Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/04952/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 January 2018	**On 16 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

MR M A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Fripp of Counsel, instructed by Morden Solicitors (London)
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Rhys-Davies dismissing his appeal against the decision of the respondent refusing his application to remain in the UK on asylum grounds and under Article 8 of the ECHR.

2. The appellant is a national of Pakistan born on 5 July 1982. He claims to have arrived in the United Kingdom on 23 September 2014. He claimed asylum the following day. His application was refused on 14 September 2015. His appeal against the respondent's decision was dismissed by First-tier Tribunal Judge McAll in a decision promulgated on 10 June 2016. His onward appeals to the First-tier Tribunal and Upper Tribunal for

permission to appeal were refused. His appeal rights were exhausted on 24 August 2016.

3. The respondent and subsequently the First-tier Judge accepted that the appellant was an Ahmadi Muslim. On 10 May 2017 the respondent accepted that the appellant had demonstrated a fresh claim to protection under paragraph 353 Immigration Rules HC 395. The appellant's claim depended upon two primary matters.

   (1) He was at risk in Pakistan as an individual by reason of his profile as an Ahmadi, and/or

   (2) returning him to Pakistan would place him in a situation of fear of persecution for a relevant reason and force him to restrain the ordinary expression of his religious faith so that he should be recognised as a refugee consistently with the country guidance case in **MN and others (Ahmadis – country conditions – risk) Pakistan [2012] UKUT (IAC)**.

4. FtTJ Rhys-Davies recorded the respondent's case at paragraphs 16 to 29. The respondent stated that Judge McAll's decision must be the starting point for the consideration of the second appeal in line with the principles in **Devaseelan.** At paragraph 20(a) – (l) the judge recorded the various adverse findings made by Judge McAll against the appellant's credibility as identified by the respondent.

5. The respondent also noted **[21]** that the appellant had produced a letter from Mr K dated 3 February 2012 who claimed to have known the appellant in Islamabad. Mr K stated that the appellant was an active member of the Ahmadi community in Islamabad; regularly offering prayers at the Ahmadiyya mosque and preaching. The judge noted that the letter mentioned no problems experienced by the appellant and failed to substantiate his claimed prominent role in the Ahmadi population.

6. The respondent also noted **[22]** that the new AMA letter, dated 20 February 2017, was the first to refer to the appellant having a high-profile position in Islamabad, Lahore and Muzaffargarh, even though the appellant had claimed asylum in September 2014. The judge said this letter contradicted Mr K's account of the appellant's activities in Islamabad. The AMA letter stated that the appellant had to move from Islamabad with his family on 24 August 2014 due to his fear, but could not confirm whether that was due to his religion or to installing outdoor satellite antennae.

7. The respondent said it was telling that no-one had attended from the AMA to support the appellant, particularly given the comments made by Judge McAll regarding the AMA letter in the previous appeal. He said the appellant would have known that a letter alone would not be sufficient in these circumstances.

8. The respondent noted that the photographs submitted by the appellant captured only moments in time and were not cogent evidence of activism.

The guidance set out in **MN** at head note paragraph 9 was applicable here regarding the appellant's alleged changes in religious practice. Consequently, the judge did not accept that the appellant had proved that he was of any adverse interest in Pakistan now, or that he would be at risk if he returned and his claim for international protection should be dismissed.

9. The respondent noted that the appellant no longer pursued his arguments under Article 8.

10. At paragraphs 29 to 42 the judge identified the appellant's grounds of appeal and submissions.

11. The judge's findings on the appellant's asylum claim are set out at paragraphs 43 to 62.

12. The judge found that there was no good reason for him to go behind Judge McAll's rejection of the appellant's credibility as to his allegedly high-profile roles in the Ahmadi community in Pakistan and his claim that he fled to the UK as a result of the danger he felt he was facing from KN or others.

13. The judge held at [46] that the appellant has advanced no new material evidence as to the alleged threats he faced in 2014. He repeated the same account, but apart from his own (previously rejected) evidence, there was nothing else of substance. The judge said he had difficulty with the statement in the AMA UK letter dated 20 February 2017 paragraph (iv) that *"he was identified by anti-Ahmadi agents and remained in fear of persecution or arrest. He had to move with his family from Islamabad on 24 August 2014 due to this fear"*. The judge said this was the first time this statement had appeared in the AMA correspondence that had been disclosed.

14. The judge found that the AMA UK letter of 12 November 2014, submitted at the previous appeal made no mention of the appellant being identified or in fear of arrest or persecution. He found this was odd as the source of the information in the two letters appeared to be the same in each case, namely the records held in Rabwah and reports obtained from the District President of Islamabad. On that basis the judge said there would appear to be no reason why the 12 November 2014 letter did not include this information. The judge attached little weight to the AMA UK letter of 20 February 2017 on this issue.

15. The judge said at paragraph 49 that the only other evidence which was before him that might address this point, and which was not before Judge McAll, was a statement from Mr K dated 3 February 2017. This statement made no reference to the appellant facing any adverse attention, and in any event Mr K did not attend to give evidence. Again, the judge attached little weight to this statement.

16. The judge at paragraph 50 considered that the appellant's sister being granted asylum in the USA was not a matter that assisted him in determining this appeal. The status document produced by the appellant did not set out the basis on which that status was granted.

17. The judge further found that while the appellant may have held the various positions in the Ahmadi community in different areas of Pakistan that the 20 February letter lists it does not prove that these roles or any of them were high profile, or that they brought the appellant any adverse interest.

18. The judge at paragraph 52 considered that Judge McAll's finding was relevant here. *"The appellant has lived in various cities and districts of Pakistan as an Ahmadi and he has, on his own evidence, never experienced any threats, ill-treatment, or persecution. If the appellant had been a longstanding and established prominent figure he would have experienced some level of harassment or intimidation but on his own evidence he has not"*. The judge stated that this point has not been adequately addressed by the appellant before him and therefore found that it materially damaged the credibility of the appellant's claims.

19. The judge set out at paragraph 53 that a related point on the appellant's credibility was the question of whether he claimed he experienced any threats at all. The appellant's witness statement before him referred to him "constantly facing problems from the activist of KN which included threats to my life". The judge found that this was inconsistent with his account to Judge McAll and that the appellant then wrote back from his statement when asked about these alleged threats in oral evidence. The appellant qualified or amended the version in his statement, by saying that he had heard second-hand, via another Ahmadi, who had told him that the KN were going to move against him.

20. The judge found that the appellant's failure to mention to Judge McAll any such threat, however it came to his attention, was a further matter that damaged his credibility.

21. The judge concluded in the light of his findings that the appellant had adduced nothing to persuade him that Judge McAll's findings about his status in Pakistan, or events that the appellant claimed occurred there, should be disturbed.

22. The judge then looked at the related limb of the appellant's appeal: the **HJ (Iran)** issue.

23. The judge said the appellant once again relied principally on the letter from AMA UK of 20 February 2017 to overcome this. The judge accepted that this letter in addition to those dated 24 November 2015 and 9 May 2016 also from the AMA UK as well as the photographs and documents produced in the UK were evidence of his many activities in the UK for the Ahmadi faith. He noted that Judge McAll accepted this evidence too.

24. However, the judge found that this evidence did not displace the findings made by Judge McAll, which concerned the appellant's failure to provide any examples of going into the community in Pakistan to preach his faith and his example of preaching to a co-worker being "very vague" and amounting to "nothing more than a minor discussion about faith". The judge found that the AMA UK letters relating to his activities in Pakistan also lacked detail and did not assist the appellant.

25. The judge found that the fact that the appellant has been more openly active in his practice of his faith in the UK does not prove, even to the lower standard, that he would be so open in Pakistan, or that he would be discreet, but because of his fear of persecution.

26. The judge noted that the appellant had already been found to lack credibility and regarded his evidence as to his intentions of how he would practise in Pakistan with caution as a result. Applying the guidance in **MN** (particularly paragraphs 3, 6 and 9 of the head note and paragraphs 120, 123 and 126 of the main body of the text), the adverse credibility findings led him to conclude that the appellant's claim that he would either practise openly, or be discreet out of fear, were not credible, particularly given his many years of practising his faith actively but quietly by choice and without incident. The judge also noted that the AMA UK letter of 20 February 2017 did not allege that the appellant had undergone some material change in his outlook as to how he practises his faith.

27. The judge said **MN** does not state that all Ahmadis are at risk of persecution and the appellant does not contend that it should be displaced by more recent country background evidence in this respect.

28. The judge concluded that the appellant's claim to asylum, for humanitarian protection and under Article 3 of the ECHR, all of which depend on the same account, must be dismissed.

29. Mr Fripp relied on two issues. He said that the appellant sought a fresh application by producing further evidence as manifestation of his fear and his involvement in the Ahmadi community in the UK. The Secretary of State accepted this fresh claim, which resulted in an appealable decision even though the decision was to refuse the appellant's application. He submitted that by accepting that the appellant had shown a fresh claim, the respondent was saying that the claim had a realistic prospect of success. He accepted that this does not mean that the appellant has proved his case. Nevertheless, this was a relevant matter which the judge had to consider as to how much weight to place on "the realistic prospect of success". He submitted that the judge's failure to take into account this relevant matter amounted to an error of law.

30. I reject Mr Fripp's argument. I accept Mr Jarvis' argument that there is no legal requirement on a judge to consider that the claim has "a realistic prospect of success" was relevant to his assessment of the appellant's asylum claim. I find that following acceptance of his application as a fresh claim, the respondent considered the substance of that claim and

concluded that the appellant did not require international protection. That was the issue before the judge and I find that the judge properly considered it. The Secretary of State made an appealable decision based on the fresh claim. What was binding on the judge was the decision made by First-tier Tribunal Judge McAll. The application of **Devaseelan** was binding on the judge to take the findings made by Judge McAll as the starting point. The judge's failure to address the "realistic prospect of success" does not amount to an error of law.

31. The second issue submitted by Mr Fripp was about the judge's understanding and application of **MN**. He said the judge relied on an earlier decision. Therefore, the underlying problem was common to both decisions.

32. Mr Fripp said that the guidance in **MN** is the starting point, where at paragraph 119, the Tribunal held:

> *"(i) The background to the risk faced by Ahmadis is legislation that restricts the way in which they are able openly to practise their religion. The legislation not only prohibits preaching and other forms of proselytising but also in practice restricts other elements of manifesting one's religious beliefs, such as holding open discourse about religion with non-Ahmadis, although not amounting to proselytising. The prohibitions include openly referring to one's place of worship as a mosque and to one's religious leader as an Imam. In addition, Ahmadis are not permitted to refer to the call to prayer as azan nor to call themselves Muslims or refer to their faith as Islam. Sanctions include a fine and imprisonment and if blasphemy is found, there is a risk of the death penalty which to date has not been carried out although there is a risk of lengthy incarceration if the penalty is imposed. There is clear evidence that this legislation is used by non-state actors to threaten and harass Ahmadis. This includes the filing of First Information Reports (FIRs) (the first step in any criminal proceedings) which can result in detentions whilst prosecutions are being pursued. Ahmadis are also subject to attacks by non-state actors from sectors of the majority Sunni population"*.

33. Mr Fripp said that the prohibitions identified at paragraph 26 of **MN** highlighted paragraph 295-C of the Penal Code.

34. Mr Fripp relied on a letter from Lady Hale dated 4 November 2016 to Mr Fripp and another Counsel, informing them why permission has been given in the case for **R (on the application of FA (Pakistan) (Appellant) v Secretary of State for the Home Department (Respondent)**. The letter said:

> *"The arguable point of law of general public importance is that the Court of Appeal's decision has the potential to undermine the principles in **HJ (Iran) & HT (Cameroon)** about the right to live*

*openly. There is a category of single 'quiet' Ahmadis who do not face persecution where the country guidance case of **MN**, as interpreted by the Court of Appeal in this case, does not make it sufficiently clear that the 'quiet' ones must be living in this way entirely voluntarily and not because of fear of the consequences of behaving otherwise".*

35. Mr Fripp said that the difficulty with both decisions was to decide what was prohibited and to compare that with what the appellant was doing. He submitted that prominence is not a requirement. What is important is that an Ahmadi is likely to be at risk for saying "I am Ahmadi and a Muslim".

36. He said repeatedly the judge relied on concepts such as preaching, proselytising, prominence but these were erroneous applications of **MN**.

37. Mr Fripp said the judge assessed the appellant's case by looking at the new letter from the AMA. He said that the judge had to acknowledge the relevancy by the Secretary of State of the fresh claim in line with what the Court of Appeal said in **MN** as they endorsed **Devaseelan**. He said that the judge did not refer to the **MN** criteria in his finding at paragraph 51. The judge at paragraph 51 had found that the appellant's various positions in the Ahmadi community in different areas of Pakistan did not prove that these roles were high profile or that they brought the appellant any adverse interest. He submitted that the findings at paragraph 58 did not address the appellant's identity as an Ahmadi.

38. Mr Fripp, said that t paragraphs 59 and 60 the judge did not set out what **MN** says is protected and there was no independent consideration short of preaching and facing direct fear by KN and terrorists. He said the appellant exercised his religion discreetly as in **MN;** it was unsuccessful. There was insufficient consideration to the concern raised by Lady Hale. Mr Fripp said he accepted that **MN** does not accept all Ahmadis are at risk but that they are likely to be at risk for basic expressions such as "I am Ahmadi" or say to the police that they have had problems because they are an Ahmadi. He said that the case of **FA** was filed by the Secretary of State for the Home Department in the Supreme Court. In paragraphs 101 to 130, the Tribunal in **MN** anticipated that an Ahmadi would be able to practise their religion openly in defiance of 295-C of the Penal Code. He said that there was no coherent finding on the **MN** guidance decision to resolve the **MN** question or what **MN** protects in this decision.

39. I was not persuaded by Mr Fripp's arguments. I accept the submission made by Mr Jarvis that it is important to separate the second judge's approach from the first judge's approach. The first judge rejected the appellant's appeal. Further onward appeals to the First-tier Tribunal and to the Upper Tribunal were refused. In other words, both tiers found that Judge McAll had not made an error of law in his decision. Consequently, this is not the forum to criticise Judge McAll's decision by claiming that the use of terminology was inconsistent with **MN**.

40. I find that it was the appellant himself who based his claim to asylum on his alleged high-profile roles in the Ahmadi community in Pakistan. The

letter from Mr K dated 3 February 2017 which the judge produced at paragraph 21 mentioned that the appellant was an active member of the Ahmadi community in Islamabad, regularly offering prayers at the Ahmadiyya mosque and preaching. The new letter from AMA dated 20 February 2017 was the first to mention that the appellant had a high profile in various cities in Pakistan. I further note that in the grounds of appeal lodged by Mr Fripp, in the background to the application he mentioned that one of the primary matters was that the appellant was at risk in Pakistan as an individual by reason of his profile as an Ahmadi. I therefore reject that the terminology used by the judges was inappropriate because they did not comply with **MN**. That terminology was used by the appellant to support his application and used by Counsel, Mr Fripp, to support the appellant's grounds of appeal. I find that the terminology used by the judges was not inconsistent with **MN**.

41. I note that in **MN** the Tribunal did not conclude that all Ahmadis are at risk because they are Ahmadis. In head note 2(ii) of **MN** the Tribunal held: *"It is, and has long been, possible in general for Ahmadis to practise their faith on a restricted basis either in private or in community with other Ahmadis, without infringing domestic Pakistani law."* The country guidance in **MN** was not saying that Ahmadis are not able to express their basis religious beliefs, functions or identity. It said that they may choose to quietly practise their religion as part of their natural form of expression.

42. I find that the judge considered the reliability of the appellant's claimed activities in Pakistan and the reliability of his activities in the UK. The judge assessed the appellant's personal expression of his religion within **MN.** I find that the judge's decision was entirely lawful.

43. The second judge assessed the impact of the new evidence, using the decision of the first judge as the basis and made his own findings about the new evidence. I find that these findings do not reflect the judge's misunderstanding of **MN**.

44. I find that **FA** changes nothing. It is a permission application by the Secretary of State to the Supreme Court.

45. Each case relies on its own merits. I find that significant parts of the appellant's evidence were not accepted. I find that the judge adopted the correct legal approach.

46. I find that the decision made by FtTJ Rhys-Davies does not disclose an error of law.

47. The judge's decision dismissing the appellant's appeal shall stand.

Notice of Decision

The appeal is dismissed

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 9 February 2018

Deputy Upper Tribunal Judge Eshun