Upper Tribunal
(Immigration and Asylum Chamber

MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC)

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 10 October 2013	
Ex tempore judgment	……

Before

THE PRESIDENT, THE HON MR JUSTICE MCCLOSKEY
UPPER TRIBUNAL JUDGE PERKINS

Between

MK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Sinker (of counsel), instructed by Andrew Jackson Solicitors
For the Respondent: Mr G Harrison, Home Office Presenting Officer

(1) It is axiomatic that a determination discloses clearly the reasons for a tribunal's decision.

(2) If a tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons.

DETERMINATION AND REASONS

Introduction

[1] By letter dated 4th June 2013, the Secretary of State for the Home Department ("*the Secretary of State*") refused the Appellant's application for asylum. The Secretary of State made a further decision which recorded that the Appellant had not sought entry under any other provision of the Immigration Rules and refused him leave to enter the United Kingdom, proposing to give directions for his removal to Pakistan. The Appellant exercised his right of appeal, invoking grounds which included his rights under the Refugee Convention and the ECHR. His appeal was dismissed by the First-tier Tribunal ("*the Tribunal*").

This Appeal

[2] This appeal proceeds on two grounds. The first is that the Tribunal erred in law by failing to give reasons for determining that no weight should be attributed to a letter from the Ahmadiyya Muslim Association ("*AMA*"). The second is that the Tribunal failed to provide adequate reasons for its assessment that the Appellant was not a credible witness. In short, it is contended that the Tribunal's determination is inadequately reasoned.

[3] The Appellant's grounds of appeal to the Tribunal put his case clearly and coherently:

> "*The Appellant contends that he has a well founded fear of persecution under the 1951 Geneva Convention. This is a real risk of serious harm to the Appellant and a threat to his life or freedom on the basis of his membership of a particular social group if he is returned to Pakistan ……*
>
> *The Appellant submits that he would face mistreatment and harassment and that he will be kidnapped ….. He would face a real risk of unlawful killing and torture or inhuman or degrading treatment ……*
>
> *The Appellant contends that he is a practising Ahmadi ….. He is genuinely involved in the Ahmadi faith to the extent that his marriage was conducted in accordance with the Ahmadi rites in 1984 ….*
>
> *There is a continuous attack on members of the Ahmadiyya community.*"

From these passages one can readily gauge the framework of the appeal at first instance.

First Ground of Appeal

[**4**] In considering the first ground of appeal, there are two basic considerations which combine to provide the starting point. First, the Tribunal determined to give no weight to the AMA letter. In paragraph [46], the Judge stated:

> "*Taking into account the complete lack of credibility shown from the evidence before me I attach no weight whatsoever to the letter from the* [AMA]."

The second is that the Judge provided no reasons for this aspect of his decision.

[**5**] It is timely to recall what the AIT said in **Tanveer Ahmed** [2002] Imm AR 318, paragraph [38]:

> "*1. In asylum and human rights cases it is for an individual claimant to show that a document on which he seeks to rely can be relied on.*
>
> *2. The decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round.*
>
> *3. Only very rarely will there be the need to make an allegation of forgery, or evidence strong enough to support it. The allegation should not be made without such evidence. Failure to establish the allegation on the balance of probabilities to the higher civil standard does not show that a document is reliable. The decision maker still needs to apply principles 1 and 2.*"

Given the context of the present appeal, it is appropriate to draw attention to the further principle that evidence is relevant if it goes to proving or disproving a matter in issue. Furthermore, what is relevant in any given case is decided by the application of logic, common sense, fairness and human experience (Halsbury's Laws of England, 4th Edition Re-Issue, Vol 17 (1), para 409). It is also useful to recall another basic principle:

> "*The weight to be given to a particular item of evidence is a matter of fact which will be decided, largely on the basis of common sense, in the light of the circumstances of the case and of the views formed by the* [tribunal] *on the reliability and credibility of the witnesses and exhibits.*"
>
> [Halsbury, para 417]

[**6**] There is a related duty to explain the tribunal's assessment of the more important pieces of evidence and to provide reasons for choosing to give (as the case may be) no, little, moderate or substantial weight thereto. Properly analysed, this discrete duty and the principles highlighted in paragraph [5] above are aspects of two overarching duties of hallowed importance. The first is the duty of every court or tribunal to afford the parties a fair hearing, within the parameters of the governing

legal rules and principles. The second is the long established judicial duty to provide a reasoned decision. It matters not whether these are separate duties or two sides of the same coin, forged together by the common law principle of fairness. Each of these duties is properly described as elementary in nature.

The Duty to Provide a Reasoned Judgement

[7] Given that an asserted failure to provide any or adequate reasons for decisions of the First-tier Tribunal or important aspects thereof features with some frequency in applications for permission to appeal to this Tribunal, it may be timely to reflect on the doctrinal considerations and principles in play. In an immigration case decided some 30 years ago, **R – v - Immigration Appeal Tribunal ex parte Khan** [1983] QB 790, Lord Lane CJ said (at page 794):

> "*The important matter which must be borne in mind by Tribunals in the present type of circumstances is that it must be apparent from what they state by way of reasons first of all that they have considered the point which is at issue between the parties and they should indicate the evidence on which they have come to their conclusions. Where one gets a decision of a Tribunal which either fails to set out the issue which the Tribunal is determining either directly or by inference, or fails either directly or by inference to set out the basis on which it has reached its determination on that issue, then that is a matter which will be very closely regarded by this Court* ***and in normal circumstances would result in the decision of the Tribunal being quashed.*** *The reason is this. A party appearing before a Tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the Tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the Tribunal; in other cases it may not. Second, the Appellant is entitled to know the basis of fact on which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in others it may not.*"
>
> [Emphasis added]

In a slightly different context, Buckley LJ stated:

> "*Litigants are entitled to know on what grounds their cases are decided. It is of importance that the legal profession should know on what grounds cases are decided, particularly when questions of law are involved. And this Court is entitled to the assistance of the Judge at first instance by an explicit statement of his reasons for deciding as he did.*"

[**Capital & Suburban Properties v Switcher** [1976] Ch 319, p 326]

In **R – v – Crown Court at Harrow, ex parte Dave** [1994] 1 All ER 315, this passage was considered by the Divisional Court to be "*of general application*" (at page 322). In **Eagil Trust – v – Piggott-Brown** [1985] 3 All ER 119, Griffiths LJ formulated the general rule that a professional Judge should give reasons for his decision, while simultaneously acknowledging that the particularity required must depend on the circumstances of the individual case and the nature of the decision being made (at page 122).

[8] More recently, in **Flannery – v – Halifax Estate Agencies** [2000] 1 All ER 373, one finds a comprehensive exposition of the duty imposed on today's professional Judge. The Court of Appeal observed, first (at page 377):

> "*It is not a useful task to attempt to make absolute rules as to the requirement for the Judge to give reasons. This is because issues are so infinitely various.*"

The following passages in the judgment of Henry LJ are deserving of full reproduction:

> "*(1) The duty* [to give reasons] *is a function of due process and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties – especially the losing party – should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know …. whether the Court has misdirected itself and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.*
>
> *(2) The first of these aspects implies that want of reasons may be a good self standing ground of appeal. Where because no reasons are given it is impossible to tell whether the Judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the Court entertains an appeal based on the lack of reasons itself.*
>
> *(3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about the events which he claims to recall, it is likely to be enough for the Judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the Judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.*
>
> *(4) This is not to suggest that there is one rule for cases concerning the witness's truthfulness or recall of events and another for cases where the issue depends on reasoning or analysis (with experts or otherwise).* ***The rule is the same: the Judge must explain why he has reached his decision. The question is always what is required of the Judge to do so; and that will differ from case to case. Transparency should be the watch word.***"

[Emphasis added.]

[9] In modern jurisprudence, the Privy Council has also made a notable contribution to this subject. In **Stefan – v – General Medical Council** [1999] 1 WLR 1293, Lord Clyde said the following:

> "*The advantages of the provision of reasons have often been rehearsed. They relate to the decision making process, in strengthening that process itself, in increasing the public confidence in it and in the desirability of the disclosure of error where error exists. They relate also to the parties immediately affected by the decision, in enabling them to know the strengths and weaknesses of their respective cases and to facilitate appeal where that course is appropriate.*"

Such is the exalted nature of the judicial duty to provide a reasoned judgment that, in another case, belonging to the specific immigration law context, the Court of Appeal was prompted to observe that this duty would apply even in circumstances where a statutory duty to give reasons did not apply: **R (Tofik) – v – Immigration Appeal Tribunal** [2003] EWCA Civ 1138, paragraph [17]. This serves as a reminder of the dominance of common law fairness in this field. In short, the venerable authority of **Re Poyser and Mills Arbitration** [1964] 2 QB 467 has not merely withstood the test of time but applies with greater force today than ever before. We would add only that the duty imposed on the First-tier Tribunal and the Upper Tribunal to provide a reasoned judgment in every case is a discipline adherence to which can only serve to enhance the quality of the product in every respect and to promote excellence.

[**10**] Furthermore, the increasing European influence on the United Kingdom legal system has placed the judicial duty to provide a reasoned decision into sharper focus. Article 6 ECHR requires, *inter alia*, an independent and impartial Tribunal established by law and the pronouncement of judgment in public. The Strasbourg Court has spelled out of these provisions an obligation on courts and tribunals to give reasons for their decisions, see, for example, **Van de Hurk – v – Netherlands** [1994] 18 EHRR 481, paragraph [61]. In its pronouncements on this subject, the Court has consistently recognised that the extent to which a Court's duty to give reasons applies may vary according to, *inter alia*, the nature of the decision. Further, the duty is intensely contextual in nature, its performance depending on the circumstances of the individual case. In **Ruiz Toriga – v – Spain** [1994] 19 EHRR 553, the Court stated, at paragraph [29]:

> "*The Court reiterates that Article 6(1) obliges the Courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the Courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a Court has failed to fulfil the obligation to state reasons, deriving from Article*

6 of the Convention, can only be determined in the light of the circumstances of the case."

As the brief survey above of the relevant English jurisprudence demonstrates, the expectations of the Strasbourg Court are likely to be relatively elevated in cases involving United Kingdom courts and tribunals, in cases where Article 6 ECHR applies. This observation does not, of course, detract from the decision in **MNM** (**Surendran Guidelines For Adjudicators)** [2000] UKIAT 005 that Article 6 does not apply to immigration and asylum cases.

[11] The depth and extent of the duty to give reasons will inevitably vary from one case to another. The duty is contextually sensitive. Thus, as the Upper Tribunal observed in **Shizad** [2013] UKUT 35 (IAC), a tribunal's reasons need not be extensive if its decision makes sense. See also **R (Iran) v SSHD** [2005] EWCA Civ 982.

[12] It is appropriate to reflect finally on one intensely pragmatic-and frequently occurring- scenario, namely that of believing or disbelieving the evidence, in full or in part, of a party or a witness. In **Allport v Wilboram** [2004] EWCA Civ 1668, Neuberger LJ stated:

"*It is frequently difficult to explain wholly satisfactorily why one rejects or accepts one particular piece of evidence given by one particular witness. Sometimes there is no real alternative to decide which is inherently more believable.* "

In every court's findings, issues of this kind must be squarely addressed. Where the court finds the evidence of one person more believable than that of another, it should normally be possible to state, briefly and clearly, why. The reason might, for example, be based on a demonstrated inconsistency or inconsistencies on an issue or issues of significance. Alternatively it might relate to the demeanour of a witness or party. If, for instance, it appears to the court that one person was clearly and conscientiously striving to tell the truth, while another was hesitant and evasive in response to questions, this should be stated. Likewise, where a court finds a person's evidence unimpressive or unpersuasive on account of matters such as hesitancy, lengthy pauses, frequent requests to repeat simple questions or a reluctance to engage with the court generally. If any of these considerations or anything comparable constitutes the basis for the court's credibility assessment and findings, care should be taken to say so in the judgement: neither the parties nor the appellate court can be left or expected to guess. The final word on this subject goes to Lord Neuberger:

"*Decisions without reasons are certainly not justice: indeed they are scarcely decisions at all*"

[The Bailii Annual Lecture, 20 November 2012]

First Ground of Appeal: Resolution

[13] We turn to apply these principles to the instant case. The cornerstone of the Appellant's case before the Tribunal was his asserted lifelong adherence to and association with the Ahmadi faith in Pakistan. The AMA letter was, on any showing, an important part of the Appellant's case. On its face, it provided independent verification and confirmation. It was preceded by an earlier, shorter letter from the same source indicating that enquiries were going to be pursued. The longer letter was clearly the product of such enquiries. It was rejected brusquely by the Tribunal, without explanation. We consider that it was incumbent on the Tribunal to explain why the document was afforded no weight at all. One does not know, for example, whether the First-tier Tribunal found that the document was a forgery or was in some way suspect or unreliable. The Tribunal's stark statement that it was attributing no weight to this significant piece of evidence lacked the necessary underpinning of duly articulated findings and an associated explanation. It is clear from the Determination - and was agreed by the parties before this Tribunal - that the AMA letter featured prominently during the first instance hearing. It was a matter of some moment. The weight to be attached to it was, of course, a matter for the Tribunal. However, in the particular context of this case, we consider that it was incumbent on the judge to explain his reasons for his robust and outright rejection of this important piece of evidence. It was not sufficient for the Judge to refer vaguely to "*the complete lack of credibility shown from the evidence before me*" in the context of his rejection of the letter: see paragraph [4] *supra.* Within these words the Judge was clearly referring to his finding that the Appellant's evidence was not worthy of belief. However, the AMA letter was entirely free standing of the Appellant's evidence. The importance of addressing this type of evidence and making relevant associated findings is underlined by the recent decision in **AB (Ahmadiyya Association United Kingdom: letters) Pakistan [2013] UKUT 511 (IAC)**. It had to be addressed separately and directly. There was a failure to do so.

[14] We find, accordingly, that there was a failure on the part of the Tribunal to explain why it was rejecting the AMA letter. As there was a legal duty on the Tribunal to provide a reasoned explanation for this rejection, we consider that this failure constitutes an error of law. Given the important nature of the evidence concerned, we further consider that this error of law was material. Furthermore, we have identified a related error of law. It is common case that the Tribunal was invited to receive and consider the original of the AMA letter. It refused to do so, without proffering any rational explanation for such refusal. We consider that this refusal, unexplained, infringed the sacred principle that justice must not only be done, but must manifestly and undoubtedly be seen to be done. In simple terms, this refusal rendered the hearing unfair.

[15] Thus, duly analysed, the first ground of appeal has two aspects. The first concerns the Judge's failure to provide any reason for his rejection of a key piece of evidence adduced on behalf of the Appellant. The second concerns the fairness of the hearing.

For the reasons elaborated above, we conclude that this ground of appeal is established.

Second Ground of Appeal: Resolution

[16] As regards the second ground of appeal, it is clear from a reading of the Determination as a whole that the Tribunal considered the Appellant's case to be unworthy of belief. This was expressed in various ways:

> "*What I noted in the Appellant's oral testimony …… is prevarication by the Appellant and his failure to answer straightforward questions on a large number of occasions …*
>
> *Taking into account the complete lack of credibility shown from the evidence before me …..*
>
> *What little information he was able to give was vague and imprecise. The Appellant's conduct during both his evidence in chief and cross examination is a further indication that the Appellant has not told the truth …… The Appellant has falsely claimed that misinterpretation took place* [during the asylum screening interview] ….
>
> *He prevaricated and failed to answer questions that were put to him. That is because he is not an honest witness. Such was his manner in cross examination that it was necessary for me to repeat the preliminary advice I had given to him on two occasions ….*
>
> *I do not accept that he was or is a follower of the Ahmadi faith.*"

As we have made clear in paragraph **[12]** hereof, vagueness, imprecision, hesitancy – or a host of other factors - might lead a judge to disbelieve a party or witness on one or more material issues. The requirement that the judge explain why is an indispensable one. In the passages set out above there are swingeing and repeated denunciations of the Appellant's honesty and credibility. However their most striking feature is that they are unreasoned, unexplained and unillustrated. While the Tribunal dismissed the Appellant's case out of hand, robustly and unambiguously, it did not explain why it did so. The necessary illumination, illustration and exposition are lacking. We accept that, in certain contexts, reasons for findings of this kind can properly be inferred. However, this is not possible in the present case. Appellate courts cannot have resort to conjecture.

[17] The second ground of appeal succeeds accordingly. The error of law which we have identified was plainly material, since the credibility of the Appellant's case was an issue of pivotal importance, as the first of the Tribunal's omnibus conclusions confirms. This error is neither extinguished nor remedied by the Tribunal's second main conclusion, which was couched thus:

"*If I was wrong in that conclusion, at best the Appellant would be regarded as a low level supporter of the Ahmadi faith. There is no evidence that he would be of any particular interest to opponents of that faith in Pakistan. He never proselytised and if he were truthful his activities were insignificant.*

We cannot be confident that this further, alternative conclusion was unaffected or uninfluenced by the first. Moreover, the nexus between this secondary conclusion and the Judge's primary conclusion, which we have found erroneous in law, is apparent. The former is contaminated accordingly. Finally, this secondary conclusion does not redeem the unfairness which we have identified in paragraph **[13]** above.

Decision

[18] We allow the appeal and set aside the decision of First-tier Tribunal. Following careful deliberation and having considered the parties' respective submissions, we decline to re-make the decision, since we have misgivings about the course and conduct of the hearing at first instance and consider that the Appellant should not be denied his right to a fair and proper hearing at both first instance and on appeal. Accordingly, we remit the case to a differently constituted First-tier Tribunal. We do not consider any specific procedural directions under section 12(3)(b) of Tribunals, Courts and Enforcement Act 2007 necessary.

Signed:

Mr Justice McCloskey,
President of the Upper Tribunal