Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09199/2016

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 25th August 2017 **On 8th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

[Z A]
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Javid of Thompson & Co Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan whose date of birth is recorded as [ ] 1985. On or about 20th February 2016 he made application for international protection as a refugee. On 17th August 2016, a decision was made to refuse the application and the

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Appellant appealed. His appeal, based upon his Ahmadi faith and consequent persecution, was heard on 9th December 2016 by Judge of the First-tier Tribunal Haria sitting at Hatton Cross. Judge Haria dismissed the appeal.

2. Not content with that decision, by Notice dated 1st March 2017 the Appellant made application for permission to appeal to the First-tier Tribunal. There were three grounds. Ground 1 was based upon the contention that the judge had mis-contextualised or otherwise misquoted the Appellant's evidence. Ground 2 placed reliance upon the submission that the judge had failed to follow the guidance in **HJ (Iran) [2010] UKSC 31**. The third ground was not pursued before me, it being accepted by Ms Javid that it was misconceived.

3. HJ (Iran) establishes that where a person would in future refrain from behaving in a way that would expose them to danger *because of the risk of persecution that behaviour brings*, that person is a refugee.

4. On 8th June 2017, with some reservations, Judge of the First-tier Tribunal Cruthers granted permission.

Ground 1

5. The following is taken from the grounds themselves:

> *"8. At paragraph 58 the learned judge states;*
>
> > *'The Appellant at paragraph 8 of his witness statement states he ... 'Did not preach anyone* [sic] *because of I was afraid of the treatment I had faced in Karachi'.* [sic] *As a consequence, on the Appellant's own evidence I find that he did not preach whilst in Pakistan.*
>
> *9. Again, at paragraph 60 of the determination, the learned judge found:*
>
> *'The Appellant in his own evidence has stated that whilst in Pakistan he did not preach or proselytise his religion'.*
>
> *10. It is submitted that the Appellant's evidence has been considered in the wrong context. It was Appellant's evidence at paragraph 7 of his witness statement he preached his faith. At paragraph 8, he describes how he described his belief to a close friend Adnan. This resulted in problem* (sic) *in Karachi. The Appellant was forced to relocate to Faisalabad. While describing his activities in Faisalabad, he said that while in Faisalabad, he did not preach anyone* (sic) *because of the treatment he received in Karachi. It does not follow the conclusion that the Appellant claimed that he did not preach anyone while in Pakistan. At paragraph 8, he only refers to his activity in Faisalabad.*
>
> *11. It is submitted that the learned judge erred in assessment of facts in this regard.*
>
> *12. At paragraph 59 the First-tier Tribunal noted;*

> *'It is implausible that a person who has suffered mistreatment since childhood because of his faith and who has not previously revealed his faith to a non-Ahmadi and who knows the implications of disclosing his faith would choose to reveal his faith to someone at work'.*

13. *It is submitted that A did not tell that he never disclosed his faith to non-Ahmadis (in Pakistan). His religious affiliation was known at school and local area (AIR109). On the contrary, it was his evidence that he used to preach his faith (paragraph 7 of witness statement), he told his friend Adnan not only about his faith but also about his beliefs (para 8 of witness statement). He was seeking conversion of Adnan (AIR125 and 126). The learned judge totally misquoted A's evidence. The conclusion reached is not supported by any evidence.*

14. *While assessing the evidence in relation to preaching activities in the UK the learned judge found:*

> *'62. ... this inconsistency is to when he started on preaching programme through his doubt on his credibility. It is of note that there is no mention of his having participated in a preaching programme prior to August/September 2016'.*

15. *Again, this is simply incorrect. The letter, dated 26th July 2016, from AMAUK (referred at paragraph 45 of the determination) states that the Appellant participated in a preaching programme including 'Tabligh stalls and distribution of literature at Hammersmith'.*

6. In summary, therefore at Ground 1 was the contention that the finding that the Appellant did not and would not preach was against the weight of the evidence.

7. I have looked with some care at paragraphs 7 and 8 of the Appellant's witness statement to which I was taken by Ms Javid. They read as follows:

> *"7. As I grew older, I became active in my religion and initially was a part of the Atfal Auxiliary Organisation (for Ahmadis aged up until 15 years old), thereafter the Khuddam Ul Ahmadiyya (for Ahmadis aged from 15 years to 40 years old). With each organisation, I was active and would attend the mosque and preach my religion.*
>
> 8. *Though my problems has* (sic) *started from very early age, yet they were not life threatening until February 2010. I was working in a grocery shop and I told my colleague Adnan who is very close to me about my belief as I had refused to pray with other in congregation. I would pray in separate instead. Two of my colleagues Zahid Ahmed and Hamid Ahmed were very fanatics. They asked Adnan about me and he told them that I was an Ahmadi that was why I was not praying with them. They complained to mullahs of the Khatn-e-Nabowat but I was praying and prostrating in an Islamic manner which I was not allowed to. They led the mullahs to my house in a mob. They were banging on the door and calling for me to come out. I hid myself in my neighbour's house. My mother and brother told them I was not at home. My elder brother advised me to leave the house and go to Faisalabad*

and stay with my paternal aunt. I worked at different places in Faisalabad. I also worked as a salesman in cloth market. I also worked in a textile factory until December 2012. I used to pray in the factory but avoided praying with other in congregation. I ..... delayed my prayers and avoided any confrontation. I did not preach anyone because I was afraid of the treatment I faced in Karachi'.

8. The burden of the submission was that at paragraph 58 of his decision, the judge had misunderstood the Appellant's evidence. It was submitted that the evidence of the Appellant was that he had in fact been preaching until he arrived in Faisalabad.

9. I remind myself that the proper test is not whether the judge's findings were open to some other interpretation or construction but whether the findings of the judge were open to him on the basis of *all* the evidence that was presented.

10. It is perfectly clear from paragraphs 58 through to 60, being those paragraphs specifically relied upon in the first part of Ground 1, that the judge had read all of paragraphs 7 and 8, or at least the important parts because they are set out in the Decision. It is further of note that the judge had regard to paragraph 14 of the Appellant's response to the refusal letter as further support for his finding that the Appellant had not been preaching whilst in Pakistan, although I note that the last three words of paragraph 7 of the witness statement makes reference to preaching his religion (though it is not clear whether he was for saying that that was inside or outside the mosque). However, consistent with preaching inside the mosque, the Appellant, at paragraph 14 explains in terms why he had, in his own words, "low preaching activity". It is to be noted that those words follow an explanation as to why preaching in Pakistan was virtually impossible. That part of the statement is not on its face *necessarily* confined to any later activities of the Appellant, but as I have already said that is not the test.

11. The Decision and reasons is to be read as a whole. It is of note that at paragraph 14(3) the judge found the Appellant to be evasive and generally lacking in credibility. It is of note that the Appellant's own representative accepted that there were difficulties in getting the correct information from the Appellant. Mr Wilding invited me to have regard to the fact that the judge had stated that he had looked at all the evidence in the round as set out at paragraph 33 and that the decision when read demonstrated that to be the case. I also observe, though it is trite that just because a witness says something (which obviously includes the Appellant) the judge is not bound to accept it provided the reasons for rejecting that evidence are sufficiently clear.

12. In further support of his finding that the Appellant had not been a reliable witness, and therefore impacting on the judge's assessment of the extent of the Appellant's "current religious observance", the judge found there to be an inconsistency in part of the evidence. The Appellant had stated that he joined the preaching programme on arrival in the United Kingdom in July 2016. Yet in oral evidence had stated that it was at the end of December 2015 and that he arranged Tabligh stalls. The date of July 2016 at paragraph 62 is clearly a typographical error because the Appellant

arrived in July 2015 but the inconsistency remains. It was at question 77 in interview that the Appellant had said that he joined the preaching programme in the United Kingdom when he came to the United Kingdom. As to spreading messages and handing out leaflets, that taken from the record of interview from question 29 onwards, is clearly reference to activities in the United Kingdom and certainly open to such an interpretation.

13. The Judge was of course obliged to consider not only whether the Appellant had been preaching when in Pakistan in order to ascertain the likely risk facing the Appellant upon return, but was required also to have regard to any "*sur place*" activity in the United Kingdom, in order to make that same assessment. Here reliance was placed by Ms Javid on paragraph 19 of the witness statement, in which the Appellant had actually stated that he would continue preaching, although discretely and with people that he would trust were he to return to Pakistan. If the Appellant were found to be a person who would preach but exercised discretion because of fear of persecution (applying the lower standard) then, applying the guidance in HJ (Iran) the Appellant's case was made out.

14. On the issue as to whether there was an inconsistency as identified by the judge at paragraph 62, my attention was drawn to question 66 in interview, in which the Appellant was asked when he attended the annual convention in 2015. He had said it was, "last September", so that the arrival in the United Kingdom, to which I have already referred, was in fact to be seen in the context of all of the interview questions and answers. Had it been then the apparent inconsistency, it was submitted, would have been explained.

15. Further as to the Appellant's history of preaching in Pakistan, I was invited to have regard to question 109 in which the Appellant had been asked what problems he had growing up. He said that when at school it was known that he was Ahmadi and he was teased for it. I would simply observe that if the Appellant were teased, that without more would be some way below the threshold of persecution, though I appreciate that in interview the Appellant was saying that threats to kill were made.

16. I have already made some reference to the view that the judge took as to the Appellant's evidence generally and I observe that at paragraph 63 the judge noted that it was difficult to obtain details from the Appellant as to the process involved in participating in Tabligh stalls and the distribution of literature. The judge went on to explain why he had difficulty in accepting that the Appellant had been involved in any of these stalls or indeed preaching. What was more, the judge supported his reasoning by reference to the absence of the Appellant's brother or evidence from him. Still further the judge noted that there was generally a lack of supporting evidence from family members. Indeed, from paragraph 62 onwards, the judge spends a considerable amount of time explaining why he did not accept the Appellant as a reliable witness and in particular, a person who would be involved in preaching were he to return to Pakistan.

17. The third ground which was abandoned by Ms Javid was to the effect that the judge had relied on what was said to be an unreported decision of **AB (Ahmadiyya Association UK: letters) Pakistan [2013] UKUT 511 (IAC)**. In fact, Ms Javid accepted that the decision was a reported case and the judge in reliance upon it was entitled to look to the supporting letters from the Ahmadiyya Association UK with circumspection. The judge fully explains why he attached little weight to those letters and the amount of weight that he attached to them was indeed a matter for him, provided he was not perverse or irrational or made findings which could be said to be against the weight of the evidence. Provided the judge made findings that were open to him, then as I have already indicated the fact that there may have been an alternative inference or finding does not mean that what the judge has done amounts to an error.

18. It seems to me, looking at all the evidence to which I have been referred and looking to the decision itself, that the judge was very careful in his assessment of the evidence and whilst it may be possible to infer from the witness statements that the Appellant was saying that he had preached in Pakistan before sharing his religion with Adnan, the evidence is in my judgment open to the interpretation preferred by the judge. It is not to be forgotten that whilst the standard of proof is low the burden remains upon the Appellant and if he is found for reasonable cause to be an unreliable witness then that itself may be sufficient basis to find against the Appellant. In this case, however there were other factors clearly set out in the Decision.

19. If there were some uncertainty, then it was for the Appellant and his representatives, at the time of the hearing, to present the evidence with greater clarity. But I would also add, as Judge Cruthers pointed out in the grant of permission, that the guidance in the case of **TK (Burundi) [2009] EWCA Civ 40** is apposite in this case because the sort of corroborative evidence that one might reasonably have expected in this case was absent. Of course, it is trite law that corroboration is not required in order to find that a person is a refugee but, there has to be sufficient evidence and if the evidence of the Appellant alone is found to be inadequate and if there is other evidence that one might reasonably have expected to have been made available, then the judge is entitled to draw adverse inferences as is indeed occurred here.

20. I turn then to the second ground.

Ground 2

> *"It was the Appellant's case that on his return to Pakistan he would not be able to practise his faith without fear. The learned judge considered this part of his claim at paragraph 75 and found that this demonstrates that it is not of particular importance to the Appellant to preserve his religious identity. It is submitted that the judge failed to follow the step-by-step approach asked by* ***HJ (Iran)****, to assess if the reluctance is due to fear of persecution. It is the Appellant's evidence at paragraphs 19 and 20 of his witness statement he would be compelled to compromise the religious freedom."*

21. The step-by-step approach is as follows:

22. *"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.

23. Ms Javid invited me to find that the judge has simply got this aspect of the case wrong. Mr Wilding submitted that the answer to this ground of the appeal was to be found at paragraph 77 in which the judge said:

    > *"Considering all the evidence in the round, I find that the core of the Appellant's account of persecution lacks credibility and is a fabrication designed to enable the Appellant to remain in the UK. Overall I am not persuaded by the evidence that there is a reasonable degree of likelihood that the Appellant is spiritually active Ahmadi who is committed to preaching or similar acts of proselytising in Pakistan and has a well-founded fear of persecution arising as a result. He has not discharged the burden of*

> *proof upon him of having a well-founded fear of persecution for a Refugee Convention reason and nor that there is a real or substantial risk of his suffering torture or ill-treatment on return. For these reasons this appeal must be dismissed".*

24. The question that I have to ask is was that a finding open to the judge. Was it adequately reasoned and explained? In my judgment, it was. Although it is submitted in the grounds that the judge had not considered why the Appellant would be compelled to compromise his religious freedom, in fact the judge did not need to consider that because he had found, as was open to him, that the Appellant simply was not as committed to his faith as he would have the judge believe and though finding the Appellant to be Ahmadi that was all that in reality (material to this appeal) that the judge felt able to find in the Appellant's favour.

25. In all the circumstances the appeal fails on the basis that the findings were open to the judge. This is in my judgment an example of what McCombe LJ was speaking of in the case of **VW (Sri Lanka) [2013] EWCA Civ 522** at paragraph 12 when he said:

> *"Regrettably, there is an increasing tendency in immigration cases, when the First-tier Tribunal Judge has given a judgment explaining why he has reached a particular decision, of seeking to burrow out industriously areas of evidence that have been less fully dealt with than others and then to use this as a basis for saying the judge's decision is legally flawed because it did not deal with a particular matter more fully. In my judgment, with respect that is no basis on which to sustain a proper challenge to a judge's finding of fact ...".*

Notice of Decision

The appeal to the Upper Tribunal is dismissed. The decision of the First-tier Tribunal is affirmed.

No anonymity direction is made.

Signed

Deputy Upper Tribunal Judge Zucker 25th August 2017