Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **AA 00527-12**

THE IMMIGRATION ACTS

At **Field House** Decision signed: **08.10.2013**

on **08.10.2013** sent out: **16.10.2013**

Before:

Upper Tribunal Judges
John FREEMAN and **Clive LANE**

Between:

UB

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Anas Ahmed Khan* (counsel instructed by Thompson & Co)
For the respondent: Mr Peter Deller

DETERMINATION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge JC Hamilton), sitting at Hatton Cross on 3 and 10 February 2012, to dismiss an asylum and human rights appeal by an Ahmadi citizen of Pakistan, born 21 March 1964: as Judge Hamilton allowed her son's appeal, we shall call her 'the appellant'. There was a previous hearing before the Upper Tribunal; but the decision reached on it was set aside by a consent order in the Court of Appeal, and we are not concerned with it beyond that, other than to say that the anonymity direction given remains in force, and to discuss the effect of the consent order.

2. The terms of the consent order itself, of course drafted between the parties, rather than by the court, add nothing to the reconsideration[1] which it directed us to carry out: however it referred to the parties' statement of reasons, and that in turn to the grant of permission to appeal by Elias LJ, both of which do require further treatment. So that what Elias LJ had said can be followed, we need first to set out the two country guidance decisions potentially relevant to the outcome of this case. First came *MJ and ZM* (Ahmadis, risk) Pakistan CG [2008] UKAIT 00033: to avoid any possibility of confusion with *MN and others* (Ahmadis - country conditions - risk) Pakistan CG [2012] UKUT 389 (IAC), not published till 13 November last year, we shall refer to *MJ and ZM* simply as 'the 2008 country guidance'.

3. At the date of the hearing before Judge Hamilton, the 2008 country guidance remained in force, and Elias LJ set out what happened from there on:

> … the procedural errors here mean that the case ought at least to be heard by the full court. The First-tier Tribunal failed to have regard to the country guidance then in existence. It is arguable, had it done so, it might have influenced its factual findings. The Upper Tribunal did consider the guidance then in force, but new guidance had emerged before its decision was promulgated. The Upper Tribunal judge, in refusing leave, said that the new guideline [*MN and others*] would have made no difference to the outcome. That may be right, and that was one of the reasons he refused permission to appeal …

4. Elias LJ nevertheless went on to say:

> … but [the appellant] has not had the opportunity of arguing to the contrary so I have sufficient unease about the procedural fairness to grant permission to appeal. It may well be that having heard the appellant the court are satisfied that there clearly was no prejudice to the appellant notwithstanding such errors as may have occurred.

5. The parties however, no doubt for pragmatic reasons, preferred not to await the outcome of the consideration by the full Court of Appeal to which Elias LJ had referred the case, but to have it come back before us on the basis of the consent order. The statement of reasons ends:

> The Respondent agrees that it is arguable that there was a procedural error for the reasons given in the grant of permission. Therefore it is agreed between the parties that the matter should [*sic*] remitted to the Upper Tribunal of the Immigration and Asylum Chamber for reconsideration.

6. Mr Deller agrees that this can only be sensibly read as an agreement between the parties that there had in fact been a 'procedural error' in what had taken place, and not just that this was arguable. However, it is important to note what Elias LJ, and consequently the parties, and the consent order had been dealing with. They were concerned with the decision of the Upper Tribunal, now set aside for the reasons given by Elias LJ. We are not concerned with the validity of that decision in itself, but with whether there had been a material error of law[2] in Judge Hamilton's decision in the first place.

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[1] perhaps referring to the legislation in force from 2005 - 2010

7. It has been settled, ever since the present country guidance procedure came into being, that the following principles apply:

(a) a country guidance decision is *sui generis*, effectively a decision on the factual situation in a particular country, which nevertheless has to be followed, in the absence of evidence to the contrary, as if it were a decision on the law;

(b) however, it cannot, unlike a decision on a point of law, be treated as if it declared what the right answer had always been: a country guidance decision is a decision on the state of affairs existing at the time it is made, and, though it has to be treated as remaining authoritative till that state changes, or other evidence emerges, it cannot relate back to a previous time;

(c) so, while it may be wrong in law for a decision-maker not to follow a country guidance decision which has come out by the time his own decision is made, it cannot be wrong for him to fail to foresee one which has yet to be made.

8. In the light of those principles, we pointed out to the parties that

(a) we came to the case on the same basis as the first Upper Tribunal panel had done: in other words, there was a potential issue for us as to whether Judge Hamilton had followed the 2008 country guidance, and, if not, whether any failure to do so would have been likely to make a difference to the result he reached;

(b) but, on the basis of those principles, Judge Hamilton could no more have been wrong in law in failing to take account of *MN and others* than the anonymous draftsman of the grounds of appeal to the Upper Tribunal could have been blamed for not taking that point himself;

(c) so it seemed to us that, failing some agreement between them to the contrary, we could only consider the validity or otherwise of Judge Hamilton's decision on the basis of point (a);

(d) but the grounds of appeal to the Upper Tribunal as they stood, unlike the grounds of appeal to the Court of Appeal, took no point on any failure by Judge Hamilton to follow the 2008 country guidance.

9. We recognized ourselves that consideration of a 2012 decision on the basis of 2008 country guidance, when (later) 2012 guidance was now available, might be regarded as a rather arid legal exercise; and so we gave the parties time to consider the practicalities of the situation, and to reach some agreement about what should now be done. However, this did not prove possible, and so, the previous Upper Tribunal decision having been set aside by the consent order, we were left to consider the validity of the first-tier decision on general principles, together with anything in the consent order which bore on that issue.

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[2] in the sense of one which might have required the first-tier decision to be set aside, with a view to its being either reconsidered by the First-tier Tribunal, or re-made by the Upper Tribunal: see Tribunals, Courts and Enforcement Act 2007 s. 12 (2)

10. Mr Khan took his stand firmly on the terms of the consent order: it had clearly been the intention of the parties, and so of the Court of Appeal that the case should be reconsidered in the light of *MN and others*, and any attempt to do so on any other basis would amount to trying to get round the consent order. That of course is far from our intention, and Mr Deller disclaimed any of inviting us to do so. As he accepted, we had to take it as settled that there had been a procedural error, requiring reconsideration by the Upper Tribunal; but the error pointed out by Elias LJ had been one on the part of the Upper Tribunal, and not of Judge Hamilton. Mr Khan did not seek to modify the stand he had taken.

11. **Conclusions** We bear in mind that, as Elias LJ said in granting permission: "The First-tier Tribunal failed to have regard to the country guidance then in existence. It is arguable, had it done so, it might have influenced its factual findings." However, no point was taken on the 2008 country guidance in the grounds of appeal to the Upper Tribunal; and Mr Khan chose not to apply to amend them, even in the light of what we had pointed out at **8**. Instead those grounds referred to a decision applying to asylum appeals in general, *Katrinak* [2001] EWCA Civ 832, while the grounds of appeal to the Court of Appeal relied on *MN and others*.

12. Though counsel for the appellants before the Upper Tribunal referred to the 2008 country guidance (see paragraph 15 of the decision), the panel themselves said this:

> 31. Whilst we are of the view that the judge should have expressly referred to the latest country guidance in his assessment of the risk on return, we are not satisfied that that omission in the circumstances of this appeal amounts to an error of law, or if does, that it is material. Our reason for that conclusion is that, giving effect to the decision in MJ and ZM the appellant would not be at risk of any form of proscribed treatment on return, having regard to the facts found.
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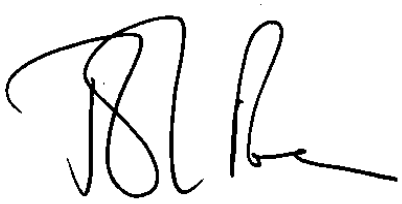
> 32. The argument advanced in the skeleton argument about the extent to which the background evidence now suggests that MJ and ZM should no longer be considered as representing the factual position in terms of risks for Ahmadis was not pursued at the hearing before us.

13. Whether the panel regarded what they said at 32 as reason enough not to consider the effect of *MN and others* in their decision itself, or whether they would in any case have taken that view on the grounds before them hardly matters. They did not re-make the first-tier decision for themselves, in which case they would have needed to consider that up-to-date country guidance; but upheld it, on the basis given in their decision at paragraph 46, that it involved no *material* error of law on the part of Judge Hamilton. Only in their refusal of permission to appeal to the Court of Appeal, and in response to the grounds put forward for that, did they deal with the effect of *MN and others* at all. They did not need to do so, other than out of politeness to the anonymous draftsman of the grounds, and neither do we.

14. Even on the basis of Mr Deller's sensible concession (see **6**), the consent order, taken together with Elias LJ's grant of permission, cannot be taken as settling anything but that there had been a 'procedural error' by the Upper Tribunal, in dealing with the effect of *MN* for the first time in their refusal of permission to appeal, in answer to the point taken on it in the grounds of appeal, but on the basis that it would have made no difference to the outcome before them, without however giving the appellant an opportunity of arguing to the contrary. It is entirely possible, given the weight of paper applications no doubt daily before the Court of Appeal, that what had happened misled Elias LJ into the view he took on the materiality of *MN and others*, though only on the limited basis of whether the point was arguable.

15. We still consider that we have to deal with whether or not Judge Hamilton's decision was materially wrong in law or not, on the basis of the country guidance as it stood at that time, and the grounds of appeal to the Upper Tribunal as they still stand. If the parties had had any common intention to have us decide the appeal on the basis that the first-tier decision should be judged on the basis of Judge Hamilton's failure to predict the outcome of *MN and others*, then no doubt they could have invited the Court of Appeal to make a consent order to that effect. However, that did not happen; and there is nothing in the general, and by now well-understood principles relating to country guidance cases, or elsewhere, to entitle us to judge this one on that basis for ourselves. No doubt, as the previous panel said at 31, the judge should have referred to the current country guidance; but there is nothing before us to show that his failure to do so amounted to a *material* error of law.

Appeal dismissed



(a judge of the Upper Tribunal)