Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03589/2014

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 6 May 2015	**On 1 June 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

K N A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Chelvan instructed by NLS Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order by the First-tier Tribunal pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Introduction

2. The appellant is a citizen of Pakistan who was born on 17 November 1983. On 30 August 2010, the appellant was granted entry clearance as a Tier 4 (General) Student with leave valid until 30 January 2012. The appellant came to the United Kingdom. On 13 December 2011, he applied for further leave to remain as a student which was granted until 15 April 2012. Subsequently, he applied for and was granted further leave as a Tier 1 (Post-Study Worker) valid until 24 March 2014.

3. On 17 December 2013, the appellant claimed asylum. The basis of his claim was that he was of the Ahmadi faith and would be at risk on return to Pakistan because of his religion.

4. On 4 April 2014, the Secretary of State refused the appellant's claim for asylum, for humanitarian protection and under Art 8 of the ECHR. On 4 April 2014, the Secretary of State, as a consequence, made a decision refusing to vary the appellant's leave and also made directions for his removal under s.47 of the Immigration, Asylum and Nationality Act 2006.

The Appeal

5. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 14 July 2014, Judge NJ Osborne dismissed the appellant's appeal on all grounds. Judge Osborne accepted that the appellant belonged to the Ahmadi faith. However, Judge Osborne did not accept the appellant's account that he had been mistreated because of his faith prior to coming to the UK. Judge Osborne also concluded that the appellant would not openly practice his faith on return to Pakistan and, therefore, applying the country guidance case of MN and Others (Ahmadis – country conditions – risk) Pakistan CG [2012] UKUT 389 he had failed to establish that he was at risk of persecution on return.

6. The appellant sought permission to appeal. Permission was initially refused by the First-tier Tribunal (Judge Reid) on 6 August 2014. The appellant renewed his application for permission to the Upper Tribunal. On 10 November 2014, the Upper Tribunal (UTJ Macleman) refused the appellant permission to appeal. However, it is clear from reading the judge's reasons that he intended to grant permission and the statement that permission was "refused" was a typographical error.

7. The appellant responded to that decision in two ways. First, the appellant sought to judicially review the refusal on a Cart basis. Secondly, the appellant made an application under rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) to correct the obvious slip in the Upper Tribunal's decision so that it read permission to appeal "granted". On 13 January 2015, Gilbart J granted the appellant permission to bring judicial review proceedings against the Upper Tribunal's refusal of permission to appeal. However, on 5 January 2015 the Upper Tribunal's decision was amended to read "permission to appeal is granted".

8. Before me, both Mr Richards, (who represented the Secretary of State) and Mr Chelvan (who represented the appellant) accepted that the amendment to UTJ Macleman's decision made on 5 January 2015 meant that permission to appeal had been granted to the Upper Tribunal and had, in effect, superseded the judicial review proceedings.

The Judge's Decision

9. As I have already noted, the judge accepted that the appellant was of the Ahmadi faith. Before Judge Osborne it was the appellant's case that he would openly practise his Ahmadi religion in Pakistan as he had done whilst living with his parents prior to 2002 and again had done so in the UK since 2010. On the basis of MN and Others, the appellant's case was, therefore, by practising his religion openly he was at risk of persecution.

10. By contrast, the respondent's case was that the appellant would practise his religion discreetly as he had done between 2002 and 2009 when he was at university in Faisalabad (2002-2007) and working in Pakistan (2008-2009). Consequently, the respondent argued that the appellant was not at risk applying MN and Others from persecution directed against those who openly practised their Ahmadi religion in Pakistan.

11. Judge Osborne accepted that the appellant had openly practised his religion prior to 2002 when he lived with his parents in Rabwah. Further, he accepted that between 2002 and 2009 the appellant had practised his faith within the privacy of his own room. Judge Osborne also noted that the appellant had, since he had lived in the UK, practised his faith freely and openly. Nevertheless, at paras 22-24, Judge Osborne concluded that the appellant would, if returned to Pakistan, practise his religion discreetly. The judge's reasons are as follows:

> "22. Having left his parents' home to proceed to further education in Faisalabad in or about the end of 2002/beginning 2003, the Appellant suffered discrimination due to his faith and practised his faith within the privacy of his own locked room. He practised his faith in that way from the end of 2002 to when he left the university in Faisalabad in 2007. He therefore practised his faith privately for a period in excess of four and a half hears whilst he was in university.
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> Second, when the Appellant worked for the Sitara Chemical Industries from 3 February 2008 to 12 December 2009, a period of all but two years, his oral evidence was that throughout that period he practised his faith within his room. I therefore find that for a period of approximately seven years from the end of 2002 to the end of 2009, the Appellant practised his Ahmadi faith privately within his own room and did not practise it openly as he had done earlier with his parents throughout his upbringing. In short, I find that the Appellant's life had "moved on" and he had become accustomed to practising his faith not openly as he had done when he lived with his parents in Rabwah, but privately in order to fit into the Pakistani community at large. In short, the Appellant adapted to his circumstances.

Having done it previously, there is no evidence or reason to conclude that the Appellant would not be able or prepared to do so in the future.

23. In oral evidence the Appellant stated that if he now returns to Pakistan he would not be able to settle in Rabwah. His reason for this was not the inability to practise his Ahmadi faith openly but was because there are no jobs in Rabwah for someone of his qualifications. I find that the Appellant therefore has a stated intention of not living in Rabwah in Pakistan but only because he wishes to make the most of his qualifications in obtaining suitably remunerative employment. It follows that if the Appellant is returned to Pakistan and is fortunate enough to obtain employment (away from Rabwah) then he will continue practising his Ahmadi faith as he did for the seven years between 2002 and 2009 when he was at university and working for Sitara Chemical Industries. I find that through his conduct over a period of seven years the Appellant has demonstrated that he falls within paragraph 2(ii) of **MN** in that he has consistently over a period of years demonstrated that he has practised his faith on a restricted basis in private without infringing domestic Pakistan law. I have heard no good reason or indeed any reason from the Appellant, either orally or in writing, as to why he could not and should not upon return to Pakistan exercise his faith in the manner in which he has most recently exercised his faith in Pakistan over a relatively long period of time.

24. I accept entirely that since the Appellant has lived in Swansea he has been able to exercise his Ahmadi faith freely and openly and that he has done so. That does not mean that the Appellant should not be reasonably expected to worship his faith in private if and when he is returned to Pakistan."

12. Consequently, Judge Osborne accepted the respondent's submission that on the basis of MN and Others the appellant, by practising his religion discreetly, was not at risk of persecution on return.

The Submissions

13. Mr Chelvan submitted that the judge had wrongly applied the country guidance case of MN and Others and the approach set out by the Supreme Court in HJ (Iran) and Another v SSHD [2010] UKSC 31.

14. First, Mr Chelvan submitted that the judge had been wrong in para 24 to reach his finding that the appellant would not freely and openly practise his faith on the basis that he could "reasonably [be] expected to worship his faith in private". Mr Chelvan submitted that that amounted to 'forced modification' of the appellant's behaviour which could not properly be expected of him. Mr Chelvan also pointed out that at para 23 the judge had also said that there was "no good reason … why he could not and should not" exercise his faith discreetly, as he had done in Pakistan over a relatively long period of time, if he returned there. He emphasised the Judge's wording as amounting also impermissibly to 'forced modification'.

15. Secondly, Mr Chelvan submitted that, even if the appellant would practise his religion discreetly, it was clear from his previous conduct that he had only done so when he feared persecution. Prior to 2002, Mr Chelvan submitted that the appellant

was not at risk in Rabwah and that was also the position in the UK. However, when the appellant was in Pakistan, but not in Rabwah, between 2002 and 2009, he had as had the judge put it for the period 2002-2007 when he was in university – "practised his faith within the privacy of his own locked room". Mr Chelvan submitted that the judge was wrong in law to conclude that the appellant was not a refugee even if he would practise his religion discreetly because it was clear that he would only do so because of a fear of persecution. Applying both MN and Others and HJ (Iran) and Another, Mr Chelvan submitted that the judge's decision should be set aside and reversed so as to allow the appellant's appeal on asylum grounds.

16. Mr Richards submitted that there was no material error of law in the judge's approach. He pointed out that the judge had been clearly invited to consider the appellant's appeal on the basis that he was at risk if he practised his religion openly or he was not at risk if he did so discreetly. Mr Richards relied upon the judge's adverse credibility finding in relation to matters which the appellant claimed had occurred whilst he was in Pakistan and submitted that the judge was fully entitled to find that the appellant would practise his religion discreetly, as he had done so in the past, because his faith was not of particular importance to him.

Discussion

17. In HJ (Iran), the Supreme Court considered the legal framework in relation to gay men who claimed to be at risk because of their sexual orientation on return to their home country. Lord Rodger set out at [82] the approach to be followed, in such a case, in determining whether an individual was a refugee:

> "82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality. If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly". If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so. If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay. If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a

> well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

18. That approach was accepted by all the Justices in the Supreme Court (see Lord Hope at [35]; Lord Walker at [86]; Lord Collins at [100] and Lord Dyson at [108]).

19. Consequently, the decision maker must address a number of issues:

    (1) is it established that the individual is a gay man or would be perceived as gay in his own country?;

    (2) is it established from the evidence that if a gay man lived openly he would be liable to persecution in his own country?;

    (3) is it established that the individual would live openly and thereby be exposed to a real risk of persecution even if that could be avoided by living "discreetly"; if so, the individual is a refugee?;

    (4) if the individual would live discreetly and so avoid persecution, the decision maker must ask "why" he would do so;

    (5) if he would choose to live discreetly simply because of social pressures or other factors not connected to persecution then the individual will not be a refugee;

    (6) if a material reason for the individual living discreetly is his fear of persecution if he were to live openly as a gay man, then the individual has a well-founded fear of persecution and, all things being equal, is a refugee.

20. In MN and Others, the Upper Tribunal applied the approach of the Supreme Court in HJ (Iran) to the situation of Ahmadis in Pakistan. It was common ground before me that the Upper Tribunal's approach is properly summarised in the italicised head note. At para 2 of that head note, the Upper Tribunal distinguished the position of Ahmadis who openly practised their faith in Pakistan and who are risk as a consequence and those who practise in private who are not:

> "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.
>
> (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."

21. Paragraph 3(i) goes on to conclude that an Ahmadi who engages in behaviour within para 2(i) is likely to be in need of protection:

> "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."

22. It was the appellant's contention before the judge that he fell within para 2(i) and the respondent's that he fell within para 2(ii).

23. However, the application of HJ (Iran) to the situation of Ahmadis is not complete without reference to, at least, para 3(ii) of the head note which is as follows:

> "3. (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."

24. Paragraph 3(ii) of the head note encapsulates the position, recognised by Lord Rodger applied to Ahmadis, that if the tribunal of fact concludes that the individual will practise his religion discreetly, nevertheless he will be a refugee if a material reason for him doing so is the fear of persecution, recognised by the UT in relation to Ahmadis who openly practise their faith.

25. Paragraph 7 of the head note recognises that, unlike the position on the background evidence accepted in earlier CG cases, internal relocation by living in Rabwah is not now in general reasonably open to an Ahmadi.

26. In para 6 of the head note, the UT identified that in assessing an individual's intentions in relation to the practise of their faith on return to Pakistan there is a:

> "… need to establish whether it is of particular importance to the religious identity of the Ahmadi concern to engage in paragraph 2(i) behaviour".

27. The burden of proof is upon the individual that it is their intention or wish to practise and manifest aspects of their faith openly which is prohibited by the Pakistan Penal Code. The UT observed that:

> "The decision maker needs to evaluate all the evidence. Behaviour since arrival in the UK may also be relevant."

28. Returning to Mr Chelvan's submissions, it seems to me that the judge's finding that the appellant would behave discreetly and not, as a consequence, be at risk of persecution on return to Pakistan is flawed for two reasons.

29. First, in reaching that finding it is clear that at para 24 of his determination the judge asked himself whether it would be reasonable to expect the appellant to worship in private (i.e. discreetly) in Pakistan. That, with respect to the judge, runs counter to the approach of the Supreme Court in HJ (Iran) that an individual cannot be expected to behave discreetly in order to avoid persecution. Whilst I do not accept Mr Chelvan's submission that the judge failed to take into account the appellant's conduct in the UK - he makes specific reference to it in para 24 - he discounted it as indicative of the appellant's behaviour on return to Pakistan by considering the impermissible, 'forced modification' rejected by the Supreme Court. That the judge had that in mind is further supported by his reference to there being no good reason why the appellant "should not" practise his faith discreetly in para 23 of his determination.

30. Secondly, having concluded that the appellant would behave discreetly, the judge did not properly consider "why" he would do so. Mr Richards sought to argue that this was not a point raised before the judge on the basis that the appellant's case was that he would, in fact, behave openly. Having rejected that evidence, it was nevertheless incumbent upon the judge, applying MN and Others itself applying HJ (Iran), to make a finding on why the appellant would behave discreetly.

31. The evidence before the judge covered three periods of time.

> (1) prior to 2002 when living with his parents in Rabwah he had practised his religion openly.
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> (2) between 2002 and 2009 when he was in Faisalabad in university and then working, he had practised his religion, on the judge's findings, wholly in private.
>
> (3) since being in the UK from 2010 he has practised his religion openly.

32. The distinction in behaviour during these periods reflects the position of an Ahmadi in the relevant community at that time. Prior to 2002, Rabwah was, and it was not disputed before me, recognised as a place where Ahmadis could safely practise their religion openly. However, that was not the position elsewhere in Pakistan during the period 2002 and 2009 when the appellant was in Faisalabad and working. Of course, the appellant has not been at risk of persecution by reason of his religion since being in the UK.

33. The judge came very close to recognising that the reason why the appellant behaved discreetly between 2002 and 2009 was the very risk of persecution which the appellant claimed to fear because of his religion. At para 22, the judge recognised

that the appellant had "suffered discrimination" whilst in university and "therefore practises his faith privately". Further, the judge recognised that since leaving Rabwah in 2002 the appellant's life had "moved on" and "he had became accustomed to practising his faith not openly as he had done when he lived with his parents in Rabwah" and then the judge adds "but privately in order to fit in to the Pakistani community at large". The Pakistani community at large can only be a reference to the circumstances that a person of Ahmadi faith would face outside Rabwah. The CG case law at the relevant time was that outside Rabwah there was a risk of ill-treatment to Ahmadis if they practise their faith openly. Given this evidence, and given the judge's phraseology, it is not clear to me why the judge did not find that the appellant had practised his religion openly when he could do so safely but had practised it privately when he was at risk. That latter position would be the circumstances on his return to Pakistan now. Today, as MN and Others makes plain, even Rabwah is not a safe place for internal relocation for an Ahmadi who practises his faith openly.

34. As Mr Chelvan pointed out, there was no evidence before the judge that the appellant had practised his faith privately between 2002 and 2009 because of any social or family pressure or any reason unconnected with the risk to him if he had done otherwise. Mr Richards relied upon the judge's adverse credibility finding in relation to the remainder of the appellant's account which he had found to be "a fabrication". That general finding did not, however, contribute to the judge's adverse finding, if in fact he made such a finding, as to the underlying reason why the appellant would behave discreetly on return to Pakistan. As I have said, the judge came very close to making a finding which, consistently with MN and Others, should have led to the appeal being allowed on the basis that a material reason for the appellant practising his faith discreetly would be the fear of persecution in Pakistan.

35. For these reasons, I am satisfied that the judge materially erred in law in dismissing the appellant's appeal on asylum grounds. He wrongly applied a 'forced modification' test and also failed to give adequate reasons why, if the appellant behaved discreetly, he was nevertheless not a refugee because he had not established that a material reason for him doing so would be a fear of persecution.

36. Consequently, I set aside the judge's decision. In remaking the decision, the burden of proof to establish that there is a real risk or reasonable likelihood of persecution for a Convention reason is upon the appellant.

37. The judge accepted that the appellant was of the Ahmadi faith from Pakistan. Accepting the judge's finding that the appellant would practise his faith discreetly on return to Pakistan, in my judgment, the irresistible inference from the evidence is that he would do so because of a fear of persecution. He had only previously practised his religion openly when it was safe to do so and has practised his religion privately over an extended period of time when it was not safe to do so. I did not understand Mr Richards to challenge Mr Chelvan's submission that outside of Rabwah during most, if not all, of the period 2002-2009 the appellant would have been subject to

treatment amounting to persecution if he had openly practised his religion. He has not suggested that he could openly do so today as a result of MN and Others.

38. Consequently, applying MN and Others whilst the appellant falls within para 2(ii) of the head note, a material reason for that discreet behaviour would be his fear of persecution as identified by the Upper Tribunal in MN and Others at para 2(i) of the head note. MN and Others recognises that internal relocation to Rabwah is no longer an option for an Ahmadi who wishes openly to practise his faith. The source of the persecution is the Pakistani State itself and so, therefore, there can be no "sufficiency of protection" issue.

39. For these reasons, I am satisfied that the appellant has a well-founded fear of persecution for a Convention reason, namely his religion on return to Pakistan. His return will breach the Refugee Convention.

Decision

40. The decision of the First-tier Tribunal to dismiss the appellant's appeal on asylum grounds and under Art 3 of the ECHR involved the making of an error of law. That decision is set aside.

41. I remake the decision allowing the appellant's appeal under the Refugee Convention and, because it follows, Art 3 of the ECHR.

42. The First-tier Tribunal's decision to dismiss the appellant's appeal on humanitarian protection grounds and under Art 8 of the ECHR stands.

Signed

A Grubb
Judge of the Upper Tribunal