

IN THE SUPREME COURT OF THE UNITED KINGDOM UKSC 2016/0167
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)
NEUTRAL CITATION BELOW: [2016] EWCA Civ 763

B E T W E E N : -

FA (PAKISTAN)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

-and-

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

CASE FOR THE INTERVENER

Introduction

1. This appeal is a sequel to the decisions of this Court in *HJ (Iran)* [2011] 1 AC 596 and *RT (Zimbabwe)* [2013] 1 AC 152. It concerns the correct application of the principles in those cases (and EU Qualification Directive 2011/95/EU) to religion-based refugee claims. UNHCR intervenes with the kind permission of the Court, as it did in *HJ (Iran)* and *RT (Zimbabwe)* and as it did in the CJEU in the related case of *X, Y & Z* (C-199/12, C-200/12 and C-201/12).
2. As this Court knows, UNHCR has supervisory responsibility in respect of the Refugee Convention¹ and State Parties have obligations² to cooperate with UNHCR in the exercise of its functions and to facilitate its duty of supervision. UNHCR is entrusted with the responsibility for providing international protection to refugees and others of concern and, together with governments,

¹ The 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

² Article 35 of the 1951 Convention and Article II of the 1967 Protocol.

for seeking permanent solutions for the problem of refugees.³ It fulfils its mandate, *inter alia*, by, “supervising [the] application” of the “international conventions for the protection of refugees”.⁴ Its supervisory responsibility, recognised also in the EU instruments⁵, is exercised in part through the issuing of interpretative guidelines, including the *UNHCR Handbook*.⁶ UNHCR does not make submissions on the facts of individual cases or on evidentiary matters, but is concerned with the interpretation and application of the Refugee Convention as a matter of law.

3. In the present case UNHCR invites particular attention to the following materials which it has promulgated: (1) the *UNHCR Handbook*; (2) the *2004 Guidelines*;⁷ (3) the *2011 Statement*;⁸ and (4) the *2017 Eligibility Guidelines*.⁹

Religion-based refugee claims

4. Key points which apply to the determination of religion-based refugee claims include the following, beginning with relevant principles from international human rights law.
5. The right to freedom of religion is a fundamental human right which includes the freedom to manifest one’s religion or belief: (a) individually or in community with others; (b) in public or private; and (c) in worship, observance, practice or teaching: see UDHR (Universal Declaration of Human Rights)

³ 1950 Statute of the Office of UNHCR, annexed to UN General Assembly Resolution 428(V) 14.12.50.

⁴ 1950 Statute §8(a).

⁵ See e.g. recital 22 to the Qualification Directive (“*Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States where determining refugee status according to Article 1 of the Geneva Convention*”) and Article 29(3) of the Asylum Procedures Directive (2005/85/EC) (“*When making its proposal [for a minimum common list of third countries to be regarded as safe countries of origin] the Commission shall make use of ... information from UNHCR*”).

⁶ UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (1979, reissued January 1992 and December 2011).

⁷ UNHCR Guidelines on International Protection: Religion-Based Refugee Claims (28 April 2004, HCR/GIP/04/06).

⁸ UNHCR Statement on religious persecution and the interpretation of Article 9(1) of the Qualification Directive (addressing Joined Cases C-71/11 and C-99/11 *Y & Z*).

⁹ UNHCR Eligibility Guidelines for Assessing International Protection Needs of Members of Religious Minorities from Pakistan (January 2017).

Article 18; ICCPR (International Covenant on Civil and Political Rights) Article 18(1); ECHR (European Convention on Human Rights) Article 9(1); CFR (EU Charter of Fundamental Rights) Article 10(1); Qualification Directive Article 10(1)(b); and *2004 Guidelines* at §11. Specifically, as ICCPR Article 27 recognises:

[i]n those States in which ... religious ... minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group ... to profess and practise their own religion ...

6. Limitations on the right to freedom of religion will only be justified where prescribed by law, necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others, and proportionate to that aim: see ICCPR Article 18(3); CFR Article 52(1); ECHR Article 9(2). A limitation will not be justified where it is imposed for discriminatory purposes or applied in a discriminatory manner: see *2004 Guidelines* at §§15 & 19; *2011 Statement* at §4.2.2; also UN Human Rights Committee CCPR General Comment No. 22 30 July 1993 at §8. Discrimination on the grounds of religion is itself prohibited: see UDHR Article 2; ICCPR Article 26 (also ICCPR Articles 4(1), 20(2), 24(1)); CFR Article 21(1); ECHR Article 14.

7. Discriminatory laws and practices against members of religious minorities may amount, in themselves or on a cumulative basis, to persecution within the meaning of the Refugee Convention. What will amount to persecution, in the context of religion-based claims, is described by UNHCR in the *2004 Guidelines* at §§11 - 26; and in the *2011 Statement* at §§4.1.1 - 4.2.7. Persecution may include the prohibition of worship or practice in community with others, in public, or in private: see *2004 Guidelines* §12; *2011 Statement* §4.2.4. It may include discriminatory measures which are serious or which cause substantial prejudice to the person concerned, including serious restrictions on their right to earn a livelihood, or their right to practise their religion: *UNHCR Handbook* §§54 & 55; *2004 Guidelines* §17. As the Qualification Directive Article 9(2)

recognises, acts of persecution may¹⁰ take the form of “(a) acts of physical or mental violence ...; (b) legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; (c) prosecution or punishment which is disproportionate or discriminatory ...” As the CJEU has explained: “violation of the right to freedom of religion may constitute persecution within the meaning of art. 9(1)(a) of the Directive where an applicant for asylum, as a result of exercising that freedom in his country of origin, runs a genuine risk of, inter alia, being prosecuted or subject[ed] to inhuman or degrading treatment or punishment by one of the actors referred to in art. 6 of the Directive” (Y & Z at §67). As the CJEU explained, in the context of criminalising homosexual acts: “the term of imprisonment which accompanies a legislative provision which ... punishes [such] acts is capable, in itself of constituting an act of persecution” where “it is actually applied in the country of origin which adopted such legislation” (X, Y & Z at §56), since such punishment is “disproportionate and discriminatory” (§61). A restriction on external or public practices of religion is no less, and no more, serious than a restriction upon private or internal practices: 2011 Statement §4.2.3; Y & Z §62. Such a distinction would be incompatible with the nature of the right to freedom of religion (Y&Z §63).

8. Persecution may emanate from non-state actors where there is a failure of state protection. As the *UNHCR Handbook* explains at §65: “where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”¹¹ It is important not to overlook this particular situation of persecution, but in the analysis which follows the focus is on persecution through state action.

¹⁰ Where of sufficient severity: Qualification Directive Article 9(1).

¹¹ See eg. UNCHR’s 2012 Guidelines on International Protection No. 9 (23 October 2012) on Claims to Refugee Status based on Sexual Orientation and/or Gender Identity at §§35 and 36 (“the 2012 Guidelines”); *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489.

'Modified behaviour': HJ (Iran) and RT (Zimbabwe)

9. The principled approach to 'modified behaviour' avoiding persecution was identified in this Court in HJ (Iran) (which concerned the protected characteristic of sexual orientation) and RT (Zimbabwe) (which concerned the protected characteristic of political opinion). The principled logic applies equally to other protected characteristics, such as religion. It involves three key analytical steps.
10. **First**, the underlying rationale of the Refugee Convention is that individuals with protected characteristics (race, nationality, religion, political opinion, sexual orientation etc.) should be able to live freely and openly in society, without fearing that they may as a result suffer harm (of the requisite intensity and duration to amount to persecution) because of the protected characteristic. As Lord Dyson (for this Court) explained in RT (Zimbabwe) at §18:¹²

[t]he underlying rationale of the Convention [is] that "people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they are, say, black, or the descendants of some former dictator, or gay" ...

As Lord Rodger had explained in HJ (Iran) at §52:

the Convention proceeds on the basis that people should be allowed to live their lives free from the fear of serious harm coming to them because of their race, religion, nationality, membership of a particular social group or political opinion ...

11. **Secondly**, it runs contrary to that rationale for individuals to conceal who they are, or modify their behaviour, or avoid activity, for the material¹³ reason of avoiding such persecutory harm, as this involves surrender of the person's

¹² Quoting Lord Rodger in HJ (Iran) at §53, and citing §§52, 65, 67 and 78 from that case.

¹³ As to this, see §13 below.

right to live freely and openly as who they are in terms of the protected characteristic. As Lord Dyson explained in *RT (Zimbabwe)* at §18:¹⁴

... the necessary modification in order to avoid persecution ([acting] 'discreetly') [runs] contrary to this underlying rationale. It involve[s] surrendering the person's right to live freely and openly in society as who they are, in terms of the protected characteristic, which [is] the Convention's basic underlying rationale ...

As Lord Rodger had explained in *HJ (Iran)* at §76, to treat as “reasonably tolerable” the individual having to “conceal” the protected characteristic is “unacceptable as being inconsistent with the underlying purpose of the Convention since it involves the applicant denying or hiding precisely the innate characteristic which forms the basis of his claim of persecution”.¹⁵

12. This approach is applicable to the protected characteristic of religion. As UNHCR has explained:¹⁶ “[r]eligious belief, identity or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution” (2004 Guidelines at §13; 2011 Statement at §4.3.1); “the Convention would give no protection from persecution for reasons of religion if it was a condition that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Bearing witness in words and deeds is often bound up with the existence of religious convictions” (2004 Guidelines at §13).
13. In the analysis, avoiding feared persecution must be “a material reason” for the modified action. That is sufficient for the modification to be “a response to the feared persecution”, the phrase used by Lord Dyson in *RT (Zimbabwe)* at §18. As Lord Rodger had explained in *HJ (Iran)* at §§60 & 62:¹⁷

¹⁴ Citing *HJ (Iran)* at §§75 - 76, 11 & 110.

¹⁵ See *HJ (Iran)* at §76 (also §§11, 75 & 110); *RT (Zimbabwe)* at §18.

¹⁶ See too the 2012 Guidelines (footnote 11 above) at §§30 - 33.

¹⁷ Paragraphs cited with approval in *RT (Zimbabwe)* at §18.

The question is not confined to cases where the fear of persecution is the only reason why the applicant would act discreetly...

... the need to avoid the threat of persecution would be a material reason, among a number of complementary reasons, why the applicant would act discreetly. Would the existence of these other reasons make a crucial difference? In my view it would not ...

The “other reasons” may, for example, include “social pressures” (Lord Rodger at §61). As UNHCR has observed in the context of sexual orientation-based refugee claims, “social norms and values” may be “closely intertwined in ... refugee claims”.¹⁸

14. **Thirdly**, it follows that the individual who would, if returned to the country of origin, modify their behaviour or avoid activity for the material reason of avoiding persecutory harm, because of the dangers of living freely and openly in society as who they are in terms of the protected characteristic, is entitled to refugee protection: see *RT (Zimbabwe)* at §§17 & 18; *HJ (Iran)* at §§20, 22, 40, 61, 62, 66 & 116 - 122.¹⁹
15. As UNHCR has explained in the context of religious belief (2011 Statement at §4.3.1):

Manifestations of religious belief cannot be expected to be suppressed in order to avoid a danger of persecution as long as the manifestations constitute an exercise of human rights. In the same vein, a statement by an applicant expressing the intention to abstain from certain religious manifestations in order to avoid persecution does not render refugee protections unnecessary; to the contrary, this avoidance could constitute evidence of the individual's fear of persecution.

16. Two further points merit observation. The first is that it is not “necessary for a refugee to be able to characterise living ‘discreetly’ in order to avoid persecution as being itself ‘persecution’”: see *RT (Zimbabwe)* at §19. As Lord Dyson had explained in *HJ (Iran)* at §120: “the phrase ‘being persecuted’ in articles 1A(2) refers to the harm caused by the acts of the state authorities or those for whom they are

¹⁸ 2012 Guidelines (footnote 11 above) at §23.

¹⁹ See further the discussion of the principles arising from *HJ (Iran)* in *LC (Albania) v Secretary of State for the Home Department* [2017] 1 WLR 4173 at §§26 - 32.

responsible. The impact of those acts on the asylum seeker is only relevant to the question whether they are sufficiently harmful to amount to persecution. But the phrase 'being persecuted' does not refer to what the asylum seeker does in order to avoid²⁰ such persecution. The *response* by the victim to the threat of serious harm is not itself persecution (whether tolerable or not) within the meaning of the article".

17. The second is the idea that it may be "useful" to consider "whether the applicant's proposed or intended action lay at the core of the right²¹ or at its margins" when "deciding whether or not the prohibition of it amounted to persecution" (*RT (Zimbabwe)* at §50).²² It is important to appreciate the following:

17.1 As can be seen from these quotations, this idea (a) goes only to the question whether a prohibition on action would amount to Refugee Convention persecution; and even then (b) involves considering the importance of the activity to the right (freedom of religion). There is no relevant distinction here between activities in public and in private, as the CJEU explained in *Y & Z* at §§62 & 63. There is no test of 'reasonable tolerability', as by reference to "an individual's strength of feeling about his protected characteristic" (*RT (Zimbabwe)* at §42, referring to *HJ (Iran)* at §§29 & 121).

17.2 As to (b) (the importance of the activity to the right), in the case of any individual, an activity may be important to the right to freedom of religion, because (i) it is important to the faith or (ii) it is important to the individual's faith. Either of these will suffice. As UNHCR explained in the 2004 *Guidelines* at §16, what is relevant is "[t]he importance or centrality of the practice within the religion and/or to the individual personally". As UNHCR explained in the 2011 *Statement* at §4.2.7, practices may be "central to the religion" or they may be "central to [the individual]'s belief, identity or way of

²⁰ Bold in quotations connotes emphasis by the author of the quote.

²¹ Underlining in quotations connotes emphasis by UNHCR in these submissions.

²² Referring to *HJ (Iran)* at §§114 - 115

life". A religious practice need not be "of fundamental significance to the religion", for its "restriction could still constitute persecution on the basis of ... conscience or belief" if it is a practice which is "nonetheless especially important for the individual" (2011 Statement at §4.3.2). Conversely, if it is objectively important, that suffices, it being "wrong in principle" then to focus on its importance to the individual (*RT (Zimbabwe)* at §42).

- 17.3 As to (a) (whether a restriction constitutes persecution), the point is that a prohibition may have a more intrusive or severe nature, or may more readily be characterised as discriminatory, if it relates to activity which is important to (i) the faith or (ii) the individual's faith.

Ahmadis in Pakistan

18. The Position of Ahmadis in Pakistan is described in the UNHCR's 2017 *Eligibility Guidelines* at pp.28-38, to which attention is invited.

- 18.1 UNHCR says this of the prohibitions on certain actions and words in the Pakistan Penal Code at ss.298B and 298C (*Eligibility Guidelines* p.30):

These sections impose discriminatory measures: Ahmadis are prohibited from practising their religion, from worshipping in private or in public, from any form of religious instruction and from publishing or disseminating their religious materials. These criminal provisions also make it illegal for Ahmadis to refer to their founder as a Prophet or to refer to their holy personages by their religious salutations; to refer to their places of worship as mosques; to use the traditional Islamic form of greeting; to use the Islamic call to prayer, known as the Azan (or Adhan), or to refer to their own call to prayer as Azan.

Moreover, the language used in Sections 298B and 298C allows for a broad range of interpretations, reportedly creating scope for abuse. For instance, Section 298C stipulates that any person of the Ahmadis group who "by words, either spoken or written, or by visible representation, or in any manner whatsoever outrages the feelings of Muslims shall be punished". Ahmadis who are convicted under section 298C may be sentenced to up to three years imprisonment and/or a fine.

Through these anti-Ahmadis laws, the State has imposed severe restrictions on the non-derogable right to freedom of religion of Ahmadi individuals in Pakistan ...

18.2 Section 298B of the Pakistan Penal Code provides as follows:

Misuse of epithets, descriptions and titles, etc., reserved for certain holy personages or places.

(1) Any person of the Qadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name) who by words, either spoken or written, or by visible representation, -

(a) refers to, or addresses, any person, other than a Caliph or companion of the Holy Prophet Muhammad (peace be upon him), as 'Ameer-ul-Mumineen', 'Khalifa-tul-Mumineen', 'Khalifa-tul-Muslimeen', 'Sahaabi' or 'Razi Allah Anho';

(b) refers to, or addresses, any person, other than a wife of the Holy Prophet Muhammad (peace be upon him), as Ummul-Mumineen;

(c) refers to, or addresses, any person, other than a member of the family (Ahle-bait) of the Holy Prophet Muhammad (peace be upon him), as Ahle-bait:

(d) or refers to, or names, or calls, his place of worship as 'Masjid' [mosque]:

shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to [a] fine.

(2) Any person of the Qadiani group or Lahori group, (who call themselves 'Ahmadis' or by any other names), who by words, either spoken or written, or by visible representations, refers to the mode or form of call to prayers followed by his faith as 'Azan' [call to prayer] or recites Azan as used by the Muslims, shall be punished with imprisonment of either description for a term which may be extended to three years and shall also be liable to [a] fine.

18.3 Section 298C of the Pakistan Penal Code provides as follows:

Person of Qadiani group, etc., calling himself a Muslim or preaching or propagating his faith.

Any person of the Qadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name). Who, directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

18.4 The activities prohibited and penalised by ss. 298B and 298C of the Pakistan Penal Code are at the core of the right to freedom of religion. They are clearly important to the Ahmadi faith. Furthermore, they will in individual cases, also be important to an individual's faith (see §17.2 above).

18.5 The prohibitions and sanctions contained in ss.298B and 298C are applied and enforced in practice in the Pakistani courts: see *Eligibility Guidelines* pp.30-31.

18.6 Section 295C of the Pakistan Penal Code provides as follows:

Use of derogatory remarks, etc in respect of the Holy Prophet.

Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.

18.7 UNHCR explains that Ahmadis are "*particularly affected*" by the wording and application of section 295C: *Eligibility Guidelines* pp.30-31. Judges have "*reportedly interpreted the expression of Ahmadi religious beliefs by Ahmadis as a form of blasphemy*" (p.31).

19. As the 2017 *Guidelines* also explain:

19.1 Actors in the judicial system, including "*police, lawyers and judges, reportedly frequently demonstrate bias against those accused of blasphemy, thus infringing on these individuals' right to a fair trial*" (p.13).

19.2 The subjective language of section 295C has led to judicial decisions reported to be "*disturbingly contradictory and arbitrary*" and the lack of a

clear definition leaves the provision “open to abuse” as does “the absence of a requirement to prove intent for section 295C offences, and a lack of procedural safeguards” (p.14).

19.3 Accusations of blasphemy “may carry serious risks for the person accused as well as their family, irrespective of whether the person concerned is subsequently charged ... Individuals accused ... have reportedly been subject to death threats, assaults, including mob attacks, and assassinations by community members or members of the security forces ... forcing some to go into hiding or to flee in fear of their lives” (p.16).

19.4 So far as non-state actors are concerned (see §8 above), the Pakistani government “has been criticised for ‘looking the other way’ and for failing to stop extremists who engage in hate speech and incite violence against Ahmadi communities. Anti-Ahmadi hate speech and incitement of violence against Ahmadis, including by Islamic scholars, reportedly remains largely unchecked and/or unpunished by the authorities” (pp.34-35). “Repressive and discriminatory legislation coupled with state-sanctioned discriminatory practices have reportedly fostered a culture of religious intolerance and impunity. Consequently, members of the Ahmadi community are reportedly left vulnerable to abuse, violence including killings, harassment and intimidation at the hands of members of the community” (p.35) and “members of Ahmadi communities report living in constant fear of harm” (p.36). Incidents of violence and killings, together with statistics, are recorded by UNHCR at pp.35-38.

19.5 Further, UNHCR observes that members of the Ahmadi community (including those charged with criminal offences under the blasphemy or anti-Ahmadis provisions) are ‘likely to be in need of international refugee protection’ (p.38).

The Upper Tribunal determination in MN

20. The following description encapsulates the essence of the ‘country guidance’ reasoning of the Upper Tribunal in *MN and Others* [2012] UKUT 389 at §§118 - 127:

Formulation by the Upper Tribunal in MN:

A person is “likely to be in need of protection”²³ if he or she “genuinely is an Ahmadi”²⁴ who can “discharge[] th[e] burden”²⁵ of “demonstrat[ing]”²⁶ that, “if returned to Pakistan”²⁷:

- (1) he or she would have a “genuinely held” “intention or wish” “as to his ... faith” (a) “to practise and manifest aspects of the faith openly that are not permitted by the Pakistan Penal Code”²⁸ (since the Code restricts the way Ahmadis are “able openly to practise their faith”²⁹), rather than (b) “to practise [the] faith on a restricted basis either in private or in community with other Ahmadis” (since it “has long been possible in general” to do this “without infringing domestic Pakistan law”³⁰); and
- (2) “it is of particular importance to his [or her] religious identity³¹ to practise and manifest his faith openly in Pakistan in defiance of the restrictions in the Pakistan Penal Code”³²;

it then being “no answer to expect an Ahmadi ... to avoid engaging in [such] behaviour ... to avoid a risk of persecution”³³.

²³ §120(i) and §123.

²⁴ §122.

²⁵ §123.

²⁶ §120(i) and §123.

²⁷ §123.

²⁸ §123.

²⁹ §119(i).

³⁰ §119(ii).

³¹ §123.

³² §120(i).

21. UNHCR respectfully submits that a correct formulation would be more straightforward, as follows:

A person is in need of protection if found to be a genuine Ahmadi who, if returned to Pakistan:

- (1) would practise their faith by engaging in activities prohibited under ss.298B or 298C of the Pakistan Penal Code (“**the prohibited activities**”); or
- (2) would avoid practising their faith in that way, at least in part because of a fear of serious harm if they did so.

22. UNHCR submits that there are a number of difficulties with the Upper Tribunal’s approach in *MN*, the essence of which is encapsulated at §20 above.

23. **First**, there is the reference to a claimant who “discharges” the “burden” of “demonstrating” features of the protection claim. As UNHCR explains in the *UNHCR Handbook* at §196, the position is more nuanced³⁴:

... while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

³³ §120(ii).

³⁴ See further Article 4(1) of the Qualification Directive; UNHCR’s Note on Burden and Standard of Proof in Refugee Claims (16 December 1998); and c.f. *J.K. v Sweden* (2017) 64 EHRR 15 at §§92 - 98 (which discusses the position under the Refugee Convention, and the Qualification Directive, when considering the burden of proof under Article 3 ECHR in expulsion cases).

24. **Secondly**, there are the references to *"the claimant's intentions and wishes as to his faith"* and the *"intention or wish to practise and manifest aspects of the faith openly"*. There may be differences between what a person (a) wishes to do, (b) intends to do, (c) would wish to do, (d) would intend to do and (e) would do. It is necessary to posit a return to the country of origin, and to address the case of the individual who would avoid certain conduct, and who would have no 'wish or intention' to face the feared persecution. The question is what would the individual do and why.
25. **Thirdly**, there are the references to practising and manifesting aspects of the faith *"openly"*, that being what the Pakistan Penal Code is said to prohibit. The prohibitions and penalisations under the Pakistan Penal Code are not restricted to *"open"* conduct. Prohibitions apply to activities including those undertaken *"in private"*, and *"in community with other Ahmadis"*. The Upper Tribunal's generalisation that such actions can be undertaken *"without infringing domestic law"* is not justified. It may be very difficult in practice to draw the line between what is meant by *"open"*, *"private"*, or *"in community"* activity as being the *"restricted basis"* which does not involve *"infringing domestic law"*.
26. **Fourthly**, there is the reference to practising the faith *"in defiance of"* the domestic law restrictions (and indeed the *"particular importance to his religious identity"* that he should practise *"in defiance"* of the restrictions). That suggests that defiance of the law would be a required component, and moreover that it must be important to the individual that they should defy the law. Neither such condition is required. An individual who would act in a particular way need not be *"defiant"* in their demeanour or action. There is no *"defiance"* in the case of the individual who would avoid action through fear of persecution. Nor of course would there be *"defiance"* in the action of such a person, were there no persecutory criminal code to fear.
27. **Fifthly**, there is the reference to it being *"of particular importance to his religious identity"* to engage in the prohibited activities. Once it is recognised that there is

persecution which is feared, because of the importance of the prohibited activities to the faith or the individual's faith (see §18.4 above), no further enquiry arises (see §17.1 above).

28. Sixthly, there is the reference to it being "*no answer to expect an Ahmadi ... to avoid engaging in [such] behaviour ... to avoid a risk of persecution*". This formulation is inadequate because the "*behaviour*" in question has already been mischaracterised; and because "*to avoid a risk*" does not make clear that this is sufficient as a material reason.
29. Seventhly, there is the reference to it being "*no answer to expect*" the individual to avoid behaviour to avoid the risk of persecution. The idea of "*expect*" is suggestive of an individual who would refuse to modify their behaviour, and is entitled to international protection because modification "*cannot be expected*". But international protection applies to a person who can be 'expected' to modify their behaviour, in that he will do precisely that, if a reason for doing so is to avoid persecution. It is sufficient to ask what the individual would do, or avoid doing, and why.

The Court of Appeal Judgment

30. The following description encapsulates the essence of the reasoning of the Court of Appeal in the present case at §§10 - 15:

Formulation by the CA in the present case:

A person will be "*at significant risk*"³⁵ on return to Pakistan if he or she is an Ahmadi who:

- (1) "*feel[s] compelled to manifest their faith, if necessary in contravention of the Pakistan Penal Code*"³⁶ as a person who "*feel[s] impelled to ... resort*

³⁵ §13.

³⁶ §10.

*to the kind of public preaching that contravenes the Penal Code*³⁷, or who *“feels impelled to manifest his [or her] faith to third parties”* by action to *“profess [their] faith openly or actively seek to interest others in it”*³⁸;

- (2) rather than *“being content to live quietly and practise their faith in private”*³⁹, as one of *“those who practise their faith privately”*⁴⁰, within *“the category of those who choose to practise their faith discreetly”*⁴¹;

albeit that *“the principle ... that a person cannot be expected to conceal an essential aspect of his [or her] identity in order to avoid persecution ... applies in the case of Ahmadis who feel impelled to practise their faith publicly”*⁴².

31. Again, UNHCR respectfully submits that a correct formulation would be more straightforward, as follows (repeating §21 above):

A person is likely to be in need of protection if found to be a genuine Ahmadi who, if returned to Pakistan:

- (1) would practise their faith by engaging in the prohibited activities (as defined in §21 above); or
- (2) would avoid practising their faith in that way, at least in part because of a fear of serious harm if they did so.

32. UNHCR submits that there are a number of difficulties with the Court of Appeal’s approach, the essence of which is encapsulated at §30 above.

³⁷ §11.

³⁸ §13.

³⁹ §10.

⁴⁰ §13.

⁴¹ §14.

⁴² §15.

33. **First**, there are the references to persons "*who feel compelled*" to manifest their faith (§10), who "*feel impelled*" to discuss their faith (§11), who feel "*impelled*" to manifest their faith to third parties (§13), and who "*feel impelled*" to practise their faith publicly (§15). The principled approach asks what the individual would do or avoid, and why. The word "*feel*" is not helpful, nor is "*impelled*" nor "*compelled*".
34. **Secondly**, there are the references to "*the kind of public preaching that contravenes the Penal Code*", "*manifest[ing] his faith to third parties*", action to "*profess [his] faith openly or actively seek to interest others in it*", and action "*to practise their faith publicly*". The prohibitions and penalisation in the Pakistan Penal Code are not confined to such actions.
35. **Thirdly**, there is the reference to those who manifest their faith "*if necessary in contravention*" of the Pakistan Penal Code (§10). There is no basis for making protection conditional on whether the individual would regard contravention of the Pakistan Penal Code as "*necessary*".
36. **Fourthly**, there is the reference to those who are "*content to live quietly and practise their faith in private*" and those who "*choose to practise their faith discreetly*". Again, the correct questions are what the individual would do, or avoid doing, and why. The words "*content*" and "*choose*" are not helpful in distinguishing between persons who would avoid a prohibited activity for reasons which do, and reasons which do not, include the fear of persecution.
37. **Fifthly**, there are the references to those living "*quietly*" (§10), practising faith "*in private*" (§10), "*privately*" (§13), and "*discreetly*" (§§14 & 16). Once again, the activities prohibited by the Pakistan Penal Code include those which can be so described. The prohibitions and penalisations in the Pakistan Penal Code can in principle give rise to a well-founded fear of persecution from engaging in any prohibited or penalised activity – whether open, in public, in community or in private.

38. Sixthly, there is the reference to not expecting the individual “to conceal an essential aspect of his identity in order to avoid persecution” (§15). It is not necessary that something be “concealed” (it may be an activity avoided); nor that it is an “aspect of ... identity” (it could be a practice); still less that it is an “essential” aspect of identity.
39. Seventhly, there is the reference to the “principle” (of not expecting modification) as applying “in the case of Ahmadis who feel impelled to practise their faith publicly”. The words “feel”, “impelled” and “publicly” are not appropriate restrictions. The question is whether an Ahmadi would avoid practising their faith in a way which is prohibited or penalised under the Pakistan Penal Code, for reasons which include the fear of persecution.
40. Eighthly, there is the reference to “cannot be expected” in relation to modified behaviour “in order to avoid persecution”. The idea of “cannot be expected” is suggestive of an individual who would refuse to modify their behaviour, and is entitled to international protection because modification “cannot be expected”. But international protection applies to a person who “can be expected” to modify their behaviour, and will do precisely that, if a reason for doing so is to avoid persecution. Once again, it is sufficient to ask what the individual would do, or avoid doing, and why.

Conclusion

41. UNHCR respectfully commends the analysis set out above, and in particular the formulation at §21 above.



MICHAEL FORDHAM QC



SHANE SIBBEL

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