IN THE COURT OF APPEAL **Appeal Ref: C5/2015/3749**
CIVIL DIVISION

ON APPEAL FROM THE UPPER TRIBUNAL **Claim No: AA/08054/2014**
IMMIGRATION AND ASYLUM CHAMBER

B E T W E E N : -

WA (PAKISTAN)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

-and-

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES ("UNHCR")

Intervener

WRITTEN SUBMISSIONS OF THE INTERVENER

Introduction

1. UNHCR intervenes with permission, as it did in the related cases of *HJ (Iran)* [2010] UKSC 31 [2011] 1 AC 596, *RT (Zimbabwe)* [2012] UKSC 38 [2013] 1 AC 152, *FA (Pakistan)*[1] and as it did before the CJEU in *X, Y & Z* (C-199/12, C-200/12 and C-201/12). As this Court knows, UNHCR has supervisory responsibility in respect of the Refugee Convention[2] and State Parties have obligations[3] 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, for seeking permanent solutions for the problem of

[1] UKSC 2016/0167, appealed from [2016] EWCA Civ 763, which was never determined by the SC.
[2] The 1951 Convention relating to the Status of Refugees and its 1967 Protocol.
[3] Article 35 of the 1951 Convention and Article II of the 1967 Protocol.

refugees.[4] It fulfils its mandate, *inter alia,* by, "*supervising [the] application*" of the "*international conventions for the protection of refugees*".[5] Its supervisory responsibility, recognised also in the EU instruments[6], is exercised in part through the issuing of interpretative guidelines, including the *UNHCR Handbook*.[7] UNHCR does not make submissions on the facts of individual cases but is concerned with the interpretation and application of the Refugee Convention as a matter of law.

2. In the present case UNHCR will in particular invite the Court's attention to the following materials which it has promulgated: (1) the *UNHCR Handbook*; (2) the *2004 Guidelines;*[8] (3) the *2011 Statement;*[9] and (4) the *2017 Eligibility Guidelines*.[10]

3. UNHCR respectfully submits that, in religion-based claims brought by Ahmadis:

> A person is in need of protection as a refugee if found to be a genuine Ahmadi who, if returned to Pakistan:[11]

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[4] 1950 Statute of the Office of UNHCR, annexed to UN General Assembly Resolution 428(V) 14.12.50.
[5] 1950 Statute §8(a).
[6] See e.g. recital 22 to the Council Directive (EC) 83/2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (the "**Qualification Directive**") ("*Consultations with the United Nationals 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*").
[7] UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (1979, reissued January 1992 and December 2011).
[8] UNHCR Guidelines on International Protection: Religion-Based Refugee Claims (28 April 2004, HCR/GIP/04/06).
[9] 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*).
[10] UNHCR Eligibility Guidelines for Assessing International Protection Needs of Members of Religious Minorities from Pakistan (January 2017).
[11] UNHCR does not contend that these are the only circumstances in which an Ahmadi would be in need of protection. See for example the position of Ahmadis targeted by reference to the prohibition on blasphemy in s295C of the Pakistan Penal Code, addressed at §22.7 and §23 hereafter.

(1) would practise or manifest their faith by engaging in activities prohibited under ss.298B or 298C of the Pakistan Penal Code;[12] or

(2) would avoid practising their faith in that way, at least in material part, because of a fear of serious harm if they did so.

4. UNHCR notes that the First Tier Tribunal ("**FTT**") found that the Appellant is an Ahmadi (§39); who, while in the United Kingdom, was "*practising his Ahmadi faith*" (§48); but who, if returned, would not practice his faith "*in the manner that could bring him to the adverse attention of the authorities or any non-state actors*" (§56). That was held to be because he is "*an intelligent young man…[who] appeared to demonstrate familiarity with the laws of Pakistan which placed Ahmadis under restrictions regarding the practice of their faith.*" The FTT found that those restrictions and prohibitions "*prohibited Ahmadis from referring to their place of worship as a mosque, call to prayer as azan, call themselves Muslims or refer to their faith as Islam*." The FTT reasoned that it did not "*expect*" the Appellant "*to suppress his desire to practise his religion in Pakistan to avoid persecution and ill-treatment*", but did not believe that the Appellant "*would be so naive as to deliberately expose himself to a real risk*" (all at §53). The FTT expected the Appellant to be "*pragmatic*" after his return to Pakistan, and did not accept that "*he would be so naive and foolish to deliberately expose him[self] to serious personal risk at the hands of the authorities in Pakistan or any non-state actors*"[13] (§54).

5. UNHCR has set out (§3 above) the principled position in law. It will seek to assist the Court with further elaboration, based on principles of international human rights and refugee law, and other relevant sources.

[12] See §§22.2-22.3 below.

[13] So far as non-state actors were concerned, this was also because the Appellant lacked "*a prominent social and/or business profile*" as an Ahmadi in the United Kingdom or Pakistan (§55).

Religion-based refugee claims

6. Key points which apply to the determination of religion-based refugee claims include the following, beginning with relevant principles from international human rights law.

7. 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) 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 ...***

8. Limitations on the right to manifest 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.

9. 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* at §12; *2011 Statement* at §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* at §§54 & 55; *2004 Guidelines* at §17. As the Qualification Directive Article 9(2) recognises, acts of persecution may[14] 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 …*" In the context of criminalising homosexual acts, the CJEU has further clarified that: "*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 or 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* at §4.2.3; Y & Z at §62. Such a distinction would be incompatible with the nature of the right to freedom of religion (Y & Z at §63).

10. 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*."[15] It is important not

[14] Where of sufficient severity: Qualification Directive Article 9(1).

[15] See e.g. UNHCR'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.

to overlook this particular situation of persecution, but in the analysis which follows the focus is on persecution through state action.

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

11. The principled approach to 'modified behaviour' avoiding persecution was identified by the Supreme Court in *HJ (Iran)* (which concerned the protected characteristic of sexual orientation) and *RT (Zimbabwe)* (which concerned the protected characteristic of political opinion). This logic applies equally to other protected characteristics, such as religion. It involves three key analytical steps.

12. **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:[16]

> ***[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 ...***

13. **Secondly**, it runs contrary to that rationale for individuals to conceal who they are, or modify their behaviour, or avoid activity, for the material[17] reason of avoiding such persecutory harm, as this involves surrender of the person's

[16] Quoting Lord Rodger in *HJ (Iran)* at §53, and citing §§52, 65, 67 and 78 from that case.
[17] As to this, see §16 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:[18]

> ***... 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 ...***

14. 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*".[19]

15. This approach is applicable to the protected characteristic of religion. As UNHCR has explained:[20] "*[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).

16. 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:[21]

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[18] Citing HJ (Iran) at §§75 - 76, 11 & 110.
[19] See also HJ (Iran) at §§11, 75 & 110; RT (Zimbabwe) at §18.
[20] See also the *2012 Guidelines* (footnote 15 above) at §§30 - 33.
[21] 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 …***

17. 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*".[22]

18. **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.[23]

19. 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.***

20. 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*

[22] *2012 Guidelines* (footnote 15 above) at §23.
[23] 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 ***avoid***[24] *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*".

21. 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 right*[25] *or at its margins*" when "*deciding whether or not the prohibition of it amounted to persecution*" (*RT (Zimbabwe)* at §50).[26] It is important to appreciate the following:

    21.1 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).

    21.2 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.[27] As UNHCR explained in

[24] Bold in quotations connotes emphasis by the author of the quote.
[25] Underlining in quotations connotes emphasis by UNHCR in these submissions.
[26] Referring to *HJ (Iran)* at §§114 – 115.
[27] See further *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 (Supreme Court of Canada) at §55: "*… an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief.*" See also *Y & Z* at §71.

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 thereafter 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 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).

21.3 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

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

22.1 UNHCR says this of the prohibitions on certain actions and words in the Pakistan Penal Code at ss.298B and 298C (*2017 Eligibility Guidelines* at p.30):

> ***These sections impose discriminatory measures: Ahmadis are prohibited from practising their religion, from worshiping 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 ...

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

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

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, -

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

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.

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

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

Any person of the Quadiani 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.

22.4 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 §21.2 above).

22.5 The prohibitions and sanctions contained in ss.298B and 298C are applied and enforced in practice in the Pakistani courts (*2017 Eligibility Guidelines* at pp.30-31).

22.6 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.

22.7 UNHCR explains that Ahmadis are *"particularly affected"* by the wording and application of section 295C (*2017 Eligibility Guidelines* at pp.30-31). Judges have "*reportedly interpreted the expression of Ahmadi religious beliefs by Ahmadis as a form of blasphemy*" (p.31).

23. As the *2017 Eligibility Guidelines* also explain:

23.1 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).

23.2 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).

23.3 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).

23.4 So far as non-state actors are concerned (see §10 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.

23.5 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 correct formulation in Ahmadi cases

24. UNHCR's formulation (§3 above) follows directly from what it has set out above. To reiterate:

> A person is in need of protection as a refugee if found to be a genuine Ahmadi who, if returned to Pakistan:
>
> (1) would practise or manifest 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 material part, because of a fear of serious harm if they did so.

The FTT decision in *WA*

25. The FTT identified the relevant issue at §37 as whether the Appellant would "*actively practis[e] his faith*" after his return to Pakistan "*to such an extent that he would come into confrontation with the authorities with the result that he would be at risk of persecution and ill-treatment*". UNHCR respectfully submits that the problems with such a formulation are:

25.1 It gives no consideration at all to whether the Appellant would avoid practising their faith by engaging in the prohibited activities, at least in part because of a fear of serious harm if he did so.

25.2 The reference to "*active practis[e]*" may imply "open practice" or "proselytising", whereas any Ahmadi engaging in the prohibited activities will be in need of protection (whether practising privately, in community with other Ahmadis, or openly).

25.3 The requirement that such practice be to "*such an extent*" that the individual "*would come into confrontation with the authorities*" ignores the fact that a person may be at real risk of persecution and ill-treatment prior to any such confrontation (and even if such a confrontation never in the event arises).

26. The FTT (at §§49 to 56) did not apply the formulation suggested above (§3) to its factual findings. Its findings are summarised above (§4). Finding that the Appellant would avoid practising his faith by engaging in the prohibited activities, at least in part because of a fear of serious harm if he did so, is a finding which entitles the Appellant to protection under the Refugee Convention.

The UT decision in *WA*

27. UNHCR submits that the reasoning of the Upper Tribunal ("**UT**") conflated, or otherwise confused, two distinct questions: (1) Would the Appellant, on his return, practise his faith by engaging in the prohibited activities?; (2) Would the Appellant avoid practising his faith in that way, at least in part because of a fear of serious harm if they did so?

28. This had a number of consequences for the UT's analysis.

28.1 **First**, the UT treated question (2) as a "*nuance*" of question (1), which did not need expressly to be identified (at §12 of the UT decision). However,

the questions are distinct and each provides a free-standing basis for recognised refugee status.

28.2 **Secondly**, the UT considered the FTT's formulation of the relevant issue (at §37 of the FTT decision) "*perfectly adequate*" (at §12 of the UT decision). That formulation had a number of problems, as set out in §25 above.

28.3 **Thirdly**, the UT stated that once the Appellant's stated intention to engage in prohibited activities on his return to Pakistan had been rejected, "*the discrete point under the principle in HJ (Iran) concerning the suppression of religious identity never fell to be engaged*", because of the "*logically prior*" finding "*disbelieving the Appellant's stated intention in the first place*" (§28 of the UT decision). A negative answer to question (1) does not answer question (2), nor does it excuse the fact finder from considering question (2).

The UT guidance in *MN*

29. The Respondent contends that the 'country guidance' reasoning of the UT in *MN and Others* [2012] UKUT 389 is "*correct, in accordance with authority and reflects the appropriate extent of protection against religious persecution prescribed by the Refugee Convention*" (at §49 of the Respondent's skeleton). Respectfully, UNHCR disagrees.

30. The following description encapsulates the essence of the reasoning in *MN*:

> Formulation by the UT in *MN*:
> A person is "*likely to be in need of protection*"[28] if he or she "*genuinely is an Ahmadi*"[29] who can "*discharge[] th[e] burden*"[30] of "*demonstrat[ing]*"[31] that, "*if returned to Pakistan*":[32]

[28] §120(i) and §123.

(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"*[33] (since the Code restricts the way Ahmadis are *"able openly to practise their faith"*[34]), 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"*[35]); and

(2) *"it is of particular importance to his [or her] religious identity*[36] *to practise and manifest his faith openly in Pakistan in defiance of the restrictions in the Pakistan Penal Code"*;[37]

it then being *"no answer to expect an Ahmadi … to avoid engaging in [such] behaviour … to avoid a risk of persecution"*.[38]

31. UNHCR respectfully submits that this formulation is not correct. The correct formulation is at §3 above. In the UNHCR's view, there are a number of difficulties with the UT's approach in *MN*.

32. **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 nuanced:[39]

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[29] §122.
[30] §123.
[31] §120(i) and §123.
[32] §123.
[33] §123.
[34] §119(i).
[35] §119(ii).
[36] §123.
[37] §120(i).
[38] §120(ii).
[39] See further Article 4(1) of the Qualification Directive; UNHCR's Note on Burden and Standard of Proof in Refugee Claims (16 December 1998). See also *J.K. v Sweden* App no 59166/12 (ECHR, 23

> ***... 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. **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.

34. **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*".

35. **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

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August 2016) (2017) 64 EHRR 15 at §§91 - 98 and F.G. *v Sweden* App no 43611/11 (ECHR, 23 March 2016) at §§113, 120-122.

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.

36. **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 §22.4 above), no further enquiry arises (see §21.1 above).

37. **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.

38. **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 obligation to investigate the facts and apply the law to the facts found

39. UNHCR notes that the Respondent contends as follows, that:

39.1 "*no finding of fact could be made that the Appellant would avoid openly preaching for any reason, because there would be no evidence to support such a finding, given that he claimed the opposite*" (at §5 of the Respondent's skeleton); and

39.2 similarly, that the FTT "*did not address why the Appellant would not preach openly, because the issue did not arise: the Appellant presented no evidence or argument on the matter…*" (at §27 of the Respondent's skeleton).

40. UNHCR respectfully submits that there are a number of difficulties with that position, as set out below.

41. **First**, as set out at §32 above, in refugee claims there is a shared duty of fact finding between the applicant and the State (including its tribunals). This follows not just for pragmatic reasons but as a matter of fundamental principle:

> ***State parties to the Refugee Convention have voluntarily agreed to ensure that persons who meet the refugee definition set by Art 1. receive the rights set by Arts 2-34. By virtue of their accession to the Convention, states have signalled their intention to effectuate refugee protection, meaning that they have no adverse interest to that of a person who in fact meets the refugee definition. Given the legal duty to implement treaties in good faith, governments of state parties are reasonably expected to commit themselves not simply to ensuring that the benefits of the Convention are withheld from persons who are not refugees, but equally to doing whatever is within their ability to ensure the recognition of genuine refugees.***
>
> ***…The shared duty of fact finding means that asylum state authorities may not simply adopt a passive posture, responding only to whatever evidence is adduced by the applicant. It also means that there is a duty to recognize refugee status even if the applicant misconceived her claim, or otherwise fails properly to frame her assertion of refugee status…The Tribunal should look at all the evidence and material that it has not rejected and give consideration to a case which it might reasonably arise, notwithstanding that such a case might not have been contended for by the applicant.*** [40]

[40] Hathaway and Foster, The Law of Refugee Status (2014, 2nd Edition) at pp.119-120; see also Pobjoy, The Child in International Refugee Law (2017) at pp.90-91.

42. **Secondly**, as set out at §4 above, the FTT in this case was able to, and did, make factual findings sufficient to establish that the Appellant is in need of protection. It did so having regard to the evidence before it, material parts of which it accepted, which included the Appellant's oral evidence (see §19 of the FTT decision).

43. **Thirdly**, the Respondent appears to confine the relevant modified behaviour to "*openly preaching*". As set out at §34 above, this is too narrow: the prohibited activities go well beyond open preaching.

44. **Fourthly**, it is the responsibility of the FTT to apply the law correctly to the facts found. The FTT must ask the right questions and apply itself to all matters that might bear on whether the applicant meets the Convention requirements of a refugee. That is an essential part in the State discharging its obligations under the Refugee Convention, and in particular in determining (for itself) whether the criteria for refugee status are made out, howsoever the claim may have been framed or argued by the applicant.[41] The obligation was set out by the Federal Court of Australia in *Sellamuthu v Minister for Immigration and Multicultural Affairs* [1999] FCA 247 at §21 per Wilcox and Madgwick JJ:

> ***... because the [Refugee Review Tribunal] did not apply itself to all matters which might bear on whether the applicant met the Convention requirements of a refugee, the RRT did not consider the "real question which it was its duty to consider" and this was a constructive failure by the RRT to exercise its jurisdiction. ... The correct application of the law (in the circumstances of this case) required a determination, despite the appellant's lack of credit-worthiness, as to whether, on* all *of the information obtained (including any which reasonably could and should have been obtained), he was a refugee, albeit an untruthful one.***

[41] See *UNHCR Handbook* at §67: "*It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect.*". See further, in the context of determining applicable grounds, *Canada (Attorney General) v Ward* [1993] 2 SCR 689 (Supreme Court of Canada) at p.693: '*A claimant is not required to identify the reasons for the persecution. The examiner must decide whether the Convention definition is met; usually there will be more than one applicable ground.*' See also *Taylor v Minister for Immigration and Multicultural Affairs* [1999] FCA 661 (Federal Court of Australia) at §7: "*Where the material before the Tribunal plainly raises issues relevant to the question of whether an applicant should be accorded refugee status, the Tribunal is obliged to consider those issues even if submissions made on behalf of the applicant do not draw them specifically to the Tribunal's attention.*"

45. **Fifthly**, the FTT in any event had the materials before it which should have enabled it to reach the right conclusion on the basis of its factual findings. In particular:

45.1 The FTT stated that it had "*considered and taken into account*" (at §35) and "*carefully considered and followed*" (at §49) the guidance of the tribunal in *MN and Others* [2012] UKUT 389.

45.2 The decision in *MN* contains extensive reference to *HJ (Iran)* and *RT (Zimbabwe)*, and the principles concerning modified behaviour identified in those cases: see in particular §1 of the guidance, and §§74 to 81 of the judgment. The tribunal in *MN* also considered, at §§91 to 99, the approach of the CJEU in *Y & Z*, and found that it "echoed" the decisions in *HJ (Iran)* and *RT (Zimbabwe)*. In particular, the tribunal observed (at §97) that:

> ***The Court of Justice makes clear as did the Supreme Court in HJ (Iran) that concealment is not an answer if the reason is a fear of harm.***

46. **Sixthly**, *HJ (Iran)* was expressly cited before the UT, and considered by it in its decision: see §§9, 23 and 28 of the UT decision.

Conclusion

47. UNHCR respectfully commends the analysis set out above, and in particular the formulation at §3 above.

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