Neutral Citation Number: [2019] EWCA Civ 302

Case No: C5/2015/3749

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Deputy Upper Tribunal Judge Hill QC
Appeal No. AA/08054/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2019

Before:

LORD JUSTICE IRWIN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE SINGH

- -

Between:

WA (PAKISTAN)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
-and-	
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES	**Intervener**

- -
- -

Raza Husain QC and Eric Fripp (instructed by **Luqmani Thompson & Partners**) for the **Appellant**
Isabel McArdle (instructed by **The Government Legal Department**) for the **Respondent**
Michael Fordham QC, Shane Sibbel and Gayatri Sarathy (instructed by **Baker McKenzie LLP**) for the **Intervener**

Hearing dates: 30 and 31 January 2019

- -

Approved Judgment

Lord Justice Irwin:

Introduction

1. The central issue in this case concerns the test for refugee status. The Appellant is an Ahmadi of Pakistani nationality. He has practised his religion while living in the United Kingdom. His asylum claim was rejected by the First-tier Tribunal ("F-tT"). He claimed that he wished to preach openly in Pakistan, which would make him liable to persecution. He was disbelieved in that claim, the F-tT concluding that he would not do so. The most important plank of his appeal is the submission that the F-tT failed to apply the law as laid down by the Supreme Court in *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596. The Tribunal failed to ask "why" the Appellant would avoid activity giving rise to the risk of persecution (the "why" question), an obligation laid on it in the judgment in *HJ (Iran)*. Although it failed in that way, the Appellant further submits that, paradoxically, the findings of the Tribunal in fact demonstrate that he would refrain from such expression of his Ahmadi faith through fear of persecution. Therefore, even if he would avoid persecution in that way, he was still entitled to asylum, since the law cannot "expect", meaning require, such restraint.

2. The Appellant further submits that the relevant country guidance decision, *MN and others (Ahmadis – country conditions – risk) Pakistan* CG [2012] UKUT 00389 (IAC) was wrong, and misleading as to the approach to the "why" question. It does not accurately reflect the decision in *HJ (Iran)*.

3. The Appellant's submissions were supported, orally and in writing, by the Intervener, the United Nations High Commissioner for Refugees.

4. The Respondent argues, in summary, as follows. The Appellant bore the burden of proof on his asylum claim, and the Respondent was entitled to meet the case advanced, which he did. The Appellant never claimed that he would behave in such a way as to avoid persecution: on the contrary, he expressly claimed that he would not do that, rather he would preach and proselytise. He was disbelieved. The question "why" he would repress or limit the expression of his faith in Pakistan never arose. The Appellant is not entitled to succeed on appeal by saying, in effect, "my case did not succeed in the first way, now I will try another way". Any duty on the Tribunal to inquire, in justice, into the basis of an asylum claim cannot stretch so far as to require exploration of an alternative claim contrary to the explicit factual case of an appellant.

5. The Respondent also argues that this basis of appeal was formulated or (re-formulated) far too late. The Appellant has sought leave to rely on "distilled", in fact amended, grounds. That should not be permitted.

6. The Respondent submits that, while the guidance in *MN* could be clearer, particularly in the headnote, the decision does in fact conform with the law as expounded in *HJ (Iran)*. The "why" test only arises in narrower circumstances than those advanced by the Appellant, and the case is a sufficient guide to its application.

The Facts

7. The Appellant is an Ahmadi from Pakistan, born on 3 May 1994. He came to the United Kingdom as a boy of 14, with his father, to attend the Ahmadiya Convention in London in 2008. On returning to Pakistan, the Appellant's father left him with a family friend in the UK. Accompanied by that friend, the Appellant claimed asylum in October 2008. That application was refused. However, since he was a child, he was granted discretionary leave to remain which expired on 2 October 2011.

8. On 15 September 2011, the Appellant made an application for further leave to remain. That and a subsequent application were both refused. On 25 September 2014, the Appellant was issued with a Decision to Remove. His name, nationality and date of birth were accepted. However, under the heading of religion, the Respondent did not accept that the Appellant was of the Ahmadi faith. Part of the refusal letter reads as follows:

> "It is not accepted that you are of the Ahmadi faith. I have taken into account that your passport indicates this as your faith, and that at AIR Q36 you indicate all your family are Orthodox Ahmadi. You have also shown some knowledge of the faith at AIR Q83. However, other discrepancies in your evidence undermine your links with the Ahmadi faith.
>
> It is not accepted that you have been propagating the Ahmadi faith (you have occasionally called it preaching) because you have been inconsistent over to whom you would propagate. You claim to have propagated to two of your friends, because they are "fair minded boys who liked to listen and reason with our belief" (AIR 84 and 85). However, you later claim to have propagated to "those students and friends who I knew were understanding persons and were not causing opposition. I would not propagate our beliefs to those who were our enemies because that would cause problems". Propagating to those who were understanding persons is quite distinct to having only told two friends, and this undermines your claim to have preached at all. Additionally, you indicate an understanding that propagating to "our enemies" might lead to adverse or unwanted consequences (AIR Q89 and 111). This level of understanding indicates an awareness that propagating would be a dangerous activity which you would understandably fear. Therefore it is concluded that you did not engage in it. Bearing in mind the risk associated with propagating the Ahmadi religion, it is highly unlikely you would have done so, even "jokingly" (AIR Q122). Further, you claim to have been propagating since some time around the age of 8 (AIR Q91). This is considered to be an attempt to exaggerate any claim to have propagated in Pakistan. It is implausible that a child of approximately 8 years old would have the necessary understanding of the subject matter."

9. The Appellant's appeal was dismissed in the F-tT by Judge Aujla, in a decision and reasons promulgated on 12 January 2015.

10. The Appellant had relied on a witness statement of 15 December 2014. In the course of the statement he claimed to have been an active Ahmadi as a child whilst in Pakistan and to have been physically ill-treated as a result. He also claimed that a First Information Report (or "FIR"), the initiating step in criminal proceedings, had been lodged against him in 2008 (when he was 14).

11. The statement made it clear that the practice of Ahmadi faith in Pakistan was restricted in the following terms:

> "18. … Ahmadis in Pakistan can go their mosques, places of worship but the Constitution prohibits them declaring their place of worship as mosque which is a Muslim gesture. Ahmadis in Pakistan cannot call Azan before offering a prayer. My problems with the Mullahs aggravated when I started calling for prayer in the mosque."

And his statement concluded as follows:

> "28. It is not possible for me to relocate to some other part of the country. I am a staunch religious man and my religious activities will attract the Mullahs of the KN in any other part of the country as it did in my native town. I cannot live without my faith. I cannot sever this aspect of my life from me. It is not possible for me to carry out these activities in Pakistan as I have done in the UK, without the fear of the draconian blasphemy laws.
>
> 29. My family in Pakistan has left the village and are staying at Rabwah at the moment. They moved to Rabwah about two years ago. My three brothers and one sister have moved to Germany. My sister is married to a German national whereas my brothers have claimed asylum. Two of my brothers have been granted refugee status in Germany. The asylum claim of one of my brother is pending.
>
> 30. In the UK, I am leading the life according to my faith. I am participating in the activities and religious functions as is required from me as an Ahmadi. I can openly call for prayer from which I was stopped in Pakistan. In Pakistan, I was leading a dual life. I could not preach or propagate which I believed. I have a fear of my life in Pakistan. I request the Secretary of State of grant me International Protection."

12. The Appellant amplified his case in oral evidence before the F-tT. He said his interest in religion had "gone up since the last hearing of his appeal in 2012. He could not live without his religion". He performed security duties at the mosque but held no official position. He then said, as the F-tT recorded:

> "He was engaged in preaching putting his faith. All Ahmadis in Pakistan were afraid as they were not allowed to call themselves Muslim. His family had now moved to Rabwah. If he went back

> to Pakistan he would preach his faith. He would carry on preaching even if it caused risk to his life."

13. In the submissions made on the Appellant's behalf to the F-tT it was emphasised that if he went back to Pakistan:

> "…he would preach his faith. He would preach in public, although it would get him into trouble. His main role in the UK had been to preach" (paragraph 34).

14. The judge set out his approach as follows:

> "37. There are basically four issues before me to determine. Firstly, whether or not the Appellant belongs to the Ahmadi faith as claimed. Secondly, whether I accept his account of his experiences in Pakistan before he came to the United Kingdom as credible. Thirdly, whether I find that he has truly been actively practising his faith since his arrival in this country. Lastly, and most importantly, if he has been actively practising his faith here, whether he would continue to do so 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."

15. Judge Aujla found that the Appellant did belong to the Ahmadi faith, as he had been born into the faith in Pakistan. However, he also found that the Appellant had "provided no credible evidence of any concrete and specific problems that he faced in Pakistan on account of his faith". Given the time which had elapsed since his departure from Pakistan, and the fact that his parents were in Pakistan and still in touch with him, the failure to provide such evidence "undermined his credibility" (paragraph 40). His claim to have lost contact with his parents between 2008 and 2012 was rejected, also undermining his credibility. He had given contradictory accounts about his problems in Pakistan and about the fact of his departure from Pakistan. The claim that an FIR had been issued was not accepted, again further undermining his credibility.

16. By reference to documents, photographs and evidence from others, Judge Aujla was "prepared to accept, on a lower standard of proof, that the Appellant was practising his Ahmadi faith in the United Kingdom" (paragraph 48).

17. Judge Aujla identified the question of the Appellant's continued practising of his faith upon return as the most important issue that he faced. In considering that, he took into account the guidance in *MN* and quoted the following paragraphs from the headnote to the judgment, as being of particular importance:

> "8. Ahmadis who are not able to show that they practised their faith at all in Pakistan or that they did so on anything other than the restricted basis described in paragraph 2(ii) above are in general unlikely to be able to show that their genuine intentions or wishes are to practise and manifest their faith openly on return, as described in paragraph 2(i) above.

> 9. A sur place claim by an Ahmadi based on post-arrival conversion or revival in belief and practice will require careful evidential analysis. This will probably include consideration of evidence of the head of the claimant's local United Kingdom Ahmadi Community and from the UK headquarters, the latter particularly in cases where there has been a conversion. Any adverse findings in the claimant's account as a whole may be relevant to the assessment of likely behaviour on return.
>
> 10. Whilst an Ahmadi who has been found to be not reasonably likely to engage or wish to engage in paragraph 2(i) behaviour is, in general, not at real risk on return to Pakistan, judicial fact-finders may in certain cases need to consider whether that person would nevertheless be reasonably likely to be targeted by non-state actors on return for religious persecution by reason of his/her prominent social and/or business profile."

18. Following the structured approach as outlined in *MN*, Judge Aujla found that the Appellant was genuinely an Ahmadi by faith, and then continued as follows:

> "52. Whilst I have found that the Appellant was an Ahmadi and had been practising his faith whilst in the United Kingdom, I remind myself of my adverse credibility findings against the Appellant as regards his claimed experiences in Pakistan before he came here. I also remind myself that the Appellant had submitted false documents in support of his claim in the form of FIRs and arrest warrant. **I also note that the letters issued by the AMA UK, whilst confirming the Appellant's faith, have not suggested that the Appellant would continue to practise his faith if returned to Pakistan in the manner that was likely to bring him into contact with the authorities or non-state actors and thereby expose him to a real risk of persecution or ill-treatment** (emphasis added).
>
> 53. The Appellant appeared to be an intelligent young man. Considering his most recent witness statement, he appeared to demonstrate familiarity with the laws of Pakistan which placed Ahmadis under restrictions regarding the practice of their faith. Those restrictions and prohibitions, as identified by the tribunal, 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. **Whilst I do not expect the Appellant to suppress his desire to practise his religion in Pakistan to avoid persecution and ill-treatment, I do not believe that he would be so naïve as to deliberately expose himself to a real risk** (emphasis added). Instead of just saying that he would practise his faith after return to Pakistan even if it exposed him to personal risk, the Appellant had to do more to persuade me about his intentions. The Appellant was involved in the AMA UK and yet there was no-one from that organisation or the Ahmadi community generally who could provide evidence in

> support to the Appellant's declaration that he would practise his faith even at the expense of personal harm to himself.
>
> 54. **I expect the Appellant to be pragmatic after his return to Pakistan. I do not accept, in the absence of any other evidence, that he would be so naïve and foolish to deliberately expose him to serious personal risk at the hands of the authorities in Pakistan or any non-state actors. I therefore do not find the Appellant's account credible when he stated that he would practise faith in Pakistan regardless of harm to himself** (emphasis added).
>
> …
>
> 56. Having considered the Appellant's account in the round, I find that the Appellant has not established that he will practise his faith after returning to Pakistan in the manner that could bring him to the adverse attention of the authorities or any non-state actors. I find that the Appellant has not established, on the lower standard of proof, that he had a well founded fear of persecution for a 1951 convention reason if returned to Pakistan. I therefore dismiss the appeal on asylum grounds.
>
> 57. For the same reasons, I find that the Appellant would not be at a real risk of ill-treatment if he returned to Pakistan. The appeal is therefore also dismissed on article 3 grounds."

19. Following the grant of permission, the case came before the Upper Tribunal, who dismissed the appeal on 20 August 2015. Deputy UTJ Hill QC noted that the permission to appeal had been granted on a single ground relating to the F-tT's application of the guidance in *HJ (Iran)*. In the course of the application for permission, counsel then representing the Appellant had conceded that the F-tT "could lawfully have reached the conclusion which he did in the determination" but that in proceeding, Judge Aujla had not properly dealt with the "sequential approach" prescribed in *MN* (DUTJ determination, paragraph 9). Taking the fourth question from *MN*, namely whether the Appellant would practise 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", counsel criticised the judge's formulation of that question:

> "12. … suggesting it disregarded the import of the judgment of the Supreme Court in *HJ (Iran)* (above) to the effect that persecution (in that case on the ground of sexual orientation) still exists even if the person persecuted can eliminate the harm by taking avoiding action. It is clear from the context that the Judge was doing nothing more in this paragraph than setting out the broad scheme which he would adopt in disposing of the appeal and guiding the reader as to the ordering of his judgment. It did not purport to be a definitive and comprehensive statement of every nuance of the issue to be addressed. It was merely a short hand identification of the points he was coming to, and in my

> view a perfectly adequate one. I consider Mr Palmer's criticism of this paragraph to be misplaced."

20. The DUTJ amplified the reasons for his rejection of the criticism. Reiterating that the F-tT had identified the fourth issue as the most important, DUTJ Hill QC quoted the full headnote from *MN*. He noted the Appellant's case that he claimed he would "practise his faith even at the expense of personal harm to himself" and he noted the F-tT's rejection of that claim and the judge's expectation that "the Appellant would be pragmatic" on his return.

21. The UT rejected the submission that the F-tT should have accepted the Appellant would as a matter of fact "practise his faith … in a manner which would expose him to risk" in Pakistan. It was an error to determine that the Appellant "would not be put at risk because he would curtail his religious activities to keep within the law thereby compromising his religious identity". In seeking to make good that submission, reliance was placed on both *HJ (Iran)* and *MN and Others* (paragraph 23).

22. DUTJ Hill QC met this submission as follows:

> "24. Despite the able argument of Mr Palmer, I cannot accept this submission as it proceeds on a misreading of both the Judge's determination and of the guideline authority of *MN and others*. The Judge positively rejected the Appellant's assertions of intention as not being credible. He was perfectly entitled to do so.
>
> 25. As the headnote in *MN and others* makes clear there are two types or strains of the Ahmadi faith: open practice (type 2(i) activities) which brings the individual into conflict with Pakistan's domestic law and restricted practice (type 2(ii)) which does not. The headnote emphasises that determining which type of practice applies in any given case is a fact-specific exercise and an evidential burden rests on an Appellant.
>
> > *3.(i) If an Ahmadi is able to demonstrate that it is of particular importance to his religious identity to practise and manifest his faith openly in Pakistan in defiance of the restrictions in the Pakistan Penal Code (PPC) under sections 298B and 298C, by engaging in behaviour described in paragraph 2(i) above, he or she is likely to be in need of protection, in the light of the serious nature of the sanctions that potentially apply as well as the risk of prosecution under section 295C for blasphemy.*"

23. The UT went on to conclude that there was no error of law:

> "28. … The Judge turned his mind to the Appellant's stated intention and disbelieved him. This was a factual finding which was open to the Judge on the evidence. It therefore follows that 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 of the Judge disbelieving the Appellant's stated intention in the first place."

Procedural History and the Application to Amend the Grounds

24. The case has had an untidy history following the decision of the Upper Tribunal. Previous counsel settled grounds to the Tribunal in September 2015. The grounds criticised the F-tT's application of the guidance in *MN and Others*, but in different terms. It was then said that it was:

> "…crucial to determine whether he was to demonstrate that it is of particular importance to his religious identity to practise and manifest his faith openly in Pakistan in defiance of the restrictions … and whether he would not do so in order to avoid persecution."

Grounds to the Court were settled by junior counsel in this case on 12 November 2015.

25. Treacy LJ refused permission on those grounds on 21 March 2016.

26. On a renewal application before Ryder LJ in November 2016, junior counsel now representing the Appellant obtained permission to appeal but on terms. Ryder LJ noted that permission to appeal to the Supreme Court had been granted in *FA (Pakistan) v SSHD* (UKSC/2016/0167) on appeal from the decision of this Court in *FA (Pakistan) v SSHD* [2016] EWCA Civ 763, and the order recited the reason for such permission in terms:

> "The arguable point of law of general public importance raised is that the Court of Appeal's decision has the potential to undermine the principles in [*HJ (Iran) and HT (Cameroon) v SSHD* [2010] UKSC 31; [2011] 1 AC 596] and [*RT (Zimbabwe) and ors* [2012] UKSC 38; [2013] 1 AC 152] about the right to live openly. There is a category of single 'quiet' Ahmadis who do not face persecution but the country guidance case of [*MN and others (Ahmadis – country conditions – risk) Pakistan CG 2012] UKUT* 389 (1AC)], 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."

27. The order further provided that the appeal would not be listed until after the decision of the Supreme Court in *FA (Pakistan).*

28. It is noteworthy that the grounds upon which permission was sought and obtained did not criticise the correctness of the guidance in *MN and Ors* and did not identify the "why?" question which has been central to the Appellant's arguments before us. The grounds read:

> "a. The UT erred in dismissing error of law by the FTTJ, in failing to assess the case at first instance against the range of conduct identified as protected in *MN and others (Ahmadis –*

> *country conditions – risk) Pakistan CG* [2012] UKUT 389 (IAC);
>
> b. The UT should have intervened in the decision of the FTTJ given the FTTJ's failure to address a material fact upon which argument was based, namely whether the Applicant's religious identity was of sufficient importance to him that the requirement to suppress its expression in Pakistan would place the Applicant into a situation of persecution, so that he was entitled to protection in the United Kingdom as a refugee."

29. On 31 January 2018, the Supreme Court decided that the appeal in *FA (Pakistan)* should not proceed, given that the Appellant had voluntarily returned to Pakistan.

30. Thereafter, the instant appeal was restored. On 19 October 2018, a skeleton argument was served on behalf of the Appellant which significantly recast the focus of the case, advancing the submissions I have already summarised. The skeleton argument asserted that the appeal was brought on "essentially two grounds" and the submissions appended the document described as "Distilled Grounds of Appeal". Those grounds read:

> "1. The FTT's decision was inconsistent with *HJ (Iran)* [2011] 1 AC 596, and *RT (Zimbabwe)* [2013] 1 AC 152. In particular, the FTT erred in failing to ask: *why* the Appellant would desist from practicing his faith openly? If the answer was so as (in part) to avoid well-founded fear of persecution that would otherwise ensue, the Appellant fell to be recognised as a refugee, and that was indeed the answer on the FTT's own approach. The Refugee Convention protects the Appellant's '*right to live freely and openly*' as an Ahmadi Muslim in Pakistan '*without fear of persecution*' (Grounds, paras 3b, 19, 22 [A/10, 17, 18], *HJ (Iran)*). See Skeleton, Section 5 at paras 47-52.
>
> 2. In the alternative (and if, which the Appellant denies, *MN* sets out the correct legal approach), the FTT failed to address adequately or at all the question there identified, namely whether it was now of particular importance to the Appellant to practice and manifest his Ahmadi Muslim faith openly in Pakistan. This question was important because *MN* provides that if the answer was in the affirmative, the Appellant '*is likely to be in need of protection*' and it was '*no answer to expect an Ahmadi ... to avoid engaging in [such behaviour] to avoid a risk of persecution'* (Grounds, paras 3a, 12-18 [A/10, 13-17], *MN and others,* headnote paras 2-3, 5-6, paras 119-120, 122-123). See Skeleton, Section 7 at paras 72-75."

31. Ms McArdle for the Respondent objected to the change of position, where permission had been given on different grounds, and where no application to amend the grounds had been made. That objection having been made in the Respondent's skeleton argument of 28 October 2018 to the document entitled "Distillation of Appellant's Grounds of Appeal", an application to amend/distil was subsequently made. That application is before us.

32. It is unsatisfactory that the critical point in a major appeal was not crystallised in amended draft grounds once a decision was taken that such a change was necessary. It is unfortunate also that the change was mis-described as a "distillation" of the previous grounds advanced, which it is not. As Hickinbottom LJ observed in *Amanda Hickey v The Secretary of State for Work and Pensions* [2018] EWCA Civ 851:

> "73. Whilst it is important that this court – like all other courts – is not a slave to form, the Civil Procedure Rules set out procedural requirements, and not mere aspirations. They do so for good reason. The time of both parties and the court can be wasted if issues are not identified clearly and succinctly in the grounds of appeal, supported by relevant circumstances giving rise to the appeal and the appellant's arguments or submissions as set out in a skeleton argument. Without such proper focus, it is impossible for appeal courts to deal with their prodigious workloads efficiently and effectively."

Hickinbottom LJ amplified his remarks in paragraphs 74 and 75 and this Court reinforced their importance in *Harverye v Secretary of State for the Home Department* [2018] EWCA Civ 2848, see paragraphs 38, 52-59.

33. Even in asylum claims, adherence to the rules of the court and procedural rigour are necessary.

34. Ms McArdle objects to the amendment of the grounds, essentially on two bases. Firstly, she says the amended grounds do not arise on the facts of the case. In that respect her argument is closely bound up with the substance of the appeal. Secondly, she submits that she is disadvantaged by the late amendment. I have some sympathy with the second argument, given the muddled process I have described. In the end, however, it seems to me that is an insufficient basis for refusing the amendment. The central points the Appellant wishes to argue were those in *FA (Pakistan)*. The connection between that case and the instant appeal has long been clear. Moreover, the principal arguments are of law and the Secretary of State has been on full notice of the way the matter was to be argued for some months. As Ryder LJ acknowledged, and as is evident from the grant of permission to appeal to the Supreme Court in *FA (Pakistan)*, the central point here is of considerable importance. Were it otherwise, I would be inclined to refuse permission to amend. As it is, it seems to me the balance falls the other way and I would permit the amendment. That should not be understood as in any way lessening the force of the remarks of Hickinbottom LJ quoted above.

The Fundamental Question: *HJ (Iran),* The *MN* Guidance and the "Why?" Question

35. In *HJ (Iran)*, the Supreme Court was concerned with homosexual men who, it was said by the Secretary of State, would avoid persecution if returned to their countries of origin by living discreetly. That argument had succeeded before the relevant tribunals and the Court of Appeal. The issue and its conclusion before the Supreme Court were stated with characteristic clarity by Lord Rodger in his leading judgment in the following terms:

> "40. A gay man applies for asylum in this country. The Secretary of State is satisfied that, if he returns to his country of nationality

> and lives openly as a homosexual, the applicant will face a real and continuing prospect of being beaten up, or flogged, or worse. But the Secretary of State is also satisfied that, if he returns, then, because of these dangers of living openly, he will actually carry on any homosexual relationships "discreetly" and so not come to the notice of any thugs or of the authorities. Is the applicant a "refugee" for purposes of the United Nations Convention relating to the Status of Refugees 1951 ("the Convention")? The answer is Yes."

36. In paragraph 57, Lord Rodger distinguished the case before him from that of "an applicant who could take steps to avoid persecution on his return, but who would not do so". That was, of course, the kind of applicant the Appellant before us claimed to be, but was disbelieved.

37. In paragraph 59, Lord Rodger observed that the Applicant, who was not:

> "…minded to swell the ranks of gay martyrs, when faced with the real threat of persecution, [he] would have no real choice: he would be compelled to act discreetly. Therefore, the question is whether an applicant is to be regarded as a refugee for the purposes of the Convention in circumstances where the reality is that, if he were returned to his country of nationality, he would have to act discreetly in order to avoid persecution."

38. It would be obvious from the passages already quoted that in many cases a tribunal will have to distinguish the martyr from the discreet, but as Lord Rodger observed in the ensuing paragraphs, the picture will often be more complicated. Lord Rodger summarises those potential complications, or some of them, in paragraph 61. In paragraph 62, Lord Rodger emphasises that if the need to avoid the threat of persecution "would be a material reason, among a number of complimentary reasons" then that is sufficient.

39. Between paragraph 66 and 81, Lord Rodger analysed a broad range of authority, domestic and from other common law jurisdictions, much of it emphasising the principles he had already enunciated and also pointing to the fact that a relevant tribunal must therefore enquire into the reason why an applicant would live "discreetly". The culmination of his consideration of the necessary approach by tribunals is set down in paragraphs 82 and 83:

> "*The approach to be followed by tribunals*
>
> 82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality. If so, the tribunal must go on to consider what the individual applicant would do if he were

returned to that country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly". If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so. If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay. If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.

83. The Secretary of State should, of course, apply the same approach when considering applications of this type. Although I have, for the most part, concentrated on the position of gay men, the Secretary of State and tribunals should approach applications concerning lesbian women in the same way."

40. Lords Walker, Collins and Dyson agreed with the judgment of Lord Rodger. Lord Hope did not do so explicitly but on the issue critical for this appeal he expressed himself in terms which, it seems to me, cannot be distinguished:

"35. …(d) The next stage, if it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is

> well founded. (e) This is the final and conclusive question: does he have a well-founded fear that he will be persecuted? If he has, the causative condition that Lord Bingham referred to in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, para 5 will have been established. The applicant will be entitled to asylum."

41. In the course of his eloquent submissions on behalf of the Intervener, Mr Fordham QC described the gay man living discreetly in Cameroon, or the practising Ahmadi living discreetly in Pakistan (always providing they lived in that way materially through fear of persecution): in a pungent phrase he called them "refugees who are not in harm's way". I acknowledge the memorable phrase, although it seems to me one cannot become a refugee without flight. However, the important point is that those in that position would have a good claim for asylum if they chose to exercise it.

42. In my view it is just as clear from the decision in *HJ (Iran)* that where a case gives rise to the question whether someone will live "discreetly" and thus avoid persecution, then the question why they will do so must be considered.

43. With the greatest respect to the eloquent arguments advanced on behalf of the Appellant and, to some degree at least, on behalf of the Intervener, much of what they had to say simply went to emphasise or support the law as it is set down in *HJ (Iran)*. I hope I will be forgiven for not engaging in what Lord Judge has sometimes described as an "anxious parade of knowledge" to reinforce the points so clearly stated by Lord Rodger.

44. The case of *RT (Zimbabwe) v SSHD* [2012] UKSC 38, [2013] 1 AC 152, concerned political persecution in Zimbabwe. The Asylum and Immigration Tribunal had accepted that those who could not demonstrate positive support for Zanu (PF) or alignment with the regime in Zimbabwe would be at risk of persecution but the appeals were dismissed on the basis that the Appellants held no political beliefs and would, if necessary, be able to express or demonstrate loyalty to the regime which they did not genuinely feel, and by such means avoid being subjected to ill-treatment on return to Zimbabwe. The leading judgment, with which all other Justices agreed, was given by Lord Dyson. He described the case as "a sequel to the decision" in *HJ (Iran)*: see paragraph 1. Lord Dyson accepted the analysis of Mr Fordham QC, then as now appearing for the UNHCR as intervener, as to the principal reasons for the decision in *HJ (Iran)*: see paragraph 18. The first principal issue in the case was:

> "22. …whether the *HJ (Iran)* principle can apply to an individual who has no political beliefs and who is obliged to pretend to support a political regime in order to avoid the persecution that he would suffer if his political neutrality were disclosed. Is the position of such a person analogous to that of a homosexual who is obliged to live a "discreet" life in order to avoid the persecution that he would suffer if he revealed his sexual orientation?"

45. Lord Dyson acknowledged that there are "no hierarchies of protection amongst the Convention reasons for persecution" (see paragraph 25) and at paragraph 28 stated:

> "In the context of religious belief, the United Nations High Commissioner for Refugees has said (in my view, rightly):
>
> > "*Applying the same standard as for other Convention grounds*, religious 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": *Guidelines on International Protection: Religion-Based Refugee Claims under article 1A(2) of the 1951 Convention and/or Protocol relating to the Status of Refugees* (2004) para 13 (emphasis added)."

46. At paragraph 41, Lord Dyson analysed the submissions then made on behalf of the Secretary of State to the effect that (and I paraphrase) it cannot amount to persecution to enforce false expressions of support for the regime, on those who are indifferent to the political matters concerned. Lord Dyson rejected that distinction, stating that "A focus on how important the right not to hold a political or religious belief is to the applicant is wrong in principle" (paragraph 42), and at paragraph 45 he stated:

> "45. There is no support in any of the human rights jurisprudence for a distinction between the conscientious non-believer and the indifferent non-believer, any more than there is support for a distinction between the zealous believer and the marginally committed believer. All are equally entitled to human rights protection and to protection against persecution under the Convention. None of them forfeits these rights because he will feel compelled to lie in order to avoid persecution."

47. Mr Husain QC for the Appellant relies on the decision in *RT* as applying directly to Ahmadis in Pakistan. Ms McArdle for the Secretary of State did not dissent from that in principle. Some of her submissions sought to maintain the distinction between "core" beliefs and rights, and "important" incursions and those which are not important. It may be that Ms McArdle was inhibited in developing such submissions in this particular case, given that the Respondent's case here is that none of this arises on the facts. For myself, I would accept that there can be restrictions on the expression of political or religious opinion which fall well short of persecution. An example would be public-order-based prohibitions, or expressions of opinion which may lead to public violence. However, that does not appear to be in question in this appeal. Broadly speaking, I accept the submissions of Mr Husain as to the implications of *RT (Zimbabwe)* for Ahmadis in Pakistan. If enforced false expressions of political enthusiasm for Zanu (PF), engendered by potential violence, represent persecution even in relation to the politically indifferent, then repression of religious practice by the practice or threat of persecution must logically give rise to a valid claim for asylum, where the individual would otherwise engage in the public practice of his Ahmadi faith. That must be so, even where he or she is a moderate adherent to the faith, rather than a zealot or would-be martyr. Of course, if the individual is indifferent to the public expression of faith, then it is hard to see how the threat of persecution could be shown to have a material effect on his religious practice. These considerations reinforce the need for enquiry when the question arises at all: the need to explore the "why" question.

48. Both Mr Husain and Mr Fordham pick up on the passage in paragraph 50 in the decision of *RT (Zimbabwe)*, echoing the remarks of Lord Dyson in paragraphs 114 and 115 of *HJ (Iran)*, to the effect that it may be helpful to consider the proposed activity of the individual in the exercise of his sexuality or religion (as the case may be), in deciding "whether or not the prohibition of [the activity] amounted to persecution". In my judgment their submission is correct. Consideration of the proposed activity can help establish whether there is persecution, but the decision cannot turn on the degree to which the individual concerned is prepared to tolerate prohibition of activity he or she would otherwise undertake. Apart from anything else, what the individual will tolerate will often only partly depend on the degree of intrusion. The extent of intrusion will likely be balanced by the individual against his or her capacity to relocate, resources, educational potential, commitment to family, ability to adjust, state of health and so forth.

49. It seems to me these remarks are consistent with the principles enunciated by the CJEU in *XYZ* (C-199/12, C-200/12 and C-201/12) [2014] 1 QB 1111.

50. With those conclusions in mind, I turn to *MN*.

Consideration of *MN (Ahmadis) Pakistan CG*

51. In paragraph 17 above I have set out the part of the headnote in *MN (Ahmadis)* relied on by Judge Aujla. The first step stipulated by the guidance case is that the decision-maker must ask whether the Claimant is genuinely an Ahmadi, a point no longer in issue in this case. For convenience, I will set out the ensuing steps in the guidance laid down by the Upper Tribunal, including those paragraphs cited by Judge Aujla:

> "6. The next step (2) involves an enquiry into the claimant's intentions or wishes as to his or her faith, if returned to Pakistan. This is relevant because of the need to establish whether it is of particular importance to the religious identity of the Ahmadi concerned to engage in paragraph 2(i) behaviour. The burden is on the claimant to demonstrate that any intention or wish to practise and manifest aspects of the faith openly that are not permitted by the Pakistan Penal Code (PPC) is genuinely held and of particular importance to the claimant to preserve his or her religious identity. The decision maker needs to evaluate all the evidence. Behaviour since arrival in the UK may also be relevant. If the claimant discharges this burden he is likely to be in need of protection.
>
> 7. The option of internal relocation, previously considered to be available in Rabwah, is not in general reasonably open to a claimant who genuinely wishes to engage in paragraph 2(i) behaviour, in the light of the nationwide effect in Pakistan of the anti-Ahmadi legislation.
>
> 8. Ahmadis who are not able to show that they practised their faith at all in Pakistan or that they did so on anything other than the restricted basis described in paragraph 2(ii) above are in general unlikely to be able to show that their genuine intentions

> or wishes are to practise and manifest their faith openly on return, as described in paragraph 2(i) above.
>
> 9. A sur place claim by an Ahmadi based on post-arrival conversion or revival in belief and practice will require careful evidential analysis. This will probably include consideration of evidence of the head of the claimant's local United Kingdom Ahmadi Community and from the UK headquarters, the latter particularly in cases where there has been a conversion. Any adverse findings in the claimant's account as a whole may be relevant to the assessment of likely behaviour on return.
>
> 10. Whilst an Ahmadi who has been found to be not reasonably likely to engage or wish to engage in paragraph 2(i) behaviour is, in general, not at real risk on return to Pakistan, judicial fact-finders may in certain cases need to consider whether that person would nevertheless be reasonably likely to be targeted by non-state actors on return for religious persecution by reason of his/her prominent social and/or business profile."

52. As the content of paragraphs 8 and 10 quoted above makes clear, the headnote in *MN* does not direct the decision-maker to consider "why" the Ahmadi in question did not, or will not, practise their faith in Pakistan "other than on a restricted basis". Decision-makers who focus on the headnote in the case will certainly not be stimulated to address the "why" question.

53. In the section of the judgment under the sub heading "Previous Country Guidance, Relevant Case Law and Our General Conclusions" from paragraphs 73 to 99, the Upper Tribunal reviewed the relevant previous authority, including *HJ (Iran)*, *RT (Zimbabwe)*, the previous guidance cases of *MJ and ZM (Ahmadis – risk) Pakistan CG* [2008] UKAIT 0033, *MT (Ahmadi – HJ (Iran)) Pakistan* [2011] UKUT 002077 (IAC), the decision of the Grand Chamber of the CJEU in *Federal Republic of Germany v Y* (C-71/11) and *Z* (C-99/11) and they explicitly considered Article 10(1) of the Charter and Article 9(1) of the Human Rights Convention. The Upper Tribunal noted the conclusion of *MT (Ahmadi – HJ (Iran)) Pakistan*, where the "why" question was stated clearly:

> "Where it is found that an Ahmadi will be 'discreet' on return the reasons for such discretion need to be considered in the light of *HJ (Iran)*." (see paragraph 74)

54. The Tribunal also quoted the critical passages from the judgment of Lord Hope in *HJ (Iran)* and paragraph 82 from the judgment of Lord Rodger in *HJ (Iran)*, including the passage requiring attention to the "why" question.

55. At paragraph 100, the Upper Tribunal sought to draw the threads together from the authority quoted:

> "100. We draw the following principles from the various authorities we have referred to.

a. For interference with the right to the freedom of religion guaranteed by Art 10(1) of the Charter and Art 9(1) of the Human Rights Convention to constitute an act of persecution within the meaning of Art 2(d) of the Directive, there must be a significant effect on the person concerned.

b. Acts which interfere with the right to the freedom of religion, if not of the gravity equivalent to the protected human rights from which there can be no derogation under Art 15(2) of the Human Rights Convention, will not constitute persecution within the meaning of Art 9(1) of the Directive and the Refugee Convention.

c. Limitations on the exercise of the Freedom of Religion must be provided for by law and respect the essence of the rights and freedoms recognised by the Charter. They must be proportionate and made only if necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. (Art 52 of the Charter)

d. There is no basis for distinguishing interference with core aspects from interference with marginal areas of the right to freedom of religion. This is because of the broad definition of religion in Art 10(1)(b) of the Directive.

e. Nevertheless it is only serious violation of the right to freedom of religion that will give rise to persecution or serious harm or ill-treatment and that will be determined by the nature of the repression on the individual concerned and its consequences with reference to the severity of the measures and sanctions likely to be adopted.

f. If it is reasonably thought that an individual will engage in religious practices (which may include public manifestations of that religion) or would wish to do so because of the particular importance to the person concerned in order to preserve his religious identity, the fact that an individual could avoid a risk by abstaining from certain religious practices which will expose him to a real risk of persecution is irrelevant."

It is this statement of principle which formed the foundation of the headnote.

56. I accept the submission from Mr Husain, supported by the Intervener, that this statement of principle also omits the obligation to ask the "why" question.

57. There is no issue but that Ahmadis in Pakistan represent an oppressed religious minority, and the Upper Tribunal expressly recognised that in paragraph 101 of the judgment. In that paragraph and the ensuing two paragraphs there is ample evidence of the degree of difficulty faced by this community and in the face of submissions that the risks were lower than suggested, the Upper Tribunal gave a clear rejection of that proposition:

> "104. In the context of the number of incidents recorded in the past 24 years, it may be thought that the risk to Ahmadis is not as great as has been urged in these appeals. We accept however the explanation in the submissions from the appellants' representatives that this is in part due to the way in which Ahmadis in general deal with their difficulties in Pakistan by self denial, civil obedience and by keeping a low profile. Although some of the incidents reported on *www.thepersecution.org* and its sister site might suggest otherwise, on the whole, it appears to have been a successful approach. With this moderation of the ways in which Ahmadis express and practise their faith including its propagation, we accept that there have been fewer prosecutions and complaints made than might otherwise have been the case. We accept the evidence of Dr W about the increasing Islamisation in Pakistan which undoubtedly would heighten the risks for Ahmadis who chose to flout the law and we accept that the need to keep a low profile is likely to have increased."

58. In a further important passage, the Upper Tribunal went on in effect to address the "why" question in the following terms:

> "107. These arguably positive matters however do not provide an answer to important questions. The way in which the Ahmadi faith may be practised emblematized and preached in Pakistan is constrained by the criminal law with potentially severe sanctions if breached. Is it reasonable to expect Ahmadis to show restraint and not freely manifest their faith in areas that are of particular importance to the individual concerned through obedience to the anti Ahmadi legislation to avoid prosecution? It is established law that this is neither permissible (*HJ (Iran))* if the purpose is to avoid persecution nor is it relevant: (*Germany v Y & Z),* if there is the possibility open to the claimant to avoid the risk by abstention. Is it is reasonable to expect Ahmadis to exercise similar restraint and show appeasement in order to avoid the potential for aggressive hostility from others who form the majority? The answer must be the same. Does the existence of such legislation constitute a fundamental violation of their freedom of religion such that its very existence is persecutory in the light of the consequences if it is breached? On this aspect we consider that it is not simply the existence of the legislation but the severity of consequences of the sanctions if and when applied that dictates the answer. Can the aspects of the faith that might be seen objectively as peripheral to the right of freedom of religion mean that any restrictions no matter how discriminatory are not undermining the core? Such an approach would be incorrect and irrelevant: (*RT (Zimbabwe*) and (*Germany v Y and Z*)."

59. However, the thrust of paragraph 104 is somewhat blurred by the way matters are put in paragraphs 115 and 116:

> "115. We earlier concluded that the legislation restricting Ahmadis is a disproportionate measure that furthermore undermines the fundamental right to religious expression. It has been in place for some time but over time the use of it by hostile non-State actors has made its effects pernicious. It is impermissible to expect Ahmadis who regard themselves as Muslims to comply with such legislation that undermines their fundamental identity and which, if flouted, runs the risk of persecutory ill-treatment. Furthermore, an active Ahmadi cannot be expected to be discreet about the practice and manifestation of his faith including its propagation if the decision to do so is to avoid coming to the attention of the authorities or non-state actors who are opposed to the fundamental tenets of the Ahmadi faith.
>
> 116. If an Ahmadi therefore, in the genuine pursuit of his faith, is unable to practise that faith openly in ways that are of particular importance to him and his identity as an Ahmadi because of the restrictions placed on him by statute in Pakistan, he is in need of protection in the light of the evidence that defiance would lead to a real risk of an unfair FIR under sections 298B or C or 295C of the Pakistan Penal Code leading to detention and the likelihood of an unfair trial at first instance with a risk of prolonged imprisonment until matters can be resolved on appeal. The risks stem from the sanctions in the legislation itself but also from non-state actors who use the law to pursue Ahmadis in a hostile way. Together, these factors are capable of amounting to a state-approved or state-condoned act of persecution within the meaning of the Qualification Directive and under the Refugee Convention."

The phrase in paragraph 116, suggesting that the open practice of faith must be of "particular importance" to the Ahmadi in question, tends to divert from a clear consideration as to why the asylum-seeker would avoid behaviour likely to be visited by persecution.

60. In my judgment, the appropriate guidance for a decision-maker can be summarised as follows:

    i) Is the Claimant genuinely an Ahmadi? In answering that question the guidance set out in paragraph 5 of the headnote in *MN* is well expressed.

    ii) The next step involves an inquiry into the Claimant's behaviour if he or she is returned to Pakistan. Will he or she actually behave in such a way as to attract persecution? In answering that question, the decision-maker will again consider all the evidence and will, where appropriate, expressly consider whether the behaviour claimed by the asylum-seeker is genuinely an expression of their

religious belief and is an authentic account of the way they will behave if returned.

iii) If the decision-maker's conclusion is that the Claimant, if returned to Pakistan, will avoid behaviour which would attract persecution, then the decision-maker must ask the question why that would be so. Many possibilities arise. The individual may genuinely wish to live quietly, and would do so whether or not repression existed in relation to the expression of his or her Ahmadi faith. The individual may have mixed motives for such behaviour. If such a quiet expression or manifestation of genuine Ahmadi belief is merely the result of established cultural norms or social pressures, then it is unlikely there will be a basis for asylum. However, if a material reason (and not necessarily the only reason) for such behaviour will be to avoid persecution, then it is likely that the Claimant will have a valid claim for asylum. There is no requirement that public expression of Ahmadi religious faith, of a kind which is likely to attract persecution, should be of "particular importance" to the Claimant. Such a requirement is inconsistent with the test as laid down in *HJ (Iran)*.

61. To that extent, the guidance given in the body of *MN (Ahmadis) Pakistan CG* and in the headnote is misleading and should not be followed.

The Application to this Case

62. In my view, Judge Aujla, sitting in the First-tier Tribunal on this case, made a conscientious and careful attempt to apply the guidance in *MN (Ahmadis) Pakistan CG*. However, for the reasons given above, that guidance was flawed.

63. As I have already indicated, the submission made by the Respondent that the Secretary of State is not required to meet a case inconsistent with that advanced by an Appellant is both correct and well-expressed by Ms McArdle. She argues that it is for an asylum claimant to establish the grounds for their claim. The state concerned cannot be expected to discover the ground by itself: see *FG v Sweden* (Appn. 43611/11) (2016) paragraph 127. A Tribunal is not required to address unformulated alternatives on its own initiative, as the Australian Court found in *Taylor v Minister for Immigration and Multi-Cultural Affairs* [1999] FCA 661. However, this does not represent an answer in this case. The reason is that, although Judge Aujla rejected the Appellant's explicit case, he went on to base his decision on inferred conclusions as to the Appellant's behaviour if returned, which may well be in conflict with the approach which should have been laid down in the guidance and is derived from the law as expounded in *HJ (Iran)*. In paragraph 18 of this judgment, I have quoted the relevant paragraphs from the First-tier Tribunal judgment and added emphasis to the passages which at least call into question a potentially different outcome for this Appellant. I therefore conclude that the decision below should be quashed and the matter remitted for re-hearing with the guidance in this judgment as expressing the law laid down in *HJ (Iran)* in mind. I should stress that I do not indicate what the outcome of that re-hearing should be and there is no necessary inference as to the proper outcome to be drawn from this judgment. That will be a matter entirely for the F-tT on remittal.

Lord Justice Peter Jackson

64. I agree with both judgments.

Lord Justice Singh

65. I agree that this appeal should be allowed for the reasons given by Irwin LJ. I would like to add a few words of my own in view of the importance of the issues.

66. In my view, the F-tT fell into error as a matter of law because it failed to ask the "why" question. The critical part of the reasoning of Judge Aujla is to be found at paragraphs 52-54, which have been quoted by Irwin LJ at paragraph 18 above.

67. On behalf of the Secretary of State Ms McArdle has sought to defend the decision of the F-tT primarily on the basis that it was not required to address a question which did not arise on the factual case as advanced by the Appellant himself at that stage. In my view, this argument is misconceived. This was also in essence the basis for why the Upper Tribunal dismissed the appeal from the F-tT. The reason why this approach is misconceived is that the why question arose precisely because of the finding of fact which the F-tT had made, that the Appellant would not practise his faith openly in Pakistan and, in particular, would not seek to proselytise. Merely to reject the Appellant's factual case that he would do so did not absolve the F-tT from its duty to address the "why" question. Far from it. It was precisely on the factual finding which the F-tT itself made that the why question arose.

68. For my part I see force in Mr Husain QC's further submission that, in truth, the reasoning of Judge Aujla is based on the error which was identified by the Supreme Court in *HJ (Iran)*. In my view, the reasoning of Judge Aujla at paragraphs 53-54 comes perilously close to the proposition that in circumstances where persecution will be effective in suppressing the open practice of a person's religion, it is not to be regarded as being persecution at all. This appears to be why Judge Aujla referred to the fact that the Appellant would not be "so naïve as to deliberately expose himself to a real risk." He also said that the Appellant would be "pragmatic" and that he would not be "so naïve and foolish to deliberately expose himself to serious personal risk at the hands of the authorities in Pakistan or any non-state actors." However, since this case is now going to be remitted to the F-tT for proper consideration on a correct understanding of the law, it is unnecessary to say any more.