IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

MT (Ahmadi – HJ (Iran)) Pakistan [2011] UKUT 00277(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 June 2011	**20 June 2011**

Before

SENIOR IMMIGRATION JUDGE STOREY
SENIOR IMMIGRATION JUDGE WARR

Between

MT

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Khan (Thompson & Company Solicitors)
For the Respondent: Ms A Holmes, Home Office Presenting Officer

Where it is found that an Ahmadi will be "discreet" on return the reasons for such discretion will need to be considered in the light of HJ (Iran) [2010] UKSC 31.

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan born on 6 July 1959. The appellant arrived in the United Kingdom on 6 June 2010 stating he was on a family visit. He applied for asylum on 25 June 2010. The appellant was treated as an illegal entrant. He based his claim on his

problems as an Ahmadi. His claim was rejected for reasons set out in the refusal letter dated 12 July 2010.

2. The appellant appealed and his appeal came before Immigration Judge Archer on 20 August 2010.

3. The Immigration Judge helpfully summarised the respective parties' cases as follows:

> "The Basis of the Appellant's Claim
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> 12. The appellant claims that he used to work in 1982 in Kahota District in a research laboratory as an electrical engineer but his job was terminated because he is an Ahmadi. He then worked in private companies as an engineer. He then started his own business in 2001 as the owner of Remy's International manufacturing garments and sportswear.
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> 13. In September 2004 an FIR was issued against him and 14 others for being Ahmadis. The appellant was at a wedding when 3 bridegrooms were arrested; he went underground and fled back to Sialkot.
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> 14. He was not arrested at the scene because he is from Punjabi and he fled. The case was registered in Sindh province in Kunri Court. The appellant avoided being arrested after the police found him by paying bribes of 5000-20,000 rupees.
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> 15. AW, who brought the case, died 2 years ago but the police are still blackmailing the appellant to pay bribes. On 14 March 2005 an arrest warrant was issued against the appellant but he went underground and paid bribes to police.
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> 16. The appellant went on a business trip to Malta in 2007 and 2008 and also visited Azerbaijan for business in 2009 and January 2010. He also visited Ukraine.
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> 17. The appellant applied for a visa on 17 August 2009 (his wife applied on 26 January 2009). The applications were refused but the refusals were successfully appealed and the appellant received the visas on 10 May 2010.
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> 18. On 23 May 2010 the Khatwe Nabuwwat Federation (KN) distributed a pamphlet listing 35 businesses including the appellant's business, telling Muslims to boycott Ahmadi businesses. 3 businessmen were murdered in April 2010.
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> 19. The appellant last bribed police on 23-24 April 2010. In May 2010, 3 mullahs came to his office and threatened him that Ahmadis should leave. Then on 23 May and 25 May the appellant received letters threatening that he would be killed. He made a complaint with the district police office in Faisalabad. The report was forwarded to Kotwali police station and the station house officer advised the appellant that police could not protect him against the mullahs and advised him to leave town.
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> 20. The appellant left Pakistan on 6 June 2010. His wife left on 22 June 2010 to join him. The appellant has lived in Sialkot, Islamabad and Faisalabad. At the time of the asylum interview his nephew was looking after the business; there are

various other relatives still in Pakistan.

The Secretary of State's Reasons for Refusing the Application

21. The appellant claims that he preached in Pakistan but has not provided any evidence.

22. The business trips abroad are not consistent with the claim that the appellant was in hiding. The appellant failed to claim asylum in Malta which damages his credibility.

23. The appellant changed his account during the asylum interview, first stating that he was not physically harmed by the mullahs and then after a break stating that he was beaten up in a park (Q67-69). The account of the assault is not credible.

24. The nephew was running the business under the same name whilst the appellant was in the UK and has experienced no problems even though he is also an Ahmadi.

25. The appellant has produced no evidence that police are interested in him anywhere other than his home town, where his wife resides. Nothing happened to the wife when she was living alone. No arrests have been made in relation to the outstanding FIR from September 2004.

26. The threatening letters from KN are also localised and the business has not closed down. The authenticity of the documents is not disputed but they do not show that the appellant is in fear of his life.

27. The recent attacks on Ahmadis were random attacks and the appellant has never been personally targeted. The appellant used deception to enter the UK because he always intended to claim asylum.

28. Even if the appellant could prove that he had been charged with blasphemy or for being an Ahmadi all similar charges have ultimately been dismissed. The appellant has a large family in Pakistan and can relocate easily."

4. The Immigration Judge heard oral evidence from the appellant and his wife.

5. The Immigration Judge set out his findings on the evidence between paragraphs 46 and 62 of his determination. He rejected the claim that the appellant had been assaulted or that he had gone into hiding. He was not satisfied that the appellant's business had been closed as the appellant had claimed. He had not used relatively brief business trips abroad to avoid threats – there was no reason why potential attackers could not simply wait until he returned to his office. "If the appellant was really travelling to avoid threats then he would logically have kept a low profile abroad rather than preach in Malta for fifteen days." (See paragraph 52 of the determination).

6. The Immigration Judge was not satisfied that the appellant had paid bribes to police as he had claimed and that he had been able to run his business and travel at home and abroad without difficulty.

7. The Immigration Judge pointed out that the appellant had run his business openly for a number of years and that he had returned to Pakistan on six occasions from foreign trips. The Immigration Judge was not satisfied the appellant was at risk from the authorities in Pakistan and he had not given the authorities any reasonable opportunity to provide state protection.

8. The Immigration Judge did not, however, reject the appellant's claim in all respects. The determination concludes as follows:

> "59. I accept that the appellant is a devout Ahmadi and it is reasonably likely that he used his caste name when writing the books that were produced to me ('Jihad and Extremism', 'Guidelines for Charity from the Ahmadi Faith' and 'Founder of Ahmadi Faith Travelling to Lahore and Sialkot in 1904'). However, there is little evidence that the appellant has used the books to preach to Muslims. The appellant confirmed that the books were not on sale in bookshops, the preaching was only done privately and the books would only be handed over to a person 'who is not dangerous'. The relationship is built before any preaching begins.
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> 60. I find that the research books do not support the appellant's claim to have preached in Pakistan; not least because he did not mention them during his asylum interview. In his witness statement of 20 August the appellant stated that he could not see a better way and more efficient way to preach than to publish research and materials on his faith. I find this evidence to be unreliable in that the 'publishing' is no more than providing copies of the books to those individuals who are already established as non-dangerous, on the appellant's account. I find that it is not reasonably likely that the books have been distributed beyond the Ahmadi community; they are lengthy and somewhat academic documents.
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> 61. I find that it is not reasonably likely that the appellant has been engaged in public preaching in Pakistan. The appellant's account at Q86-Q87 that he became angry at a businessman's dinner and began to preach is wholly inconsistent with his claim that he had to live in hiding much of the time because of fear of persecution due to his religion. The books do not assist the appellant's claim. The appellant himself stated at Q83 that he only preached to his friends and in secret. The appellant's family continue to live openly in Pakistan.
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> 62. I have carefully considered MJ. I find that the appellant falls within the circumstances described at paragraphs 83-84 of the judgment. The risk on return falls well below the level necessary to engage international protection. The fact that the appellant's business appears on a threat list is not sufficient to distinguish MJ, in all of the circumstances of this case."

9. The reference to MJ is a reference to the country guidance case MJ and ZM (Ahmadis – risk) Pakistan CG [2008] UKAIT 00033.

10. The Immigration Judge accordingly dismissed the appeal on all grounds.

11. There was an application for permission to appeal which was refused by Senior Immigration Judge Kekić on 1 October 2010.

12. Renewed grounds of appeal were filed on 13 October 2010. In ground 3 of the renewed grounds reference was made for the first time to the case of HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31; [2010] INLR 425.

13. It was submitted as follows:

> "The Immigration Judge and Senior Immigration Judge have also failed to consider the recent judgment of HJ (Iran) in which it was clearly held that if a person is required to carry out activities discreetly, then this amounts to persecution. It is impossible for the appellant to openly preach the Ahmadi faith because of the anti-Ahmadi laws which exist in Pakistan; therefore, he has no option but to preach discreetly. This in itself amounts to persecution. TM, KM and LZ (Zimbabwe) [2010] EWCA Civ 916 dealt with this issue further and agreed that an individual cannot be expected to lie in order to avoid persecution. It was further stated that the ratio in HJ (Iran) is not limited just to sexual orientation but will apply to all grounds covered by the Convention. This decision is, therefore, very relevant in the appellant's case and the failure to mention it and consider it results in a material error of law by both the Immigration Judge and Senior Immigration Judge."

14. As no one had brought the attention of the Immigration Judge to the decision of HJ (Iran) the criticism is somewhat unfair. No mention had been made of it either, as I have said, in the original grounds of appeal. The decision was given on 7 July 2010 in the month preceding the hearing before the Immigration Judge. In defence of all parties, however, it may be said that the full significance of that case in asylum appeals generally was not perhaps immediately appreciated.

15. Senior Immigration Judge Allen granted permission to appeal on the HJ (Iran) point, seeing little weight in the other grounds. He directed a hearing on submissions only. Ms Holmes acknowledged that there was no Home Office reply in this case.

16. Mr Khan concentrated on the ground on which permission to appeal had been specifically granted. He pointed out that the appellant had been found to be a devout Ahmadi and that the publications had been directed to those deemed not to be dangerous. He submitted that the appellant had taken care because of fear of reprisals or persecution. Mr Khan referred to paragraph 82 of HJ (Iran) and submitted that the appellant's case required positive answers to the questions posed by Lord Rodger. Preaching of the Ahmadi faith was a criminal offence and the appellant would distribute material only to people who were not dangerous in order to avoid persecution. At interview the appellant said he had had problems because of preaching and those who had not preached did not have problems. The appellant had published three papers. Reference was made to the Home Office Country of Origin Information Reports relating to Ahmadis, Ms Holmes helpfully making available from her file the version that would have been apposite when the Immigration Judge considered the matter.

17. Mr Khan submitted that the question arose about what the appellant would do on return. Would he continue to preach? He submitted that past behaviour was indicative of future behaviour by analogy with paragraph 339K (past persecution being indicative of future risk). He said there were sufficient findings of fact made by the Immigration Judge to enable the Tribunal to allow the appeal on the basis of the decision of HJ (Iran).

18. Ms Holmes submitted that the case of HJ (Iran) did not bite because the appellant's preaching

had not been circumscribed because of a fear of persecution. She referred to paragraph 60 of the determination. The appellant in his witness statement had said that "he could not see a better way and more efficient way to preach than to publish research and materials on his faith." The appellant was not deterred and would not be deterred in the future from preaching in the same way – he would still find it better and more efficient to preach in the way that he had in the past. While it appeared that the appellant had preached in Malta over a period of fifteen days it was odd that he should publish this fact in a paper in Rabwah – he was not being particularly discreet in the circumstances. Why would he draw attention to himself?

19. At the conclusion of the submissions we reserved our decision.

20. Dealing firstly with the grounds of appeal, Senior Immigration Judge Allen granted permission to appeal on the HJ (Iran) point describing the other points as of little weight. When the time came for him to issue directions for the hearing of this matter, he directed the hearing to take place on submissions only. In the event, both parties were content to deal with the case on the basis of the point highlighted by Senior Immigration Judge Allen. We respectfully agree with his observations about the remaining grounds. Had it been necessary for us to deal with them, we would not have found that they raised a material error of law. We can of course only interfere with the Immigration Judge's decision if it was flawed by a material error of law.

21. Ms Holmes, rightly in our view, did not take a point on the fact that the issue before us had not been raised before the Immigration Judge. Her submission was a simple one. The case did not bite in the particular circumstances of the appellant's case. This was because he had no need, and would not, modify his behaviour because the preaching activity he engaged in was the most efficient and best for him – he had not circumscribed his activity because of any fear.

22. Because the Immigration Judge had not had his attention drawn to the implications of the case of HJ (Iran) his findings were not directly related to the issues raised therein. However, in our view a careful reading of the determination does enable us to reach a conclusion on this matter based on the submissions we have heard as envisaged by Senior Immigration Judge Allen when he gave directions for the hearing of this case. Paragraph 59 of the determination is of pivotal importance. In that paragraph the Immigration Judge accepted both that the appellant was a devout Ahmadi and that he had written books on aspects of his faith. The preaching was done privately and the books would only be handed over to a person "who is not dangerous". The judge states that the relationship was built up before any preaching began. The Immigration Judge referred to paragraphs 83 and 84 of the case of MJ (Pakistan). In paragraph 84 the Tribunal noted "the great care exercised by the preaching teams who operate out of private homes, by invitation only and after careful vetting of those to whom they propagate the Ahmadi faith."

23. Reading the determination as a whole we are able to infer from what the Immigration Judge found that the appellant restricted the publication of his books to certain people. Those people were not dangerous. It appears to us on any sensible reading of the determination that the reason that the appellant restricted the publication to such persons was that to do otherwise would be dangerous to him. His activities in Pakistan may be contrasted with his activities in Malta. In paragraph 52 of the determination the Immigration Judge does not appear to disbelieve the appellant's claim that he had preached in Malta for fifteen days. It was the appellant's case that he had preached with approval of the head of the Ahmadiyya community.

We were referred to a document attached to the respondent's bundle at E1 which is a translation of a publication "The Alfazal Rabwah". Ms Holmes submitted that the appellant was drawing attention to himself by publishing his activities in this document. On the other hand it appears to us that it does show that the appellant's activities abroad were less inhibited than his activities in Pakistan. On the evidence before us we are prepared to accept that the appellant was preaching openly in Malta to an extent that he could not in Pakistan.

24. If we adapt the guidance given by Lord Rodger in paragraph 82 of HJ (Iran) it is first necessary to see whether the appellant is a devout Ahmadi and that has been found in his favour. The next question would be to ask whether if the appellant were to preach openly on return would he be liable to persecution in Pakistan?

25. To answer this question it is necessary simply to consider the result if the appellant were to publish to those who were "dangerous". We have already referred to paragraph 84 of MJ.

26. The next question is to consider what the appellant would do on return. In our view the evidence is consistent that the appellant is a devout Ahmadi who has published and preached in the past, both at home and abroad. There are two possibilities:

> "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."

27. On this aspect we would be inclined to the view that the appellant would do in the future as he has in the past – preach and publish to those deemed not to be dangerous. The next question is why he would do this. Ms Holmes submitted that it was simply because the appellant found it better and more efficient to do it this way. Returning to paragraph 82:

> "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."

28. It is true that the appellant in his witness statement refers, as Ms Holmes points out, to the best and most efficient way of preaching being to publish research and materials on his faith but we do not find that this establishes that "a material reason" for the appellant's discretion would not be a fear of what would happen if he was to publish to non dangerous people. We think that would be reading too much into the appellant's witness statement not least because the Immigration Judge found that particular evidence to be unreliable. It does however appear to us to be implicit that the Immigration Judge did accept that publication was restricted to non dangerous people.

29. Ms Holmes did not argue that HJ (Iran) was not potentially applicable in cases other than those involving sexual orientation and she was in our view right not to do so – see RT (Zimbabwe) [2010] EWCA Civ 1285 [2011] Imm A.R. 259. In that case it had been submitted that the ratio of HJ (Iran) applied equally to cases concerning political opinion. An individual found to hold genuine political beliefs could not be required to modify their behaviour or deny their beliefs in order to avoid persecution. This submission was not

apparently an issue in the case – see paragraph 25 of the judgment. As a general proposition "a person found to have genuine political beliefs cannot be refused refugee status merely because they have declined to hide those beliefs, or to act "discreetly", in order to avoid persecution." Counsel for the Secretary of State did not seek to distinguish between persecution on the grounds of membership of a social group and on the grounds of political opinion.

30. It does appear to us that the Immigration Judge did err in law in failing to apply the case of HJ (Iran) to the circumstances of the appellant's case although no one drew this authority to his attention and its full implications for cases not based on sexual orientation were not immediately appreciated.

31. Ms Holmes sought to distinguish the case but we find that the appellant falls squarely within the principles of HJ (Iran). He would behave discreetly on return, preaching if not to the converted to those deemed not to be dangerous. His behaviour would at least in part be conditioned by the fear of persecution.

32. Because we have found an error of law in the Immigration Judge's approach it is open to us to consider current background material and country information. As we have said, Ms Holmes helpfully provided the Country of Origin Report that would have been current at the time the Immigration Judge considered the matter and Mr Khan also lodged the January 2011 Country of Origin Report. Neither side drew to our attention to any material distinction between the two reports. Counsel did refer to the Parliamentary Human Rights Group Report published on 24 September 2010 which did not appear in the previous Country of Origin Information Report. In this report there is reference to an attack in May 2010 on two large Ahmadi mosques. Assailants entered the two mosques when the people were worshipping and in the end 85 people were killed and 150 injured. The attack was carried out by a hitherto unknown group "assumed to be a front for a sectarian organisation". The report also referred to a suggestion by the Ahmadi community that the state and political parties contributed to the discrimination against and persecution of Ahmadis – the situation could not be attributed solely to extremist mullahs. (See paragraph 19.75 of the Country of Origin Information Report published on 17 January 2011).

33. It was not argued by Ms Holmes that the situation had improved for Ahmadis in the last few years. We did not hear full evidence or submissions on whether the position for Ahmadis had altered significantly since the time when the Tribunal gave guidance in MJ and in the event it is not necessary for us to resolve the matter given the way the case was argued before us and our conclusions on the point raised by HJ (Iran).

34. Ms Holmes did not raise the issue of internal relocation. She did however in the course of her submissions raise the point that the appellant had behaved indiscreetly by publishing his activities in Malta in a Rabwah newspaper.

35. It appears to us that the appellant would, as Mr Khan submitted, behave on return as he has behaved in the past. He would so behave whether he was in Rabwah or elsewhere. In IA (Ahmadis: Rabwah) Pakistan CG [2007] UKAIT 00088 the Tribunal noted at paragraph 26 that the evidence did not suggest that Rabwah was safer than anywhere else and whilst Ahmadis sought some protection in Rabwah among the Ahmadi communities there, that "does not demonstrate that Rabwah is safe for long-term residence." In paragraph 85 of MJ the Tribunal, having referred to IA the Tribunal stated:

> "It may be, as the Tribunal said in IA and Others, that in some individual cases the level of risk can be shown to be sufficiently enhanced on the particular facts to indicate that that individual cannot be returned safely to their home area. Whether or not there is an internal relocation option, either to Rabwah or elsewhere in Pakistan, will then be a question of fact in relation to that individual. Rabwah is no safer than elsewhere in Pakistan for Ahmadis, but the question whether it is an appropriate internal relocation option for an individual Ahmadi will always depend on the particular circumstances and facts of that individual's situation."

36. There was no response by the Secretary of State to the grant of permission in this case. Ms Holmes concentrated fairly and squarely on the HJ (Iran) point and did not argue that the internal relocation option was reasonably available to the appellant in the alternative. We can understand why she approached the case in this way. If the appellant were to publish material to "dangerous" people it is unlikely that Rabwah would provide a safe haven for him. In the 2007 Parliamentary Human Rights Group Report referred to in paragraph 19.73 of the 2010 Country of Origin Information Report and paragraph 19.91 of the 2011 report it is made clear that Khatme Nabuwwat have an office in Rabwah and fear of Khatme Nabuwwat "is ever present" there. The Human Rights Commission of Pakistan explained "that the best way for an Ahmadi to protect her or himself is to hide their religion: living in Rabwah has the opposite effect as it is the focus of Khatme Nabuwwat and living in the town marks the person as an Ahmadi."

37. We deal with this case on its own particular facts in the light of the way in which it was argued and given the point on which permission to appeal was granted. The appellant has been accepted to be a devout Ahmadi and to have produced three quite lengthy publications and further it appears to be accepted that he has preached openly abroad. It may well be that if the Immigration Judge had had benefit of argument on the subject of HJ (Iran) his decision would have been different. In any event, we find that his decision was materially flawed in law for the reasons we have given and accordingly we remake the decision.

The appellant's asylum appeal is allowed.

Signed Date

Senior Immigration Judge Warr
(Judge of the Upper Tribunal)