

Neutral Citation Number: [2008] EWCA Civ 580

Case No: C5/2007/2868

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
AS/05221/2004

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2008

Before :

LORD JUSTICE WARD
LORD JUSTICE SEDLEY
and
LORD JUSTICE WILSON

Between :

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT
- and -
IA (PAKISTAN)**

Appellant

Respondent

Mr JP Waite (instructed by Treasury Solicitors) for the **Appellant**
Mr U Cooray (instructed by Messrs Thompson & Co) for the **Respondent**

Hearing date: Thursday 15 May 2008

Judgment

Lord Justice Sedley :

This is the judgment of the court.

The issue

1. In form, this is an appeal by the Home Secretary, brought by permission of Laws LJ, against the allowing by the AIT of two of three conjoined appeals by Pakistani Ahmadis on the ground that they could not find safety in Rabwah from the religious persecution which they had good reason to fear if returned. In substance, however, it is a challenge to a new country guidance decision which the Home Secretary fears is capable of undermining almost every internal relocation answer to an Ahmadi asylum claim.
2. The Ahmadi faith is a branch of Islam which is regarded by the Sunni majority in Pakistan as heretical. The sect is denied constitutional and legal protection on grounds of blasphemy. It has between 2 and 5 million adherents scattered through Pakistan, many of whom find themselves targeted by – in particular – a militant Sunni fundamentalist organisation named Khatme Nabuwwat (KN). Sometimes the attacks simply have the venal object of driving an Ahmadi family from its land so that it can be seized by others. But there is evidence in other cases, notably where the fugitive has been proselytising, that persecution on religious grounds will follow them, making them refugees unless there is somewhere else in Pakistan where they can safely relocate without its being unduly harsh.
3. For a number of years that place has been regarded as being Rabwah, a town of 25,000 to 50,000 inhabitants located on a site of a little over a thousand acres which was bought to provide an Ahmadiyya headquarters when, following partition, the seat of the sect in Qadian became incorporated in India. More than 95% of the population of Rabwah is Ahmadi: hence the received view that an Ahmadi could always be safe there. But, as the AIT in the present group of cases found, Ahmadis play no part in the government or administration of Rabwah. Because adherents of the faith are listed on a separate electoral register, few Ahmadis enrol or therefore vote. The result is that if KN militants choose to make life difficult for Ahmadis in Rabwah, the authorities there will not intervene. KN is known to have a strong organisation in Rabwah and to hold rallies several times a year; but there is – in the AIT's phrase - relatively little evidence that KN uses its power in Rabwah to cause trouble for individual Ahmadis.
4. While Rabwah is neither a ghetto nor economically deprived, Ahmadis who do not come from the town but who try to relocate there may find it difficult to obtain accommodation and legally impossible to buy land in one part of the town.

These appeals

5. Before we turn to the dispute before the court, it is necessary to summarise the three cases before the AIT, of which the first two alone are now under appeal.
 - (i) IA, a businessman, fled from his hometown when KN members attacked his house, threatening to kill him for having converted three employees, or friends of employees, to Ahmadism. He found work about 200 miles away, only to learn that the police in his hometown were investigating blasphemy charges against him. He bought off the complaint, but when he made two more converts the local mullah was told and he was again threatened with death. He fled to Lahore, but when he learnt that the blasphemy complaint against him had been reopened he fled to the United Kingdom. The immigration judge took the view that IA's proselytising had been and would continue to be confined to people he already knew, so that he could be safe in Rawbah.
 - (ii) MM's uncle (his entire family is Ahmadi) was murdered by KN in 2002. MM, perhaps defiantly, began preaching in his village, provoking a visit by KN in which he was threatened. The police would not act, so MM and his family moved to Lahore. There he began preaching again, with the result that KN members vandalised his home. Returning to his home village, he was shot at. A complaint to the police resulted in MM himself being arrested. A bribe secured his release, and he fled to the United Kingdom. The immigration judge found that he had a well-founded fear of persecution in his home village but that he could be safe in Rabwah.
 - (iii) MS, unlike the other two, comes from Rabwah. There, in 2000, she began preaching to non-Ahmadis. A group of KN mullahs attacked her and knocked her down. When she went to the police they arrested her for preaching. Released on payment of a bribe, she moved to Rawalpindi where a group of 20 to 25 mullahs, one of whom she recognised as having assaulted her in Rabwah, attacked the Ahmadi mosque. She fled to Lahore and from there to the United Kingdom. Giving qualified credence to MS's subjective fear but finding that there was "an attendant risk of greater harm", the adjudicator (*sic*: this was in 2003) held that she could nevertheless be safe in Rabwah. The paradox was obvious. It is less obvious how the sectarian manifestations which the appellant feared, however unpleasant, amounted to persecution; but that is not a question for us.
6. All three appeals were allowed by the AIT (C.M.G.Ockleton D-P, SIJ Storey and SIJ Gleeson) on the ground that Rabwah was not a safe place for any of the three appellants. Because the third appellant's fear of persecution arose from events in Rabwah itself, the Home Secretary has not sought to disturb the decision that she cannot expect to be safe there. What now concerns the Home Secretary is that, although the tribunal stressed that safety in Rabwah remained a case-specific question, their determination was given country guidance status and is framed in

terms which might be thought to lay down that Rabwah is not a safe place for Ahmadis.

7. Although Upali Cooray for the two respondents has not sought – because he had no need to – to sustain more than the immediate findings in his clients’ favour, the Home Secretary seeks a decision of this court either setting aside the determination of the AIT in relation to them or directing the tribunal to remove the country guidance status accorded to the determination as a whole. Her reasons, as advanced by John-Paul Waite, are summarised in this way:

“The Tribunal, in deciding whether Rabwah was an appropriate place of internal relocation for Ahmadis fleeing persecution elsewhere in Pakistan, appeared to proceed on the basis that, whilst incidents of harm against the Ahmadis in that city were sparse, they were no fewer in relative terms than elsewhere in Pakistan. It therefore concluded that the option of internal relocation to Rabwah was not (in general) available to Ahmadis escaping persecution elsewhere. The Tribunal’s conclusion in that respect was flawed because (i) it failed to take any or sufficient account of the fact that there was a particular concentration of Ahmadis in Rabwah (such that Ahmadis in that city are much safer in relative terms) and (ii) it followed a refusal by the Tribunal to consider the distribution of Ahmadis throughout Pakistan – a necessary prerequisite for the making of any comparison between Rabwah and elsewhere in the country. It is further the case that the Tribunal, in addressing its mind to the unduly harsh limb of the internal relocation test, failed to refer to any of the relevant case law in this area or give sufficient reasons for its (apparent) conclusion that it would be unduly harsh for the average Ahmadi to move to Rabwah. This was a serious omission in the context of a country guidance decision.”

Unduly harsh relocation

8. One of Mr Waite’s grounds is that the AIT have failed to address, save in rudimentary form, the question whether relocation to Rabwah is in any or all cases unduly harsh. The reason why they have not dealt with it is that, as he accepted in argument, until and unless an alternative location in the country of origin is found to be sufficiently safe, the question whether relocating there would be unduly harsh does not arise.

Ahmadi demography

9. IA's case was remitted by this court to the AIT by consent. The agreed terms of remission were that it was "for re-determination, limited to the issue of whether the appellant can be expected to relocate to Rabwah. Such issue is to include consideration of the general safety of Rabwah for Ahmadis, as well as whether it would be unduly harsh to relocate there." The AIT took the view that these terms of remission and its remits in the other two appeals prevented them from embarking on "larger issues". They went on

"Nevertheless, although we consider that it is not appropriate to determine any larger issues in these appeals; we note that other issues remain to be looked at in Ahmadi cases. There may be questions about whether the prosecution of Ahmadis in truth and in law amounts to persecution for the purposes of the Refugee Convention. There may also be questions about the distribution of Ahmadis in Pakistan, there being only a small minority of all Ahmadis in Rabwah. It may also be necessary to decide whether Ahmadis have a duty to preach and proselytise that is particular to them, and if so what is its effect in claims of this kind. All Muslims have the duty of dawah and it may not be right to assume that an Ahmadi is more likely to be a preacher."

10. Mr Waite's fourth ground of appeal is that the decision to give the determination country guidance status was irrational, since the AIT had decided that the terms of the consensual remission precluded them from looking at the distribution of Ahmadis elsewhere in Pakistan, a question, Mr Waite submits, "pivotal in assessing the relative safety of Rabwah". His fifth ground, however, is that the order for remission carried no such inhibition. Put in perhaps more logical order, the argument is that there was nothing to prevent the tribunal considering the demographic distribution of Ahmadis, but that if they were not going to do so their determination should not have been accorded country guidance status.
11. The reason why it is submitted that the determination could not both ignore the distribution of Ahmadis in Pakistan and at the same time be accorded country guidance status is said to be that it is only possible to gauge the relative safety of Rabwah if you know the extent of risk in the rest of the country. For reasons to which we are about to come, we do not have to decide this question, but we do not necessarily accept Mr Waite's submission. The starting-point of an internal relocation argument is not that the rest of the country is unsafe but that the appellant personally has good reason to fear persecution if returned to where he or she came from. Such a fear does not have to have a stochastic basis: it may well arise from a single and unrepeatable set of facts. If the consequent fear of persecution is so far well-founded, the fact-finder must ask whether there is in the home country a place (a) of sufficient – not absolute – safety to which (b) the appellant can move without undue hardship. The legal effect of a finding that there is such a place is to take away the objective, and possibly also the subjective, foundation of the fear.

12. The decision of the House of Lords in *Januzi* [2006] UKHL 6 relates principally to question (b), while the present case relates to question (a). It may also be noted that, despite having secured two adjournments and been refused a third, the Home Office in the present case did not seek to adduce any evidence about the relative safety of Ahmadis elsewhere in Pakistan.
13. When in §26 (see below) the tribunal find that “the evidence does not suggest ... that Rabwah is safer than anywhere else” they are, with respect, adopting what is arguably the same relativist fallacy as the Home Secretary. The comparison is not between two places, each more or less safe or unsafe. It is between the appellant’s well-founded fear, whatever its source, and the possibility of living free from that fear somewhere else in the same country. So, for example, an individual may be found to have experienced persecution, and to have good reason to fear its recurrence, in an area otherwise known to be quite safe. If they are able to relocate to a place which, albeit not in general so safe, affords them reasonable protection from any recurrence of the particular persecution, their fear of it will no longer be well-founded. If not, then the fact that their persecution was a unique event does nothing to diminish their claim to international protection. As the tribunal themselves say at the end of §19, “the question for an individual is whether he is at risk, not whether everybody is at risk”. In this light we do not need to address Mr Waite’s critique of the AIT’s methodology for omitting to factor in the much greater proportion of Ahmadis in Rabwah than elsewhere.

Safety in Rabwah

14. So the real issue is whether the AIT’s reasoning about the general safety of Ahmadis in Rabwah stands up. It is necessary first to set it out in full.

18. From the evidence we derive the following facts about Rabwah, some of which we have already referred to. Rabwah is a relatively small town and has a defined area. It has a population of something under 50,000 of whom the vast majority are Ahmadis. There are between 2,000,000 and 5,000,000 Ahmadis in Pakistan in all probability. Thus, although Ahmadis are a majority in Rabwah, the Rabwah Ahmadis are a tiny minority of the Ahmadis in Pakistan. Ahmadis however have, for a reason which has not been explained to us but the fact is not disputed, a disinclination to engage in government. They are required to register in a separate electoral roll. That, we understand, is a feature which they do not share with other Pakistani religious minorities. Whether as a result of that or not, Ahmadis as a group do not register for elections: it is that which makes it so difficult to

estimate their numbers, but it is also that which has the effect that although in Rabwah they are the vast majority of the inhabitants, they are not represented in government as one might expect. In fact the evidence shows that Ahmadis are not in government in Rabwah, as they are not in government anywhere else in Pakistan.

19. In Rabwah there is a strong branch of the KN; there are large KN rallies several times a year and other activities. Rabwah is known as an Ahmadi area and therefore may be the target of such activities. There is, however, as Mr Waite pointed out in his submissions, relatively little evidence of anti-Ahmadi trouble in Rabwah. That is the result, no doubt, of a number of factors. One may be, as Mr Waite suggested, that Rabwah is relatively safe and indeed "slightly safer or a little safer" was the evidence received by the Parliamentary Human Rights Commission. But of course the lack of activity against Ahmadis in Rabwah does not necessarily show that Rabwah is safe. It may only show that the amount of activity against Ahmadis is not very great anyway. The question for an individual is whether he is at risk, not whether everybody is at risk.

20. The Secretary of State now accepts and indeed has set out in the Operational Guidance note of 15 March 2007 as follows:

"3.7.4 Rabwah is the headquarters of the Ahmadi movement in Pakistan and is made up of ninety-five per cent Ahmadis. Although Rabwah does provide a degree of community support to individual Ahmadis, there are reports suggesting that Rabwah is targeted by fundamentalist Islamic groups for anti-Ahmadi protests and other actions. Enquiries through the British High Commission in Islamabad show that very few Ahmadis are represented in public and semi-public organisations in Rabwah. Approximately 54% of the voting population of Rabwah are Ahmadi, but it appears that Ahmadis do not normally vote in or contest elections."

To that extent, therefore, the Secretary of State's view is congruent with our view on the evidence before us.

21. Nevertheless, Rabwah's status as an Ahmadi stronghold has given rise to the view expressed sometimes by the Secretary of State, particularly in letters of refusal, and sometimes by the Tribunal, whether in reliance on country guidance or otherwise, that a person at risk elsewhere and so in need of a place to which to relocate internally could reasonably be expected to go to Rabwah where he would obtain protection because of the Ahmadis there. We are satisfied that that is wrong. The situation for Ahmadis in Rabwah is capable of examination in a way that is perhaps not so easy elsewhere because of the numbers. To the extent also that there is a large Ahmadi population in Rabwah, there may be some safety in numbers and it may also be the case that a member of the KN, who is intent merely on pursuing the KN's agenda in a generalised fashion, is less likely to target any identified individual in Rabwah simply because there are so many Ahmadis there. That is a difference from a person who seeks to do the same thing in a small village where there are few Ahmadis, each of whom would therefore be at proportionately greater risk.

22. But although there is that safety in numbers, and there is a possibility of informal community support amongst Ahmadis, the advantages of Rabwah stop there, even for an Ahmadi who lives in Rabwah. Such a person cannot expect in Rabwah any more than anywhere else to obtain protection from the police (there are few or no Ahmadi policemen) or from other officials; because, despite being the majority population of Rabwah, Ahmadis are not represented in government. So there is no greater protection available for local Ahmadis in Rabwah than there is for Ahmadis anywhere else in Pakistan.

23. For those who move to Rabwah, from other parts of Pakistan, the prospects are, on the evidence we have seen, to be viewed with even less equanimity. Unless they have friends or relations in Rabwah they may not, according to the evidence, be able to obtain accommodation. There are regulations prohibiting the sale of land in one part of Rabwah to Ahmadis, although there is some evidence of Ahmadi building on vacant land in the other part of Rabwah and outside the town centre. Further, the very fact of having moved to Rabwah may attract attention to an individual's religious affiliation.

24. We should say that the evidence does not establish that Rabwah is particularly deprived. Dr Ensor, who gave evidence about the production of the Parliamentary Human Rights Committee report, said that he observed poverty in Rabwah but at about the same level that he had observed elsewhere in Pakistan. The third appellant's witness statement gives some indication of her home situation in Rabwah and again it does not appear to be deprived. Dr Ballard, in his November report, described Rabwah as "thriving", though he retreated very rapidly from that position in oral evidence and said that it was subject to corruption. Rabwah is not a ghetto on the evidence that we have heard. It is, however, a place like any other place in Pakistan. That is to say it is a place where the government is Sunni and it has the additional difficulty that, if it is seen as a centre to which Ahmadis are attracted, it is at the same time a small place in which they may have some difficulty in acquiring accommodation.

25. It therefore seems to us that despite Rabwah's special profile in the Ahmadi religion it has no special status in the refugee related discourse relating to Pakistani Ahmadis. It is simply wrong to say in general that a person who has established a history of persecution or a fear of persecution as an Ahmadi in some other part of Pakistan can reasonably be expected to relocate to Rabwah. It may be that he can go to Rabwah for a short time. It may be that for that short time he will be safe. **But, save in exceptional circumstances, for example if he has family or relatives in Rabwah, despite the majority of inhabitants there, he may not in fact be reasonably practicably able to live there and, if he does, he will be no safer than anywhere else: because the governmental, official structure and seat of power is the same as elsewhere in Pakistan and the fundamentalist anti-Ahmadi religious group, the KN, is as active there as anywhere else, if not more so.**

26. That is not to say that every Pakistani Ahmadi is at risk of persecution and is a refugee. As Mr Waite pointed out, the evidence of serious harm to Ahmadis in Rabwah is relatively sparse. The point is, however, that the evidence does not suggest to us that Rabwah is safer than anywhere else. Mr Waite pointed to the fact that there is some evidence that, at any rate for short periods, Ahmadis from elsewhere seek some protection in

Rabwah amongst the Ahmadi community there. That is a perfectly fair point, but it does not demonstrate that Rabwah is safe for long-term residence. The incidence of actual harm to Ahmadis is, on the evidence, not high in Rabwah, and, on the evidence, is not high elsewhere in Pakistan. But that is not the point. The point is not whether every Ahmadi is at risk of persecution but whether some Ahmadis who are at risk of persecution can be expected to relocate to Rabwah.

27. The Tribunal will look in due course at the other issues relating to Ahmadis. In the meantime, however, we draw attention to one comment in particular in the evidence given by the Human Rights Commission of Pakistan to the Parliamentary Human Rights Group and recorded at paragraph 4.1 of the latter document.

“... the HRCP stated that safety in Rabwah depends on the nature of the persecution and/or the influence of the persecutor. For example, if a neighbour wishes to take over an Ahmadi’s business by capitalising on anti-Ahmadi sentiment, then the job of the persecutor is complete once the Ahmadi has left the local community. However, should the persecutor be a person of influence or means, they may use this to follow their target to Rabwah as well.”

There is therefore a difference between those who are targeted or pursued, in particular those in respect of whom there is some institutional pursuit on the one hand, and those who are merely the victims of local Sunnis who want to take advantage of restrictions on Ahmadis in order to secure some financial or other advantage for themselves.

28. It is wrong to assume that Rabwah, because of its majority Ahmadi population, is either accessible or safe for those who, on the evidence, need a place of safety. Each case will depend on its facts but in no wise can the existence of Rabwah be regarded generally as a reason for dismissing an appeal that would otherwise be allowed.

15. As Mr Cooray points out, the most radical departure in these findings is the reversal of the assumption – relayed from case to case as fact – that Rabwah is largely or significantly governed by Ahmadis. With that assumption goes any supposition or inference that Ahmadi rather than Sunni control is exercised over the police or other civic authorities. But, as Mr Cooray also accepts, it does not mean that no Ahmadi is safe in Rabwah.
16. The first problem in this light is with the headnote which forms part of the promulgated decision. It reads:

Contrary to what is said in KM (Pakistan) [2004] UKAIT 00302, MM (Pakistan) CG [2002] UKIAT 05714, KK (Pakistan) [2005] UKIAT 00033, MC (Pakistan) [2004] UKIAT 00139, and AZ (Pakistan) CG [2002] UKIAT 02642, Rabwah does not constitute a safe haven for any Ahmadi at risk of persecution elsewhere in Pakistan and should not, without more, be treated as an appropriate place of internal relocation.

17. There is at best an ambiguity and at worst an error in the phrase “a safe haven for *any* Ahmadi”. What the tribunal goes on to hold, and what is evidently meant here, is that Rabwah does not necessarily constitute a safe haven for *every* Ahmadi. Counsel agree, as we do, that the headnote should be so read.
18. This addresses the Home Secretary’s first concern but not her second one. This is that the substance of the determination, particularly in the passage we have highlighted in §25, either holds or comes closer than the evidence will bear to holding that it is only exceptionally that an Ahmadi who is fleeing persecution can be safe in Rabwah.
19. We accept that, read alone, the passage could be so construed. But it has to be read as part of the process of reasoning which culminates in §28, which we have also highlighted. That reasoning, as we understand it, proceeds by the following steps:
 - (a) It is not necessarily the case that an Ahmadi who reasonably fears persecution elsewhere in Pakistan can safely relocate to Rabwah.
 - (b) An Ahmadi who does move to Rabwah may not be able to remain there for long; and for those who are able to remain in Rabwah, safety is not assured because local power is not in Ahmadi hands and the KN is at least as active in Rabwah as elsewhere.
 - (c) But this does not mean that no Ahmadi can be reasonably safe in Rabwah. As in the rest of Pakistan, the incidence of harm to Ahmadis there is not high.
 - (d) What matters therefore is the particular risk faced by the individual Ahmadi and the reasons for it.

(e) It follows that, for those who can establish a well-founded fear of persecution elsewhere in Pakistan, Rabwah is not to be assumed to be either generically safe or generically unsafe. The issue must be determined case by case.

20. This determination was promulgated on 17 October 2007. Later that year another division of the AIT chaired by SIJ Gleeson, who was a party to the present decision, in *MJ and ZM (Ahmadis – risk) (Pakistan)* [2008] UKAIT 00033 were able to deal with two further Ahmadi asylum cases on the basis of the present determination without adopting the wide premise anticipated by the Home Secretary. Since Mr Cooray tells us that a renewed application for permission to appeal against the determination may be pending, we limit what we say about the case; but we observe that, having recited the headnote of *IA*, the AIT directed themselves (§5):

“Questions of internal relocation and undue harshness in relation to Rabwah are therefore questions of fact in relation to the particular circumstances of each appellant.”

They went on, loyally to the present decision, to hold (§28) that it was no longer sufficient to find that for an ordinary Ahmadi Rabwah was without more a safe refuge. They therefore looked in detail at the specificity of each case (and, incidentally, at the demography of the Ahmadi faith) and concluded in each case that internal relocation was both safe and not unduly harsh

Disposal

21. The Home Secretary is less concerned to reverse these particular decisions than to ensure that the AIT’s reasoning does not foreclose findings in other cases that a persecuted Ahmadi can be reasonably safe in Rabwah.
22. Mr Waite suggests that one way of making this clear would be to remove the determination’s country guidance status. We do not agree. Unless the determination keeps this status it may not have the intended effect of undoing earlier country guidance which is agreed on all hands to have had a faulty factual basis.
23. Failing this, Mr Waite invites us to remit the appeals to be decided by a freshly constituted tribunal. For reasons we have given we do not consider that this is necessary. The determination, fairly read, does not have the meaning, and will not have the effect, which the Home Secretary fears it will have. This appeal has been valuable in enabling the court to clarify the AIT’s reasoning and clear up an error in their headnote. This done, the determination can stand.
24. The appeal will accordingly be dismissed.