim of immigration control; and his decision to remove Mr Ullah to Pakistan was proportionate to any difficulties he might face on his return.

41.

The other appellant, Miss Do, was a citizen of Vietnam and entered the United Kingdom in November 2000. She applied for asylum, based on her fear of persecution as a practising Roman Catholic in Vietnam.

42.

The House of Lords drew a distinction between what Lord Bingham defined as ‘domestic cases’ and ‘foreign cases’ in which in the latter category it was not claimed that the state had violated or would violate the applicant's Convention rights within its own territory but in which it is claimed that the conduct of the state in removing a person from its territory (whether by expulsion or extradition) to another territory will lead to a violation of the person's Convention rights in that other territory. Although Article 1 of the Convention provides that the signatories shall secure to everyone within their jurisdiction the defined rights and freedoms, it sets a territorial limit on the reach of the Convention. In particular, the Convention does not govern the actions of other states, nor does it require the signatories to impose Convention standards on other States. Thus, Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention.

43.

Ullah and Do , as is readily apparent, were ‘foreign cases’. The Court of Appeal had concluded at paragraph 64:

This appeal is concerned with Article 9. Our reasoning has, however, wider implications. Where the Convention is invoked on the sole ground of the treatment to which an alien, refused the right to enter or remain, is likely to be subjected by the receiving state, and that treatment is not sufficiently severe to engage Article 3, the English court is not required to recognise that any other Article of the Convention is, or may be, engaged."

44.

The Court of Appeal ruled out as a matter of law the possibility that any Article other than Article 3 could ever be engaged. The crucial issue in the House of Lords was whether, in a foreign case, reliance might be placed on any article of the Convention other than Article 3, and in particular whether reliance may be placed on Article 9.

45.

Having examined the nature of the rights conferred by the Convention, the House of Lords decided that the Court of Appeal was in error in making the categorical statement that in foreign cases it was only Article 3 that had to be considered. Instead, the correct approach was a more stringent approach, namely, a test involving whether the returnee was at risk of a flagrant denial or gross violation. It was this test that had been adopted by the Immigration Appeal Tribunal (Mr C M G

Ockelton, deputy president, Mr Allen and Mr Moulden) in Devaseelan v Secretary of State for the Home Department [2002] IAT 702, paragraph 111:

The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case - where the right will be completely denied or nullified in the destination country - that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state.

46.
Having reviewed the case law, Lord Steyn concluded in paragraph 50 by stating:

It will be apparent from the review of Strasbourg jurisprudence that, where other Articles may become engaged, a high threshold test will always have to be satisfied. It will be necessary to establish at least a real risk of a flagrant violation of the very essence of the right before other Articles could become engaged.

47.
In the appeal before me, the Senior Presenting Officer, Mr Kandola, relies upon the high threshold test when the appellant is relying upon a violation of his human rights where Article 9 is engaged. This is, however, misplaced in the cases of a domestic claim, that is, a claim which is based on an allegation that his or another's human rights will be violated in the United Kingdom by his removal. Nor is it necessary to impose such a high threshold if and when the test is one of proportionality because in such a case the competing interests of the community at large in enforcing immigration control and the interests of the individuals or the religious community affected can be balanced.

Discrimination

48.
Cases involving discrimination on the basis of the Convention right to freedom of thought, conscience and religion offer no or little assistance. It is not suggested that the government is unlawfully discriminating and the AICC is certainly not doing so. Thus, for example, Eweida v British Airways Pl c [2010] EWCA Civ 80, was the well-publicised cases in which the appellant's employer adopted a practice of not permitting jewellery to be worn and visible at the open neck of the uniform that all employees were required to wear who had contact with the general public. The appellant wore a cross at her neck. Her attitude in doing this was severely criticised by the Court of Appeal and formed part of an unjustified but wide-ranging attack that her employer was anti-Christian. The appellant adopted as a principal plank of her claim the provisions of Reg. 3 of the Employment Equality (Religion or Belief) Regulations 2003:

3. Discrimination on grounds of religion or belief

(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if –

….

(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but -

(i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons,

(ii) which puts B at that disadvantage, and

(iii) which A cannot show to be a proportionate means of achieving a legitimate aim.

49.
Her case failed in the Court of Appeal but she succeeded in the ECtHR, (Eweida and Others v. the United Kingdom (nos. 48420/10, 59842/10, 51671/10 and 36516/10), [2013] ECHR 37). The case is of interest in the context of this appeal only by reason of the high importance the Court attached to the right to freedom of thought, conscience and religion as well as the scope of the right. The reasoning is to be found in paragraphs 79-84:

The Court recalls that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. In its religious dimension it is one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it (see Kokkinakis v. Greece , 25 May 1993, § 31, Series A no. 260-A).

Religious freedom is primarily a matter of individual thought and conscience. This aspect of the right set out in the first paragraph of Article 9, to hold any religious belief and to change religion or belief, is absolute and unqualified. However, as further set out in Article 9 § 1, freedom of religion also encompasses the freedom to manifest one's belief, alone and in private but also to practice in community with others and in public. The manifestation of religious belief may take the form of worship, teaching, practice and observance. Bearing witness in words and deeds is bound up with the existence of religious convictions (see Kokkinakis, cited above, § 31 and also Leyla Şahin v. Turkey [GC], no. 44774/98, § 105, ECHR 2005-XI, 44 EHRR 5). Since the manifestation by one person of his or her religious belief may have an impact on others, the drafters of the Convention qualified this aspect of freedom of religion in the manner set out in Article 9 § 2.

The right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance.

Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1....In order to count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question (see Cha'are Shalom Ve Tsedek v. France [GC], no. 27417/95, §§ 73-74, ECHR 2000-VII

...if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right under Article 9 § 1 and the limitation does not therefore require to be justified under Article 9 § 2.

According to its settled case-law, the Court leaves to the States party to the Convention a certain margin of appreciation in deciding whether and to what extent an interference is necessary. This margin of appreciation goes hand in hand with European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate.

The analysis

50.

Having set out the legal principles that are engaged, it is as well to recap the scope of the issues before the Upper Tribunal. The appellant, now aged 27, had spent some 3½ years at a Madrasa in Afghanistan prior to his coming to the United Kingdom. He was encountered by immigration officials on 8 January 2007, aged 17 or 18, concealed in the back of a lorry and was notified of his liability to be removed. His asylum claim was refused on 29 May 2007 and his appeal rights became exhausted in October 2007. In February 2011, the appellant sought judicial review of the respondent's refusal to treat his further submissions as a fresh claim. Those were summarily refused on 1 June 2011, it being thought that the respondent's decision-making process had been lawful and that the proceedings were bound to fail. I am now bound to consider his claim under Article 9.

51.

The appellant's personal claim to avoid removal was (and remains) hampered by this poor immigration history. Attention therefore focuses on the intervention of the Afghanistan Islamic Cultural Centre (AICC) and the effect that the appellant's removal will have on it as an a organisation and as acting on behalf of the Afghan Muslim community in the United Kingdom, and London in particular.

52.

This decision requires consideration to be given to the following elements:

(i)

The AICC as a religious organisation.

(ii)

The effect of the appellant's positive contribution to the Afghan Muslim community in the United Kingdom and its interface with the wider community. This positive contribution is, not inappropriately, sometimes referred to as ‘good works'.

(iii)

The claim by the AICC of an unlawful interference with its freedom of choice in the selection of a minister.

(iv)

Findings of fact in relation to the availability of a replacement to serve the needs of the Afghan Muslim Community in the event of the appellant's departure.

(v)

The competing interests of the Afghan Muslim community in retaining the presence of the appellant and preserving the benefits he provides to the community on the one hand and, on the other, the wider community whose interests the Secretary of State represents in the maintenance of a system of immigration control.

53.
I shall deal with each of these matters in turn.

The AICC as a religious organisation

54.
Judge Petherbridge was not satisfied that the AICC was a religious organisation. I have not explored what material was before him although in finding that there was a material error of law, Judge Saini referred to the statement of Mr Hanafi and the AICC Chairman which cumulatively reflected upon whether the organisation was one that is principally or substantially religious in character, thereby engaging Article 9. Judge Saini found the First-tier Tribunal Judge failed to have due regard to this material.

55.
I suspect that I have a much more complete picture. In a supplementary bundle there is a Certificate of Registration of a Place for Religious Worship in the registration district of Brent. The certificate emanates from the General Register Office in Southport and states that the premises are registered as a place of meeting for religious worship in accordance with the Places of Worship Registration Act, 1855. There are also entries provided by the Charity Commission in relation to the Afghan Islamic and Culture Centre naming the trustees, the date of registration, the adoption of the Constitution and providing that its charitable object is to advance Islamic religion in accordance with the teachings of the Qu'ran and Sunnah Prophet Mohammed (S.A.W.) to the Muslim community. I have no doubt that the Judge would have reached a different conclusion had he seen these documents. In addition, the Constitution of the AICC has been provided, the object of which (alongside offering facilities for recreation and leisure in the interests of social welfare) is that of advancing Islamic religion to the Muslim community. There is, therefore, overwhelming evidence that this is both an organisation in the sense that it is a legal entity as well as a religious organisation.

56.
For my part, I would not regard it as a requirement of the definition of religious organisation that the organisation should have a legal personality. Whilst many religious communities or organisations may well have a distinct legal personality, it may not always be the case. Some may have charitable status such as to provide them with a legal personality but not all will. However, an established community of believers (or, perhaps, non-believers) whose activities are organised in the sense of having a group of elders, a board or governing committee might well be able to establish that, collectively, it is an organisation sufficient for the purposes of s. 13. The purpose, I assume, of making reference to an organisation is that, if the organisation may properly be treated as a separate entity, the elders, board or committee are able to speak as a collective voice on behalf of the community as a whole and thereby carry greater weight than the individual members who write or speak. Whilst the weight that is to be attached to the voice of an organisation will depend upon the specific circumstances of that organisation, its membership and decision-making capability (and will vary from case to case), it is reasonable that a religious community as a whole should have its views and interests taken into account.

Good works and the appellant's activities as a benefit to the community

57.
In UE (Nigeria) & Ors v Secretary of State for the Home Department [2010] EWCA Civ 975, the Jjudge took into account the fact that the appellants had known for many years that they had no legal status in the United Kingdom and had taken no steps to bring themselves to the attention of the authorities

for two-and-a-half years after their return from Ireland. In addition he took account of the effect of removal on each of the appellants in terms of their individual activities: in one case as a writer, poet and performer; in other cases on their educational progress and their work and cultural activities. The judge was not, however, prepared to put into the balancing exercise the value of the appellants' various activities to the community in the United Kingdom. The question for the Court of Appeal was whether it was relevant on any basis that the person in question is of value to the community in the United Kingdom, a value of which that community would be deprived if he were to be removed.

58.
Sir David Keene described this as a separate consideration from the consequences for the appellant himself but concluded that it was a material and lawful factor:

9. It should be noted that this is a different question from asking what would be the impact on the individual in question of removing him, even though that question also would involve considering the extent to which he may have been involved in community activities. That latter question is directed at ascertaining the strength of the individual's own ties to this country and the degree, consequently, of private life which he has established here, whether in terms of friends, education, work or leisure activities. That latter question considers the extent to which his right to private life would be interfered with by removal, an issue which arises both under Article 8(1) and then if there would be such interference again under Article 8(2) as part of the balancing exercise. But the first question, that now under scrutiny, is dealing with the effect of his removal on the community in the United Kingdom... .

35. For my part, therefore, I conclude that it is open to this court to find that the loss of such public benefit is capable of being a relevant consideration when assessing the public interest side of proportionality under Article 8 and as a matter of principle I do so find. That is where this aspect comes into the proportionality exercise.

59.
Richards LJ, though saying that there was very little between himself and Sir David Keene on the issue, did in fact articulate the approach is somewhat different terms:

40. Factors are relevant to the assessment of proportionality under Article 8 in such a case only in so far as they impact either on the weight to be given to the maintenance of effective immigration control or on the weight to be given to the individual's private life. It is not a question of dropping into the scales all aspects of the public interest for or against removal or anything that might be relevant to the exercise of a discretion under the statute or Immigration Rules. It is a more specific and targeted exercise.

41. For those reasons I consider that contribution to the community is not a freestanding or stand-alone factor to be put into the Article 8 balance as an independent consideration in its own right. It can affect the balance only in so far as it is relevant to the legitimate aim or the private life claim.

42. It is common ground that community activities may affect the strength of the private life claim, and this was something that the Immigration Judge had properly in mind in his determination.

43. As to the other side of the balance, in MA (Afghanistan) [2006] EWCA Civ 1440 at paragraph 28 Moses LJ suggested that "It may well be that the benefit of the community of the work performed by the applicant diminishes the weight to be given to the public interest in immigration control." So far as I can recall and can discern from the material we have been shown, that judgment was not drawn

to the court's attention, and the possibility of contribution to the community being factored into the analysis in that way was not explored or even raised, in RU (Sri Lanka) [2008] EWCA Civ 753 . Faced with the issue in the present case, however, I would accept that the matters relied on here by way of contribution to the community are indeed capable in principle of affecting the weight to be given to the maintenance of effective immigration control. I agree that that public interest aim can and should be viewed sufficiently widely and flexibly to accommodate such considerations. But they do not have as obvious a bearing as, for example, delay by the Secretary of State in processing a claim or the applicability of a specific immigration policy favouring the applicant, and I doubt if they would in practice carry a lot of weight even on the relatively favourable facts of the present case. But I do agree that they should not be excluded from consideration altogether.

60.
This line of reasoning must apply with equal force to Article 9 cases but there is this difference: s. 13 of the Human Rights Act provides the express requirement that in any question arising under the Human Rights Act that might affect the exercise by a religious organisation of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right. This is an express requirement of the religious community's interests as distinct from those of the appellant.

Unlawful interference with the AICC's freedom of choice

61.
The appellant claims that the actions of the respondent amount to interference with the AICC selection of a religious leader. In so submitting they rely upon the decision of the ECtHR in Hasan and Chaush v. Bulgaria , 30985/96 [2000] ECHR 511. This case concerned the actions of the Bulgarian government in relation to what the two applicants said was the forced replacement of the leadership of the Muslim religious community in Bulgaria. One of the applicants was the Chief Mufti of the Bulgarian Muslim who claimed that the state authorities had interfered in the organisational life of the Muslim community by refusing to register its leadership which had been elected. The Court found that the authorities had failed to remain neutral and that led to the conclusion that they violated Article 9; the government had proclaimed changes in the leadership of the Muslim community which were not justified.

62.
The application of Hasan and Chaush v. Bulgaria , 30985/96 [2000] ECHR 511 does not assist the appellant in this appeal. Whilst the effect of the appellant's removal inevitably has the effect of depriving the AICC and its membership of the imam of their choice, this was not the motive of the respondent's actions (unlike the motive of the Bulgarian authorities which was to deprive the applicant of his position). In contrast, the United Kingdom authorities were applying immigration law as they saw it to be. Even if they were wrong, the decision had not interfered with the freedom of choice of the Afghan Muslim community because their actions have not been prompted by a wish to favour one imam over another. The personality of the appellant has not influenced the decision: anybody in the same position as the appellant who does not meet the requirements of the Rules is likely to be refused.

The availability to the Afghan Muslim Community of finding a replacement

63.
It must be noted that the appellant and, more importantly, the AICC and the worshipping community served by the appellant have a lawful route available to secure the care of the appellant or another

imam. The requirements or attributes for Tier 2 (Ministers of Religion) Migrants are set out in Appendix A to the Immigration Rules. I have set out the Rules as an appendix to this decision. In essence they provide for a valid Certificate of Sponsorship in circumstances where the sponsor must confirm that the applicant is being sponsored to perform religious duties of a nature specified; confirms that the applicant will receive pay and conditions as specified; meets the requirements of the resident labour market test; establishes the applicant is qualified to do the job in respect of which he is seeking leave as a minister of religion and demonstrates, where necessary, that a national recruitment search was undertaken.

64.
The appellant will himself, of course, face the prospect of mandatory refusal of entry clearance or leave to remain most obviously under paragraph 320(7B). Whilst the appellant will face real practical difficulties in making an out-of-country application for entry clearance as a minister of religion, this arises because of his own poor immigration record, compounded by his failure to mitigate his position by a voluntary return. Nevertheless, the option of returning to Afghanistan and making an out-of-country application for entry clearance is reasonable in the case of an individual who has no right to enter or remain in accordance with Chikwamba principles, Chikwamba v Secretary of State for the Home Department [2008] UKHL 40. Such a person cannot advance the argument that his immigration history renders it unreasonable to require an out-of-country application because he is at risk of refusal by reason of past breaches of immigration law. Were it otherwise, the reasonable requirement to regularise an individual's immigration status by an out-of-country application would favour an individual with a poor immigration history at the expense of others because his application is more likely to fail. This principle affects both the Article 9 consideration of the appellant’s own claim as well as the consideration that must be afforded to the rights of the religious organisation.

The appellant’s personal claim to avoid removal

65.
For the reasons I have given, the AICC, whose interests are co-extensive with the Muslim worshipping community in the Centre and, more generally, in London is entitled to due consideration as an organisation and through its collective membership. The community’s interest is distinct from the appellant’s personal claim seeking to avoid removal on proportionality grounds. Given the appellant’s immigration history, for which he is responsible, the appellant’s personal claim to avoid removal is easily out-weighed by the public interest in enforcing immigration controls either where the individual does not meet the requirements to remain under the Immigration Rules or where the individual is an illegal entrant or overstayer or otherwise in breach of immigration law. There is no doubt an interference sufficient to engage Article 9 but the interference is in accordance with the law and is necessary to provide the sanction of removal in the case of illegal entrants and overstayers and/or to discourage others who enter illegally or extend their stay unlawfully. As a result of his poor immigration history and the legitimate process of seeking his removal, the appellant’s personal claim to remain is extremely weak and is clearly outweighed by the wider public interest engaged by Article 9. He will be free to practice his religion without any obvious constraint when he returns to Afghanistan and he cannot claim the right to practice it in the United Kingdom notwithstanding his breaches of immigration law.

The Communities’ interest in the exercise of proportionality

66.

I use the term ‘Communities’ (in the plural) because the appeal engages the interest of two communities: the relevant Afghan Muslim community on the one hand, whose interests have been extensively articulated in the wealth of the supporting material and, on the other, the wider community whose interests the Secretary of State represents but in circumstances where that interest is less well articulated (in the sense that it is not expressed by personal letters or expressions of opinion). However, the public at large has an interest in maintaining a system of immigration control that distinguishes between those entitled to remain and others and, in the case of the latter, provides a means of removal without thereby infringing protected rights, including the right to right to freedom of thought, conscience and religion. This appeal therefore raises a proportionality balance to be exercised between one community and another.

67.
The general principle that such a body as the AICC is not entitled to employ as a teacher and minister of religion a foreign national who does not meet the statutory requirements properly identified as forming part of the public interest in maintaining immigration control was not disputed by the ECtHR in El Majjaoui & Stichting Touba Moskee v. the Netherlands . Article 9 does not guarantee a foreign national the right to obtain permission to reside in another country even for the purpose of working as a religious leader or teacher. The domestic authorities have a margin of appreciation in setting the rules that permit (or prevent) entry or leave to remain for such purposes, see paragraph 31 of El Majjaoui , cited in [21] above.

68.
The Immigration Rules cannot properly be construed as a deliberate attempt to stifle the free exercise of the practice of their religion by the AICC and Afghan Muslim community in the United Kingdom and London in particular. The Rules (see the appendix to this determination which sets out the material provisions in full) are permissive and allow ministers of religion to enter and remain subject to reasonable conditions as to the terms of their employment and the protection of the resident labour market.

69.
I recognise that it is not permissible in the implementation of the Rules (notwithstanding the fact that they normally operate consistently with Article 9) to make the free exercise of religion a practical impossibility. Thus in the case of Cha'are Shalom Ve Tsedek v. France if a religious community genuinely needed meat to have been ritually slaughtered in a way prevented by domestic law, the prescription contained in domestic law would be a violation of their Article 9 rights.

70.
I would however regard the general principle referred to in the preceding paragraph to be subject to reasonable limitations. Thus, the practice which is said to be made impossible must have obtained a sufficient level of ‘cogency, seriousness, cohesion and importance’ (to adopt the expression used by the ECtHR) to merit protection notwithstanding its contravening domestic law. I suggest this means that alterations to traditional practice brought about by domestic laws (for example, hygiene or health and safety) do not demand protection but only do so when the prohibition goes to the core of what it means to the individual to be a Muslim, a Hindu or a Christian.

71.
In the context of this appellant the functions that he performs (and which his removal would prevent occurring) must reach a level such that the AICC or its membership cannot properly function without him as a worshipping Muslim community.

72.
It must be noted that, in the context of a religious community transplanted into another country by the process of migration, religious practices often or always adapt to the changed environment. Thus, for example, the practice of cremating human remains in ghats and committing the ashes to the Ganges is inevitably different in the diaspora and practice has changed to reflect that difference.

73.
The issue in this appeal, therefore, is whether it is impossible for the Afghan religious community to operate in accordance with their religious beliefs and practices without the presence of the appellant. In addressing this issue, the Tribunal must be alive to the possibility that, in seeking to retain the appellant as a religious worker, the community may formulate a job description that effectively excludes any applicant save the claimant. Thus, for example, a job description for an individual to replace the appellant might prescribe the following requirements:

The applicant must be a male, aged between 25 and 30, and have been in the United Kingdom for at least eight years. He must be a Hafiz and speak Pashtu and Dari. He must have had experience in teaching in a Madrasa and have experience in community building. He must have a charismatic personality and have the respect of the Afghan Muslim community as a whole. He must be able to deal with Embassy functions.

74.
There is a marked similarity between this description of the work that the appellant has described doing and the advertisement which I have set out in paragraph [14] above. The AICC claim that the appellant is uniquely able to perform the functions they wish and that attempts to advertise for a replacement have failed to produce a suitable candidate. Caution should be exercised when considering the weight to be attached to the responses to an advertisement. If the job description is tailored to the specific attributions of the appellant, it will not be surprising that only the appellant himself will readily qualify. It should be remembered that the applicant himself would not have qualified for the job if he had been faced with the same criteria as those set out in paragraph [14] when he started working for the AICC in 2007.

75.
I have concluded that the AICC has failed to establish that the Afghan Muslim community cannot operate without the continued presence of the appellant. First, it is accepted that there are some 56,000 Muslim Afghans in the United Kingdom and this provides an adequate source of suitable alternative candidates, albeit an individual may not presently have the same experience and qualities as the appellant.

76.
Second, the Immigration Rules do not prevent the AICC from recruiting a suitable applicant from abroad.

77.
Third, it is not necessary that the various functions currently performed by the applicant continue to be performed by a single person. If he performs several roles, it is not a violation of Article 9 that those roles are carried out by several others. This is so even if it is more costly and less convenient to use several individuals.

78.

Fourth, it cannot reasonably be said that the Afghan Muslim community in the UK would cease to continue as a religious community were the appellant to be removed. The community operated without his presence prior to 2007. The appellant has only been in the United Kingdom since then, when he arrived aged 17 or 18, having spent some 3½ years at a Madrasa. His undoubted popularity and ability must be the result, in part at least, of his growing experience developed over time. Hence it cannot be a violation of Article 9 if the AICC were placed in the position that a less experienced religious worker has to be retained. This merely replicates the position in which the AICC must have found themselves when the applicant joined them.

79.

Finally, it cannot reasonably be said that the Afghan Muslim community in the United Kingdom would similarly face the prospect of the practical inability to practice their religion were the appellant to die or become so seriously ill as to be unable to continue his work or if the appellant himself decided to leave. If that is correct as it relates to a cessation of his activities brought about by circumstances beyond the control of the AICC or its members, it must also apply in the case of an enforced removal.

Conclusion

80.

It is inevitable in an application of this nature, as I have suggested in paragraph 47 above, that the evidence will be directed towards reasons why the appellant should not be removed. This is all the more so when the religious organisation is articulate, well-educated, committed and focused. Their support does them credit. However, their claim leaves out of the account the fact that the appellant is an illegal entrant and an overstayer.

81.

I have no doubt that the public interest criteria which come into play have to be assessed having regard to the views of the AICC and its members. In doing so, I accept that in accordance with the judgment of Richard's LJ in UE (Nigeria) & Ors v Secretary of State for the Home Department the benefit to the community of the work performed diminishes the weight given to immigration control. Nevertheless, it would be a curious result if, as a result of a petition containing 1000 signatures, the system of United Kingdom law and regulation were to be suspended. That does not mean those who petition should not influence legislators or local councillors or decision makers. Their views should be taken into account. That however is a far cry from claiming that their views should be determinative or, indeed, very influential; all the more so when the interest they represent is local, perhaps even parochial.

82.

For these reasons I am satisfied that notwithstanding the keen interest shown by the AICC and its membership (itself and collectively) in retaining the appellant, the public interest in his removal outweighs it. I accept his positive place in the community diminishes the public interest in his removal. I also accept that it is comparatively rare for any community (not simply a religious community) to rally round and offer such vocal support to an illegal immigrant and overstayer. However, for the reasons I have given, it is not easy to attach significant weight to a section of public opinion such as to render it a proportionate response to make an exception to the operation of the Immigration Rules. Although this is an Article 9 claim, based on the right to freedom of thought, conscience and religion, I do not regard that it operates in a markedly different way from the proportionality exercise in the related Article 8 case or that, in doing so, it favours the AICC and its members on the issue of Article 9 proportionality.

DECISION

The Judge made an error on a point of law and I substitute a determination dismissing the appeal on all the grounds advanced.

ANDREW JORDAN

UPPER TRIBUNAL JUDGE

12 April 2016

Appendix

Appendix A

Attributes for Tier 2 (Ministers of Religion) Migrants

85. An applicant applying for entry clearance or leave to remain as a Tier 2 (Ministers of Religion) Migrant must score 50 points for attributes.

86. Available points are shown in Table 12 below.

87. Notes to accompany Table 12 appear below that table.

Table 12

Criterion	Points
Certificate of Sponsorship	50

Notes

88. In order to obtain points for sponsorship, the applicant will need to provide a valid Certificate of Sponsorship reference number in this category.

89. A Certificate of Sponsorship reference number will only be considered to be valid for the purposes of this sub-category if:

(a) the number supplied links to a Certificate of Sponsorship Checking Service entry that names the applicant as the Migrant and confirms that the sponsor is sponsoring him as a Tier 2 (Minister of Religion) Migrant, and

(b) the Sponsor is an A-rated Sponsor, unless:

(1) the application is for leave to remain, and

(2) the applicant has, or was last granted, leave as a Tier 2 (Minister of Religion) Migrant, a Minister of Religion, Missionary or Member of a Religious Order, and

(3) the applicant is applying to work for the same employer named on the Certificate of Sponsorship which led to his last grant of leave or, in the case of an applicant whose last grant of leave was as a Minister of Religion, Missionary or Member of a Religious Order, the same employer for whom the applicant was working or stated he was intending to work when last granted leave.

90. The sponsor must have assigned the Certificate of Sponsorship reference number to the migrant no more than 3 months before the application is made and the reference number must not have been cancelled by the Sponsor or by the United Kingdom Border Agency since then.

91. The migrant must not previously have applied for entry clearance, leave to enter or leave to remain using the same Certificate of Sponsorship reference number, if that application was either approved or refused (not rejected as an invalid application, declared void or withdrawn).

92. In addition, the Certificate of Sponsorship Checking Service entry must:

(a) confirm that the applicant is being sponsored to perform religious duties, which:

(i) must be work which is within the Sponsor’s organisation, or directed by the Sponsor’s organisation,

(ii) may include preaching, pastoral work and non pastoral work,

(iii) must not involve mainly non-pastoral duties, such as school teaching, media production, domestic work, or administrative or clerical work, unless the role is a senior position in the Sponsor’s organisation, and

(b) provide an outline of the duties in (a),

(c) if the Sponsor’s organisation is a religious order, confirm that the applicant is a member of that order,

(d) confirm that the applicant will receive pay and conditions at least equal to those given to settled workers in the same role, that the remuneration complies with or is exempt from National Minimum Wage regulations, and provide details of the remuneration,

(e) confirm that the requirements of the resident labour market test, as set out in paragraph 92A below, in respect of the job, have been complied with, unless the applicant is applying for leave to remain and the Sponsor is the same Sponsor as in his last grant of leave,

(f) confirm that the migrant:

(i) is qualified to do the job in respect of which he is seeking leave as a Tier 2 (Minister of Religion) Migrant,

(ii) intends to base himself in the UK, and

(iii) will comply with the conditions of his leave, if his application is successful, and

(g) confirm that the Sponsor will maintain or accommodate the migrant.

92A. To confirm that the Resident Labour Market Test has been passed or the role is exempt from the test, and for points to be awarded, the Certificate of Sponsorship Checking Service entry must confirm:

1. (a) That the role is supernumerary, such that it is over and above the Sponsor’s normal staffing requirements and if the person filling the role was not there, it would not need to be filled by anyone else, with a full explanation of why it is supernumerary; or

(b) That the role involves living mainly within and being a member of a religious order, which must be a lineage of communities or of people who live in some way set apart from society in accordance with their specific religious devotion, for example an order of nuns or monks; or

(c) That the Sponsor holds national records of all available individuals, details of those records and confirmation that the records show that no suitable settled worker is available to fill the role; or

(d) That a national recruitment search was undertaken, including the following details:

(i) Where the role was advertised, which must be at least one of the following:

(1) a national form of media appropriate to the Sponsor's religion or denomination,

(2) the Sponsor's own website, if that is how the Sponsor usually reaches out to its community on a national scale, that is where it normally advertises vacant positions, and the pages containing the advertisement are free to view without paying a subscription fee or making a donation, or

(3) Jobcentre Plus (or in Northern Ireland, JobCentre Online) or in the employment section of a national newspaper, if there is no suitable national form of media appropriate to the Sponsor's religion or denomination;

(ii) any reference numbers of the advertisements;

(iii) the period the role was advertised for, which must include at least 28 days during the 6 month period immediately before the date the Sponsor assigned the Certificate of Sponsorship to the applicant; and

(iv) confirmation that no suitable settled workers are available to be recruited for the role; or the applicant must be applying for leave to remain and the Sponsor must be the same Sponsor as in his last grant of leave.