



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/09987/2016

**THE IMMIGRATION ACTS**

Heard at: Field House  
On: 12<sup>th</sup> December 2017

Decision and Reasons Promulgated  
On: 10th April 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

The Secretary of State for the Home Department

Appellant

And

FS

(anonymity direction made)

Respondent

**Representation**

For the Appellant:

Mr McGirr, Senior Home Office Presenting Officer

For the Respondent:

Mr Eaton, Counsel instructed by Adam Solicitors

**DETERMINATION AND REASONS**

1. FS is a national of Iran born in 1985. On the 8<sup>th</sup> June 2017 the First-tier Tribunal (Judge Myers) allowed his appeal on protection grounds, finding as fact that FS had converted from Islam to Christianity since his arrival in the UK and that as a result would be at risk of persecution in Iran for reasons of his religious belief. The Secretary of State for the Home Department now has permission to appeal against that decision, *inter alia* on the grounds that the First-tier Tribunal was not entitled to take the alleged conversion into

account, it being a 'new matter' within the meaning of s85(5) of the Nationality, Immigration and Asylum Act 2002 (as amended).

2. There has been a some delay in the determination of this appeal, in part because further written submissions were sought from the parties after the decision in Mahmud (s85 NIAA 2002 - 'new matters') [2017] UKUT 488 (IAC) was promulgated. As to the delay that accrued thereafter, the parties have my apologies.

### **Anonymity Direction**

3. This case concerns a claim for international protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

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

### **Background and First-tier Tribunal Decision**

4. On the 4<sup>th</sup> March 2016 FS made an 'in-country' claim for protection. The basis of his claim was that he was a researcher and lecturer in Neuro-Linguistic Programming and 'Erikson hypnotism', and that some of his work was perceived to have fallen outwith the strict boundaries of Islamic education as approved by the Iranian authorities. In interviews conducted on the 5<sup>th</sup> March 2016 and the 10<sup>th</sup> August 2016 he told officers that his work explored the area between science and faith and that as a result he was perceived as a threat to the regime. He had been threatened and the security services had raided his home. When they had done so they had retrieved materials which confirmed their suspicions that FS was 'un-Islamic': these included a copy of the Bible, Zoroastrian texts and banned history books.
5. Protection was refused by way of letter dated the 2<sup>nd</sup> September 2016 and FS exercised his right of appeal to the First-tier Tribunal.
6. On the 2<sup>nd</sup> February 2017 the First-tier Tribunal conducted a pre-hearing review. The form completed by the judge that day notes that FS intended to call at least one witness from a church. FS lodged his appeal bundle on the 24<sup>th</sup> May 2017. This included his witness statement dated 23<sup>rd</sup> May 2017, a letter from Reverend Pybon of the Spendmore Lane Methodist Church and two certificates: one showing that FS had been baptised on 'Easter eve 2016' at Holy Innocents Church in Fallowfield, the second showing that he was

confirmed in the same church on the 14<sup>th</sup> May 2017. I note that Easter eve 2016 fell on the 26<sup>th</sup> March 2016.

7. The matter came before Judge Myers on the 31<sup>st</sup> May 2017. Counsel for FS indicated that he wished to call FS, *Dorodian* witness Reverend Pybun, and a man named M, another Iranian who had introduced the Appellant to church in the UK. The Home Office Presenting Officer Mr Hunt-Jackson informed the Tribunal that he had only received the appeal bundle that morning and that he had not been aware that FS intended to submit that he was a Christian. He applied for an adjournment. The determination [at §5] explains the Tribunal's response:

“I allowed Mr Hunt-Jackson some time to prepare the case and to make inquiries about the Appellant's witness, however I refused the request for an adjournment on the basis that in all probability the Respondent would not take the opportunity to re interview the Appellant and it was in the interests of justice to proceed because of the attendance of the witness”.

8. The Tribunal proceeded to hear the case and having done so found as fact that the Appellant had converted to Christianity and that he would be at risk for that reason in Iran. Its summary of his evidence noted that the Iranian security services had found a bible in his home, and that he had met M on his way to the UK. M claimed to be fleeing Iran because he had converted to Christianity. FS told the Tribunal that whilst he had been living in Iran he had developed an interest in Christianity, and felt a sense of salvation and peace when he read the bible. The Tribunal accepted his evidence, and that of his witnesses. It noted that he was a regular church-goer and that he had been since his arrival in the UK. As to the most obvious credibility point weighing against FS – his failure to mention any of this when interviewed – the Tribunal accepted that he had been upset and stressed at the time and that he had not mentioned it because he did not believe it to be relevant. It accepted the explanation that FS had thought he was only being asked about events in Iran. The appeal was allowed.
9. Nothing in the determination, nor record of proceedings, gives any indication that s85(5) or (6) of the NIAA 2002 were raised by either party, nor considered by the Tribunal.

### **The Challenge**

10. The Secretary of State for the Home Department submits that the First-tier Tribunal decision is flawed for the following material errors in approach:
  - i) Unfairness. The Secretary of State had good reason to request and adjournment and its refusal prejudiced her ability to properly prosecute her case. reliance is placed on Ngaigwe (adjournment: fairness) [2014] UKUT 00418;
  - ii) The claimed conversion was plainly a ‘new matter’ falling within the ambit of s85 NIAA 2002 and as such the Tribunal had no

jurisdiction to proceed without the consent of the Secretary of State. The decision is therefore a nullity.

### **The Defence**

11. Mr Eaton resisted the appeal on all grounds. He submitted that the conversion was not a 'new matter'. It was a development of the factual matrix of the claim, but it was not a new issue: FS had clearly expressed his antipathy towards Islam whilst in Iran, and signalled that he was interested in exploring other faiths by his possession of a bible. His conversion was therefore to be regarded as part of the same continuum.
12. As to the adjournment he submitted that the Tribunal dealt with the matter fairly and with regard to the overriding objective of the expeditious disposal of appeals. The HOPO was given the necessary time to read the bundle and make enquiries. There was therefore no prejudice to her position nor, fairly, her ability to present her case.

### **Discussion and Findings**

13. I heard submissions from both parties at the hearing in December. On the 16<sup>th</sup> January 2018 I invited further submissions in light of the decision in Mahmud. I have received no further submissions, nor any request to reconvene the hearing. I therefore proceed to determine the appeal before me applying the principles set out in the reported decision of Mahmud.
14. The fact that the grounds challenge this decision on two fronts perhaps illustrates the limited utility of the new powers in s85. If the mischief that parliament intended to remedy is the unannounced appellate ambush, it is apparent from the grounds, and indeed the conduct of the Presenting Officer before the First-tier Tribunal, that it has always been open to the Secretary of State to simply apply for an adjournment (or indeed to withdraw the decision under appeal): see the commentary of the Presidential panel in Quaidoo (new matter: procedure/process) [2018] UKUT 00087 (IAC). In this case I am however satisfied that the Secretary of State has made out both limbs to her challenge. I am satisfied that it was manifestly unfair that the First-tier Tribunal did not adjourn the appeal. I am further satisfied that the Tribunal erred in not considering whether the conversion was a 'new matter'. Had its asked itself the question there can be little doubt that it would have answered in the affirmative.
15. The operative part of Part V is the amended section 85:
  - (1) An appeal under section 82(1) against the decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

- (2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in a statement which constitutes a ground of appeal of a kind listed in section 84 the decision appealed against.
- (3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.
- (4) On an appeal under section 82(1) ... against a decision the Tribunal may consider... any matter which it thinks relevant to the substance of the decision, including... a matter arising after the date of decision.
- (5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.
- (6) A matter is a “new matter” if –
  - (a) it constitutes a ground of appeal of a kind listed in section 84, and
  - (b) the Secretary of State has not previously considered the matter in the context of –
    - (i) the decision mentioned in section 82(1), or
    - (ii) a statement made by the appellant under section 120.

16. In considering what a ‘new matter’ might be the Upper Tribunal in Mahmud held:

1. *Whether something is or is not a ‘new matter’ goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue.*
2. *A ‘new matter’ is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal.*
3. *In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive.*

17. By any reckoning, the conversion to Christianity was an entirely new matter that the Secretary of State had not considered. True, it might be argued that she could have been alerted to the new element of the case in February 2017 when FS indicated, at the CMR, that he wished to call an ordained minister

as a witness in his appeal. It was not however clear at that stage what the evidence would be. The first real notice came with the lodging of the appeal bundles; for whatever reason the HOPO did not receive his until the day of the hearing. It quite plainly prejudiced his ability to put the Secretary of State's case. She had not had the chance to test FS's knowledge, nor conduct the relevant background checks on the witnesses. Applying the approach in Mahmud, it was a factually distinct matter from the claim as previously put. The Tribunal should have declared the issue a 'new matter' and sought the Secretary of State's consent.

18. Mr Eaton submitted in defence of the decision that the formal conversion to Christianity was part of a 'natural progression' in FS's case. He had on arrival indicated that he had been feeling ambivalent about Islam for some time, and that this had progressed to full-scale disenchantment. He had been in possession of a bible and this had been found by the authorities when they had raided his home. He had travelled across Europe in the company of M. That he had then started attending church, and had been baptised, was simply a factual development. Had Mahmud been available to Mr Eaton at the hearing, he might have employed its phrase: it was "further evidence of an existing matter".
19. I am unable, on the facts, to accept that interpretation of the evidence. Whilst all the points made by Mr Eaton about the historical case are true, they are not the whole picture. Much of the evidence adduced prior to the refusal would tend to indicate that FS had become disillusioned with religion in general. His evidence on his study of psychiatry, Neuro-Linguistic Programming and 'Erikson hypnotism' indicated that he had come to question the nature of 'truth' as it is portrayed in theology as a whole. At an interview in August 2016 FS expressly denied having converted to any alternative religion. The HOPO could not reasonably have been expected to anticipate from this the 'factual development' of full-scale conversion to Christianity. I would add that the failure of FS to declare his baptism when directly asked the question at interview gave added impetus to the need to adjourn. The Tribunal's conclusion that it was unlikely that the Secretary of State would re-interview was not, in the circumstances, one for it to draw.

### **Decisions and Directions**

20. The decision of the First-tier Tribunal contains errors of law such that the decision must be set aside.
21. The decision in the appeal is to be remitted to the First-tier Tribunal for hearing *de novo*.
22. Since I have found the claimed conversion to be a 'new matter' it would be helpful if the Secretary of State for the Home Department could use the hiatus between this decision, and the matter being relisted in the First-tier

Tribunal, to consider the new evidence, whether she wishes to interview the Appellant, and whether her decision is to maintained.

23. There is an order for anonymity.

Upper Tribunal Judge Bruce  
25<sup>th</sup> March 2018