Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02073/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport **Determination Sent**
On 4 July 2013

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

C N A K

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Webb of Duncan Moghal Solicitors & Advocates
For the Respondent: Mr K Hibbs, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. The appellant is a citizen of Pakistan who was born on 1 December 1948. He arrived in the UK on 24 November 2012 and claimed asylum on arrival. He claimed to fear persecution because of his Ahmadi faith if returned to Pakistan. On 21 February 2013, the Secretary of State refused the appellant's claim for asylum and refused him leave to enter. The appellant appealed that decision to the First-tier Tribunal. In a determination dated 7 April 2013, Judge R A Powell dismissed the appellant's appeal. On 30 April 2013, the First-tier Tribunal (Judge

Nightingale) granted the appellant permission to appeal to the Upper Tribunal. Thus, the appeal came before me.

The First-tier Tribunal's Decision

3. Judge Powell accepted some of the appellant's account but not all. He accepted that the appellant was Ahmadi. Further, he accepted that the appellant had been attacked on two occasions in 2011. In relation to those attacks the judge found as follows at para 30 of his determination:

> "30. It is undoubtedly the case that members of the ordinary Ahmadi community face harassment and discrimination in Pakistan. It would not be surprising if this antipathy manifested itself in low-level and occasional attacks such as the ones described by the appellant. However, his own evidence at the hearing is that the attacks were not serious or dangerous and left him with no injuries. There is very little, if any evidence, from his account, that the attacks were linked in terms of the perpetrators or their organisation. Such attacks may have been triggered locally because he was identified as part of the Ahmadi community by virtue of his work-based activities but that is not a finding that he had a high personal or business profile which would follow him across Pakistan."

4. The appellant also claimed to have been attacked in October 2012 by the Khatam-e-Nabuwat (KN). As regards that, the judge did not accept that the appellant had been attacked by the KN. He said this at para 32:

> "32. No cogent case has been put forward as to how KN would have become interested in the appellant after his return to Pakistan in September/October 2012. The appellant's identification of those who attacked him on the third occasions as members of KN is speculative and seemingly derived from their garb. Although on one hand he claims that KN has a countrywide reach and present a very serious and probably deadly threat to him, the description he gave of KN assailants running away from a few passers-by who intervened to stop him from being beaten – an attack which left him with no injuries – does not, in my judgment, accord with that description. As such, I am not satisfied that the appellant was genuinely attacked by KN."

5. At para 33, the judge repeated his finding that he did not accept that the third attack had taken place but, if it did, the judge did not accept that it had been carried out by the KN. As a consequence, he was not satisfied, as the appellant had claimed, that the KN had visited his home and left threats with his son subsequently. At paras 34-37, the judge set out his reasons for concluding that the appellant was not at risk from the KN as follows:

> "34. However, if such an attack took place, it is likely that local protagonists, aware of the appellant's faith and taking steps to visit hurt upon him, carried it out. In this case, a local incident is not indicative of a national risk. I take into account that the appellant's family was not harmed in the incident. They were not detained pending the return of the appellant. The attack was badly timed; the appellant was not there. No attempts were made to track him down even though the appellant's son was apparently able to call him almost immediately. The appellant's whereabouts were not discovered as he made the unexpected journey of

> some 350km to Lahore. Even if his wife's family in Lahore hid him, KN did not try to find him and it is reasonable to believe that if KN has the reach the appellant suggests it has, it would be able to trace the appellant's family including his wife's family.
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> 35. Since the appellant left Lahore, there is no evidence that KN have been looking for him. There is no evidence that the appellant's wife or son have been harmed or threatened by KN or that KN knows of their whereabouts. Although the appellant claimed in evidence that he had lost contact with his wife for the last two months, he attributed her disappearance to her brother deciding he was no longer able or willing to provide for her, and not to some sinister act of KN. However, I am not satisfied that the appellant has told the truth about this aspect of his case. He made no mention of it in his witness statements, dated at the end of March and did not give evidence in chief about it. I reject his explanation that his solicitors did not ask him so he did not tell him.
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> 36. There is no evidence that KN visited the appellant's wife while she was living with her own family after the appellant left. There is no evidence that his adult son has experienced any problems from KN. In my judgment, if there were genuine interest in the appellant KN would have tired to ascertain his whereabouts from his wife and son. KN has not done this either because the appellant is of no interest to them or because their reach, that is to say the reach of those who threatened the appellant and then his son if that happened, is just not as countrywide as the appellant claims.
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> 37. I also take into account the decision of the appellant to resign from his employment in Pakistan. He gave a letter of resignation to his son before he left Lahore. I do not find this a credible thing for a man fleeing from persecution to have done. It is inconsistent with the need to flee and is indicative of a man methodically sorting out his affairs."

6. At para 38, the judge found that the appellant was an "ordinary Ahmadi". He found that he had not preached and did not intend to preach if he returned to Pakistan. He concluded that the appellant did not fall within any risk category set out in MN (Ahmadis – country conditions – risk) Pakistan CG [2012] UKUT 00389 (IAC). At para 39, the judge did not accept that the appellant had suffered persecution or serious ill-treatment. The judge said this:

> "39. To the extent that he has experienced attacks in Pakistan which he does not himself regard as serious or dangerous and left him with no serious injuries, I find that the appellant has experienced low level harassment but not something of sufficient gravity to be regarded as persecution or serious ill-treatment. Such adverse interest has been shown to him in connection with his employment activities and are localised."

7. At para 40 the judge found that the appellant had not established that he was at risk of persecution or serious ill-treatment on return to his home area in Pakistan but, if he were, it would be both reasonable and not unduly harsh to expect him to relocate to another part of Pakistan where his wife, sons, and her family lived. The judge concluded that: "There he can maintain his faith and act in the way he has done in the local Ahmadi community without being exposed to a real risk of persecution."

The Submissions

8. Both in the grounds and in his oral submissions, Mr Webb raised two challenges to the judge's decision.

9. First, and principally, Mr Webb submitted that the judge had accepted that the first two attacks had occurred. However, in concluding that they did not amount to persecution, the judge had failed to take into account the absence of state protection even if the appellant had not, himself, considered them to be "serious" or "dangerous". Mr Webb relied upon the case of Horvath v SSHD [2000] INLR 239. Mr Webb submitted that the religious motivation for the attacks enhanced the seriousness and therefore brought the attacks to the level of persecution.

10. Secondly, Mr Webb submitted that the judge in finding that the third attack had not taken place, had wrongly failed to take into account that the appellant had twice come to the UK prior to that attack but had not claimed asylum. Mr Webb submitted that was relevant as the appellant had two opportunities to make a claim (following the two attacks) if he wished to manufacture one.

11. Mr Hibbs accepted that the seriousness of the attacks needed to be balanced against the protection that could be expected from the state. He accepted that the argument based upon Horvath was good in principle but, he submitted, it had not been made out in this case. He submitted that the level of those attacks, as perceived by the appellant, could not amount to persecution. As regards Mr Webb's second submission, Mr Hibbs submitted that the evidence concerning the appellant's two visits to the UK after the initial attacks but before the third attack, did not support the appellant's credibility but rather undermined it.

Discussion and Analysis

12. Although Mr Webb based his submission upon Horvath, he did not refer me to the text of the speeches in that case. I did not, therefore, have the benefit of any submissions directed to those speeches. Horvath was relied upon simply for the proposition that "discrimination can amount to persecution if the State is unwilling or unable to provide protection". The case concerned discrimination directed against Roma by non-State agents. A majority of the House of Lords (Lord Lloyd dissenting) accepted that a refugee claim could succeed where the risk emanated from a non-State agent where the state was unable or unwilling to provide protection. The House of Lords recognised the "surrogacy principle" underlying the need for international protection only arose in those circumstances. Lord Hope (at page 248D-E) stated:

> "To sum up therefore on this issue, I consider that the obligation to afford refugee status arises only if the person's own State is unable or unwilling to discharge its own duty to protect its own nationals. I think that it follows that,

> in order to satisfy the fear test in a non-State agent case, the applicant for refugee status must show that the persecution which he fears consists of acts of violence or ill-treatment against which the State is unable or unwilling to provide protection. The applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill-treatment for a Convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well-founded, do not entitle him to the status of a refugee. The Convention has a more limited objective, the limits of which are identified by the list of Convention reasons and by the principle of surrogacy."

13. At page 249E-F, Lord Hope, under the heading "conclusion", stated that:

> "Where the allegation is persecution by non-State agents, the sufficiency of State protection is relevant to a consideration whether each of the two tests – the 'fear' test and the 'protection' test – is satisfied. The proper starting point, once the Tribunal is satisfied that the applicant has a genuine and well-founded fear of serious violence or ill-treatment for a Convention reason, is to consider whether what he fears is 'persecution' within the meaning of the Convention. At that stage the question whether the State is able and willing to afford protection is put directly in issue by a holistic approach to the definition which is based on the principle of surrogacy."

14. Lord Browne-Wilkinson and Lord Hobhouse agreed with Lord Hope.

15. Lord Clyde delivered a concurring speech. He also accepted that, in non-State agent cases, at page 263D:

> "It seems to me inevitable that the persecution to which the Convention refers is a persecution which takes account of the protection available."

16. Lord Clyde cited with approval the statement of Lord Hoffman in Islam v SSHD [2009] 2 AC 629 that, in a case concerned with personal threats of violence by the husband of a claimant, the "inability or unwillingness of the State to protect" the claimant was a necessary element of persecution. Lord Clyde cited Lord Hoffman's adoption of the concise formula, "Persecution = Serious Harm + The Failure of State Protection".

17. As this latter quotation makes clear, the real point being made in Horvath is that where the State is not itself the "persecutor", the Refugee Convention is only engaged if the non-State actor's "persecution" of the claimant occurs because the claimant's own State is unable or unwilling to provide a sufficiency of protection. Only then is the need for surrogate international protection, which underlies the Convention's protective mechanisms, engaged.

18. In my judgment, the House of Lords was concerned with that latter issue. It should not be understood as suggesting that conduct or consequences which, in themselves, are not sufficiently severe to be considered as "persecution" can be transmuted into "persecution" merely by the fact that the State does not provide a sufficiency of protection. The House of Lords was, in truth, concerned to resolve the issue of whether where an allegation of persecution was made against non-State agents it was enough to demonstrate that the ill-treatment was sufficiently severe to

amount to "persecution" or, if it were such, it was necessary also to show that the State had failed to provide sufficient or adequate protection. That is again made clear in the speech of Lord Hope at page 242H where he identifies the issues to be determined in the appeal, namely where there is an allegation of persecution by non-State agents:

> "(1) Does the word 'persecution' denote merely sufficiently severe ill-treatment, or does it denote sufficiently severe ill-treatment against which the State fails to afford protection?".

19. It was, in answering that question, that the House of Lords concluded that not only must a claimant show "sufficiently severe ill-treatment" but also the claimant must show that the State has failed to provide a sufficiency of protection against that risk of ill-treatment.

20. That is also the scheme of the EU Qualification Directive (Directive 2004/83/EC). Art 9 defines "acts of persecution" as follows:

> "1. Acts of persecution within the meaning of Article 1A of the Geneva Convention must:
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> (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
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> (b) be an accumulation of various measures in common including violation of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)."

21. Article 9(2) goes on to amplify the form that such "acts of persecution" may take.

22. Article 9(1) defines "acts of persecution" by reference to their severity and seriousness. There is no reference to whether the State provides a sufficiency of protection as being relevant in determining whether there is an "act of persecution". That is dealt with elsewhere in the Directive.

23. In dealing with non-State actors, Art 6 provides that, "actors of persecution" include, for example, the State, and:

> "(c) Non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7."

24. Article 7 goes on to define "actors of protection" and that such protection may be provided by "the State" and in Art 7.2 provides that:

> "Protection is generally provided when, for example, the State takes 'reasonable steps' to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection".

25. That scheme is repeated in the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525) transposing the Directive into UK law.

26. The scheme set out in the Directive defines separately (1) persecution and (2) the need to establish an absence of sufficiency of protection where that persecution emanates from a non-State actor. I do not understand that scheme in the Directive was intended to depart from the essential structure of the law as set out by the House of Lords in Horvath interpreting the Refugee Convention.

27. In this appeal, therefore, the appellant in order to succeed had to establish (1) that on his return to Pakistan there was a real risk that he would be persecuted for a Convention reason (namely his religion); and (2) as that risk was said to emanate from non-State actors (namely KN), that the Pakistan State would be unable or unwilling to provide a sufficiency of protection to him.

28. As regards the first two attacks, the appellant's own evidence was that he did not regard them as "serious" or "dangerous" and he was left with no injuries. The judge did not accept that the third attack had taken place. On the basis of that evidence, the judge was fully entitled to find that in the past the appellant had not been "persecuted" in the sense of subject to sufficiently serious and severe ill-treatment to amount to persecution. Of course, the principal issue that the judge had to decide was not whether the appellant had been persecuted in the past, but whether there was a real risk that he would be persecuted on return. However, whether he had been persecuted in the past was "a serious indication" of whether his fear of persecution was well-founded in the future (see para 339K of the Immigration Rules).

29. For the reasons the judge gave, noting and taking into account that these attacks may have been triggered locally because of his work in the Ahmadi community, the judge did not err in law in finding that they did not amount to persecution and to find that he had not established a real risk of persecution or serious ill-treatment if he returned. That found, 'sufficiency of protection' did not arise.

30. However, as Mr Hibbs pointed out in his submissions, the judge also found that even if the appellant were at risk in his home area, it was safe and reasonable for him to internally relocate to where his wife's family live. That finding is not challenged in the grounds and was not challenged by Mr Webb in his submissions. On the basis of that finding, the appellant's appeal on asylum, humanitarian protection and human rights grounds was correctly dismissed.

31. I turn now briefly to Mr Webb's second submission. It seeks to undermine the judge's adverse credibility finding, in particular in relation to the claimed third attack, on the basis that the judge erred in law by failing to take into account that the appellant had come to the UK on two

occasions prior to that third attack and had not claimed asylum. That, Mr Webb submitted, showed that he was a genuine person as he had had two opportunities to bring a claim and had not done so.

32. With respect, this argument takes the appellant's case nowhere. On his own evidence, he did not consider the first two attacks as serious. That, presumably, is why he did not claim asylum. That does not cast any light on whether a subsequent claim for asylum based upon a further claimed incident demonstrates that that incident did occur. It is, in effect, a mere quibble with the judge's adverse credibility finding for which he gave cogent reasons at paras 32-37. Even if relevant, it cannot, in my judgment, undermine the weight of reasons given by the judge and his adverse conclusion on the appellant's credibility.

Decision

33. For these reasons, the First-tier Tribunal did not err in law in dismissing the appellant's appeal on all grounds.

34. The First-tier Tribunal's decision stands and the appellant's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal