Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/08054/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 July 2015	**On 20 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

W A
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ian Palmer, Counsel
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Appellant. Breach of this order can be punished as a contempt of court. I make this order because the Appellant may be put at risk solely as a result of his claim attracting publicity.

2. This is an appeal brought by the Appellant against a decision of First-tier Tribunal Judge Aujla who, by a determination promulgated on 12 January 2015, dismissed on asylum, human rights and humanitarian protection grounds, a

refusal by the Secretary of State to grant asylum and a decision to remove the Appellant from the United Kingdom.

3. The matter has a convoluted procedural history but the discrete point raised in this appeal is narrowly focussed and was succinctly and forcefully argued by Mr Palmer on behalf of the Appellant.

4. The Appellant was born on 3 May 1994 and is a citizen of Pakistan. The Appellant together with his father came to the United Kingdom in 2008. They came to attend an Ahmadiya Convention (as they had also done in 2006) with the intention of returning thereafter. The Appellant's father duly did so, leaving the Appellant (then aged 14) with a friend, Mr SJ, who is a British citizen.

5. On 14 October 2008, the Appellant accompanied by Mr SJ attended the Home Office and claimed asylum. The claim was subsequently refused for the reasons given in a letter dated 25 March 2009. However, as the Appellant was a minor he was granted Discretionary Leave to Remain until 2 October 2011.

6. On 15 September 2011 the Appellant made an application for further leave to remain, repeating the asylum claim and further relying on Article 8 ECHR, private and family life. This was refused by letter dated 26 December 2011.

7. The Appellant appealed this decision and his appeal was dismissed by the First-tier Tribunal in a decision promulgated on 7 March 2012. That decision was however set aside by the Upper Tribunal on 2 July 2012 and remitted to the Respondent to make a lawful decision. The Respondent reconsidered the matter and again refused the asylum and human rights claims for reasons given in a letter dated 25 September 2014.

8. On the same date, 25 September 2014, the Respondent issued the Appellant with a Decision to Remove an Illegal Immigrant. The Respondent appealed the refusal to grant asylum and the decision to remove. His appeal was heard by First-tier Tribunal Judge Aujla, and it is this determination, promulgated on 12 January 2015, which the Appellant now seeks to impugn. I note the determination incorrectly refers to Somalia (not Pakistan) at paragraph 15 and wrongly ascribes to the Appellant the female gender in paragraphs 37 and 38. No point was taken on these infelicities, presumably because they were accepted as being merely typographical errors.

9. Permission to appeal was granted by First-tier Tribunal Judge Cheales on a single ground relating to the Judge's application of the guidance in **HJ (Iran) [2010] UKSC 31.** This ground had been fully developed in the Grounds of Appeal which accompanied the application for permission. In the course of his submissions, whilst conceding that the Judge could lawfully have reached the conclusion which he did in the determination, Mr Palmer submitted that the Judge did not properly deal with one step of the sequential approach prescribed in **MN and others (Ahmadis – country conditions – risk Pakistan CG [2012] UKUT 00389 (IAC)** and this misapplication of the guidance amounted to an error of law requiring that element of the decision to be remade. No challenge is brought in relation to any of the other findings, including those concerning the Appellant's credibility.

10. The determination in the First-tier Tribunal is thorough and careful. After a summary of the proceedings, it sets out the law concerning refugees and humanitarian protection and no criticism of this is made. The Judge then identifies the evidence which was before him.

11. Next comes a summary of the evidence called by and behalf of the Appellant which I need not rehearse because the Judge's findings of fact, which were informed to a significant degree by the wholesale rejection of much of the Appellant's evidence, are unchallenged. This is followed by a summary of the respective cases advanced on behalf of the Appellant and Respondent.

12. The Judge's findings of credibility and fact are contained in paragraphs 35 and following. His reasoning and conclusions are orderly, fulsome and rigorous. Reference is made to the country material in **MN and others** (above). In paragraph 37, the Judge identified four basic issues for him to determine:

    i. whether or not the Appellant belongs to the Ahmadi faith as he claimed;

    ii. whether he accepts the Appellant's account of his experiences in Pakistan;

    iii. whether the Appellant has truly been actively practising his faith since his arrival in the United Kingdom;

    iv. if so, whether he would do so after his return to Pakistan to such an extent that he would come into confrontation with the authorities with the result that he would be at risk of persecution and ill-treatment.

    Mr Palmer criticised the Judge's formulation of the fourth question, suggesting it disregarded the import of the judgment of the Supreme Court in **HJ (Iran)** (above) to the effect that persecution (in that case on the ground of sexual orientation) still exists even if the person persecuted can eliminate the harm by taking avoiding action. It is clear from the context that the Judge was doing nothing more in this paragraph than setting out the broad scheme which he would adopt in disposing of the appeal and guiding the reader as to the ordering of his judgment. It did not purport to be a definitive and comprehensive statement of every nuance of the issue to be addressed. It was merely a short hand identification of the points he was coming to, and in my view a perfectly adequate one. I consider Mr Palmer's criticism of this paragraph to be misplaced.

13. The Judge identified discrepancies in the appellant's various accounts and concluded that the adverse credibility findings set out in the Respondent's refusal letters remained unexplained. He speaks in paragraph 46 of the Appellant's credibility being 'undermined' and in paragraph 47 of it being 'seriously flawed'.

14. The Judge gave no weight to the First Information Report and arrest warrant relied on by the Appellant as he was not satisfied they were genuine. He rejected the Appellant's account that he left Pakistan at the age of 14 because of his religion or because he was in fear of his life. He commented at paragraph 47: '[The Appellant's] case, in my view has all the hallmarks of migrating to the United Kingdom for educational/economic betterment and not due to religious problems'.

15. As appears from paragraph 49, the Judge was, however, satisfied, 'that the Appellant was practising his Ahmadi faith in the United Kingdom'.

16. The Judge then came to the fourth issue, namely whether the Appellant would continue to practise his faith after his return to Pakistan and if so, in what manner. Twice in his judgment he identified this as the most important issue for his determination: see paragraphs 37 and 49 respectively. It is the focus of Mr Palmer's criticism in the present appeal.

17. The Judge made clear and repeated references to **MN and others** and quoted extensively from its headnote. For completeness, and in deference to the detailed submissions which were made as to its precise meaning and import, I set it out in full.

> "1. This country guidance replaces previous guidance in MJ & ZM (Ahmadis – risk) Pakistan CG [2008] UKAIT 00033, and IA & Others (Ahmadis: Rabwah) Pakistan CG [2007] UKAIT 00088. The guidance we give is based in part on the developments in the law including the decisions of the Supreme Court in HJ (Iran) [2010] UKSC 31, RT (Zimbabwe) [2012] UKSC 38 and the CJEU decision in Germany v. Y (C-71/11) & Z (C-99/11). The guidance relates principally to Qadiani Ahmadis; but as the legislation which is the background to the issues raised in these appeals affects Lahori Ahmadis also, they too are included in the country guidance stated below.
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> 2. (i) The background to the risk faced by Ahmadis is legislation that restricts the way in which they are able openly to practise their faith. The legislation not only prohibits preaching and other forms of proselytising but also in practice restricts other elements of manifesting one's religious beliefs, such as holding open discourse about religion with non-Ahmadis, although not amounting to proselytising. The prohibitions include openly referring to one's place of worship as a mosque and to one's religious leader as an Imam. In addition, Ahmadis are not permitted to refer to the call to prayer as azan nor to call themselves Muslims or refer to their faith as Islam. Sanctions include a fine and imprisonment and if blasphemy is found, there is a risk of the death penalty which to date has not been carried out although there is a risk of lengthy incarceration if the penalty is imposed. There is clear evidence that this legislation is used by non-state actors to threaten and harass Ahmadis. This includes the filing of First Information Reports (FIRs) (the first step in any criminal proceedings) which can result in detentions whilst prosecutions are being pursued. Ahmadis are also subject to attacks by non-state actors from sectors of the majority Sunni Muslim population.
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> (ii) It is, and has long been, possible in general for Ahmadis to practise their faith on a restricted basis either in private or in community with other Ahmadis, without infringing domestic Pakistan law.
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> 3. (i) If an Ahmadi is able to demonstrate that it is of particular importance to his religious identity to practise and manifest his faith openly in Pakistan in defiance of the restrictions in the Pakistan Penal Code (PPC) under sections 298B and 298C, by engaging in behaviour described in paragraph 2(i) above, he or she is likely to be in need of protection, in the light of the serious nature of the sanctions that potentially apply as well as the risk of prosecution under section 295C for blasphemy.

(ii) It is no answer to expect an Ahmadi who fits the description just given to avoid engaging in behaviour described in paragraph 2(i) above ("paragraph 2(i) behaviour") to avoid a risk of prosecution.

4. The need for protection applies equally to men and women. There is no basis for considering that Ahmadi women as a whole are at a particular or additional risk; the decision that they should not attend mosques in Pakistan was made by the Ahmadi Community following attacks on the mosques in Lahore in 2010. There is no evidence that women in particular were the target of those attacks.

5. In light of the above, the first question the decision-maker must ask is (1) whether the claimant genuinely is an Ahmadi. As with all judicial fact-finding the judge will need to reach conclusions on all the evidence as a whole giving such weight to aspects of that evidence as appropriate in accordance with Article 4 of the Qualification Directive. This is likely to include an enquiry whether the claimant was registered with an Ahmadi community in Pakistan and worshipped and engaged there on a regular basis. Post-arrival activity will also be relevant. Evidence likely to be relevant includes confirmation from the UK Ahmadi headquarters regarding the activities relied on in Pakistan and confirmation from the local community in the UK where the claimant is worshipping.

6. The next step (2) involves an enquiry into the claimant's intentions or wishes as to his or her faith, if returned to Pakistan. This is relevant because of the need to establish whether it is of particular importance to the religious identity of the Ahmadi concerned to engage in paragraph 2(i) behaviour. The burden is on the claimant to demonstrate that any intention or wish to practise and manifest aspects of the faith openly that are not permitted by the Pakistan Penal Code (PPC) is genuinely held and of particular importance to the claimant to preserve his or her religious identity. The decision maker needs to evaluate all the evidence. Behaviour since arrival in the UK may also be relevant. If the claimant discharges this burden he is likely to be in need of protection.

7. The option of internal relocation, previously considered to be available in Rabwah, is not in general reasonably open to a claimant who genuinely wishes to engage n paragraph 2(i) behaviour, in the light of the nationwide effect in Pakistan of the anti-Ahmadi legislation.

8. Ahmadis who are not able to show that they practised their faith at all in Pakistan or that they did so on anything other than the restricted basis described in paragraph 2(ii) above are in general unlikely to be able to show that their genuine intentions or wishes are to practise and manifest their faith openly on return, as described in paragraph 2(i) above.

9. A *sur place* claim by an Ahmadi based on post-arrival conversion or revival in belief and practice will require careful evidential analysis. This will probably include consideration of evidence of the head of the claimant's local United Kingdom Ahmadi Community and from the UK headquarters, the latter particularly in cases where there has been a conversion. Any adverse findings in the claimant's account as a whole may be relevant to the assessment of likely behaviour on return.

10. Whilst an Ahmadi who has been found to be not reasonably likely to engage or wish to engage in paragraph 2(i) behaviour is, in general, not at real risk on return to Pakistan, judicial fact-finders may in certain cases need to consider whether that person would nevertheless be reasonably likely to be targeted by non-state actors on return for religious persecution by reason of his/her prominent social and/or business profile."

18. The Judge adopted the step-by-step approach which he had previously set out and about which I have already commented. He dealt with the Appellant's intentions in paragraphs 52 to 56 and it was in this section that Mr Palmer maintained that an error of law was to be found.

19. In paragraph 52 the Judge reminded himself of his findings of credibility, particularly in relation to the Appellant's own testimony of events in Pakistan (despite allowance being made for his young age at the time) but also the submission of false documents in support of claim (namely a First Information Report and arrest warrant). He also bore in mind that the letters from AMA UK, whilst confirming the Appellant's Ahmadi faith, did not suggest that the Appellant would continue to practise his faith if returned to Pakistan 'in the manner that was likely to bring him into contact with the authorities' and thereby expose him to a real risk of persecution.

20. In paragraph 53 the Judge recorded that the Appellant was intelligent and familiar with the restrictive religious laws of Pakistan. He stated in a particular passage relied on by Mr Palmer:

> "Whilst I do not expect the Appellant to suppress his desire to practise his religion in Pakistan to avoid persecution, I do not believe that he would be so naive as to deliberately to expose himself to a real risk. Instead of just saying that he would practise his faith after return to Pakistan even if it exposed him to personal risk, the Appellant had to do more to persuade me about his intentions. The Appellant was involved in the AMA UK and yet there was no one from that organisation or the Ahmadi community generally who could provide evidence in support to the Appellant's declaration that he would practise his faith even at the expense of personal harm to himself."

21. The Judge indicated much the same in the following paragraph adding that he would expect the Appellant to be pragmatic after his return to Pakistan. He concluded:

> "I therefore do not find that the Appellant's account credible when he stated that he would practise faith in Pakistan regardless of harm to himself'."

22. He noted in paragraph 55 that the Appellant had no profile in Pakistan. This accorded with his rejection of the Appellant's evidence concerning events prior to his departure in 2008. He also noted that the Appellant did not hold office with AMA UK or his local association. The fact that he had run a stall to propagate his faith, the Judge found, did mean he had a prominent social or business profile in the United Kingdom such as to attract adverse consequences.

23. What Mr Palmer submits, crystallising the more extensive matters advanced in the Grounds of Appeal, is that having accepted that the Appellant had practised his Ahmadi faith in the United Kingdom, he should also have accepted that he would practise his faith upon his return to Pakistan in a manner which would expose him to risk under Pakistan. Instead, it is submitted, the Judge made the error of determining that the Appellant would not be put at risk because he would curtail his religious activities to keep within the law thereby compromising his religious identity. In seeking to make good that submission, reliance was placed on both **HJ (Iran)** and **MN and others.**

24. Despite the able argument of Mr Palmer, I cannot accept this submission as it proceeds on a misreading of both the Judge's determination and of the guideline authority of **MN and others**. The Judge positively rejected the Appellant's assertions of intention as not being credible. He was perfectly entitled to do so.

25. As the headnote in **MN and others** makes clear there are two types or strains of the Ahmadi faith: open practice (type 2(i) activities) which brings the individual into conflict with Pakistan's domestic law and restricted practice (type 2(ii)) which does not. The headnote emphasises that determining which type of practice applies in any given case is a fact-specific exercise and an evidential burden rests on an Appellant.

> "3. (i) If an Ahmadi is able to demonstrate that it is of particular importance to his religious identity to practise and manifest his faith openly in Pakistan in defiance of the restrictions in the Pakistan Penal Code (PPC) under sections 298B and 298C, by engaging in behaviour described in paragraph 2(i) above, he or she is likely to be in need of protection, in the light of the serious nature of the sanctions that potentially apply as well as the risk of prosecution under section 295C for blasphemy."

26. This is reinforced by paragraph 6 of the headnote which states:

> 6. The burden is on the claimant to demonstrate that any intention or wish to practise and manifest aspects of the faith openly that are not permitted by the Pakistan Penal Code (PPC) is genuinely held and of particular importance to the claimant to preserve his or her religious identity. The decision maker needs to evaluate all the evidence. Behaviour since arrival in the UK may also be relevant. If the claimant discharges this burden he is likely to be in need of protection. (emphasis added)

Additionally, paragraph 9 provides:

> 9. A *sur place* claim by an Ahmadi based on post-arrival conversion or revival in belief and practice will require careful evidential analysis. This will probably include consideration of evidence of the head of the claimant's local United Kingdom Ahmadi Community and from the UK headquarters, the latter particularly in cases where there has been a conversion. Any adverse findings in the claimant's account as a whole may be relevant to the assessment of likely behaviour on return. (again, emphasis added)

27. In this instance the Judge's scrutiny of the evidence was meticulous, thorough and balanced. He had the particular advantage of hearing oral testimony tested by cross-examination. He was uniquely placed to make findings of credibility, a position which is not afforded to a reviewing tribunal. No challenge is made to the Judge's findings of fact or to his findings on credibility. On the evidence, the Judge concluded that the Appellant had not demonstrated that on his return to Pakistan he would practise his faith regardless of harm to himself. In other words, the Appellant had not satisfied the Judge that he would come within type 2(i). That being so, he would come within type 2(ii) whereby he will practise his faith on a restricted basis without infringing domestic law.

28. It may be that a different judge might have reached a different conclusion. But this is not the test which Upper Tribunal applies on determining appeals of this

type. It is for the Appellant to demonstrate an error of law. Here there is none. The Judge turned his mind to the Appellant's stated intention and disbelieved him. This was a factual finding which was open to the Judge on the evidence. It therefore follows that the discrete point under the principle in **HJ (Iran)** concerning the suppression of religious identity never fell to be engaged because of the logically prior finding of the Judge disbelieving the Appellant's stated intention in the first place.

29. Mr Palmer conceded that the Judge's general assessment of the Appellant's credibility was a weighty consideration but stated that it ought not to have been determinative. As I read the determination that is precisely how the Judge approached the matter. In the particular case of **MN and others**, the Upper Tribunal considered it appropriate to afford less weight to the negative findings of the various First-tier Tribunal Judges because they had not had the benefit of the extensive expert evidence on Ahmadi practices and the circumstances in Pakistan which was admitted by way of fresh evidence on the appeal. Now however, the landscape is somewhat changed in that this material is widely available in country reports and elsewhere. There is no suggestion that the Judge did not understand the position for Ahmadis in Pakistan. On the contrary, the tenor of the determination makes plain that he was fully conversant with it.

30. Cases such as these are fact-sensitive and argument by analogy is not always helpful. It appears to me, however, that this case is more akin to **ZN** which was one of the conjoined appeals determined in **MN and others**. In that instance (albeit on somewhat different facts from those here) the First-tier Tribunal Judge determined that there was insufficient evidence to show that the appellant met the criteria for type 2(ii) and the Upper Tribunal did not disturb that finding: see paragraphs 146-148.

31. In all the circumstances, I can detect no error of law in the clear and systematic application by the Judge of the approach laid down in **MN and others**. The Judge's conclusions were entirely open to him on the facts as he found them and this appeal must accordingly be dismissed.

Notice of Decision

This appeal is dismissed.

Signed *Mark Hill*

Mark Hill QC
Deputy Judge of the Upper Tribunal

Dated 17 July 2015