

Neutral Citation Number: [2010] EWHC 3437 (Admin)
IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Sitting at:
Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M3 3FX

Date: Thursday 4th November 2010

Before:

HIS HONOUR JUDGE STEWART QC

Between:

The Queen on the Application of Akram

Claimant

- and -

Secretary of State for the Home Department

Defendant

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The Claimant appeared in person.
Mr Karim (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**.

Judgment

HHJ Stewart QC:

This is the judgment in the case of Mr Muhammad Waseem Akram.

Introduction

1. On 14 January 2010 the claimant commenced a claim for judicial review in relation to a decision of the UK Border Agency, who on 4 January 2010 certified his claim for asylum as clearly unfounded.

2. On 3 June 2010 HHJ Gilbert QC granted permission to apply for judicial review on two bases:

"1. It is strongly arguable that the defendant gave no adequate (if any) reasoning for its finding at paragraph 29 of the Decision Letter dated 4 January 2010 that the Claimant's asylum claim 'is clearly unfounded'.

2. It is arguable that the Defendant's consideration at paragraph 10 of the decision letter as to whether the Claimant could be located in Karachi is irrational"

3. The claimant has appeared before me in person and has had help from two interpreter friends. He has presented his case well and politely. The defendant has been represented by Mr Karim of counsel.

Immigration History

4. Paragraph 2 of the Acknowledgement of Service dated 30 April 2010 stated that the claimant is a citizen of Pakistan born on 15 April 1966 who arrived in the United Kingdom on 13 December 2008 with his wife and son. He was the holder of a multiple visitor visa valid until 25 November 2010. He sought leave to enter the United Kingdom as a refugee. He was interviewed in connection with his asylum claim on 28 February 2009 and 9 April 2009. He also submitted a witness statement dated 24 December 2008 and a personal asylum statement dated 15 January 2009. Following interviews with the claimant a decision was made to refuse asylum and that he did not qualify for entry. He was refused leave to enter in accordance with paragraph 336 of the Immigration Rules (HC 395) and served with form IS 82A giving notice of refusal of leave to enter.

5. On 28 November 2005 the claimant was issued with a multiple visitor visa expiring on 25 November 2010. He came to and went from the United Kingdom on a few occasions between 2006 and 2008. I shall pick up the chronology at December 2008. On 13 December 2008 he arrived in the UK accompanied by his son and claimed asylum. On 24 December 2008 there was a written statement detailing the basis of the asylum claim. On 7 January 2009 the claimant's solicitors made written submissions on the asylum claim. On 16 January 2009 the claimant's solicitors made written submissions on the asylum claim. The decision to refuse the application for leave to remain as an overseas legal practitioner was served. Notice of liability to be

removed was served. On 26 February 2009 the claimant's solicitors made written submissions on asylum claim. On 28 February 2009 there was an asylum interview. On 4 March 2009 the claimant's solicitors made written submissions of the asylum claim. On 21 December 2009 he requested permission to work. On 4 January 2010 asylum was refused and certified as clearly unfounded. Permission to work was refused. On 14 January 2010 the judicial review claim was issued.

The decision letter of 4 January 2010.

6. The defendant summarised the claimant's claim for asylum and humanitarian protection in paragraphs 5 to 6 of the decision letter, which I shall now read:

"5) Your claim for asylum is based upon your fear that if you returned you would face mistreatment due to your political opinion. Your claim for Humanitarian Protection is based upon your fear that if returned you would face a real risk of unlawful killing and torture or inhuman or degrading treatment or punishment in Pakistan.

6) In establishing the basis of your claim for asylum, consideration has been given to the information you provided in your Screening Interview (SCR) dated 13 December 2008, your Witness Statement (WS) dated 24 December 2008, your Personal Asylum Statement (PAS) dated 15 January 2009, your Asylum Interview Record (AIR) dated 28 February 2009 and your Supplementary Asylum Interview Record (SAIR) dated 9 April 2009. In particular you state that :

a) You were born on 15 April 1966 in Lahore, Pakistan. You are married and have 1 child. You were educated in Lahore, Pakistan. You have a Master of Arts and LLB. You are a Law Graduate and subsequently qualified as a lawyer on 21 August 1993 when you set up your own practice. You are self-employed and practice [sic] as a lawyer in High Courts and you are a prominent member of the District Bar Association Lahore. You were elected as President of the Young Lawyers Association Lahore Cantt in 2007 to 2008. Your name is on the Role of Advocates mentioned by the Punjab Bar Council. You have a partner and 2 employees working for you. Your practice stopped after you came to the UK.

b) Prior to February 2007 you had a normal interest in politics. Then in February 2007 you began to make speeches in Lahore about terrorism. You

wanted to make people aware that terrorism is against the principles of Islam. You did this on your own behalf. You delivered these speeches wherever terrorists attacked. You delivered them in the Bar and outside the Bar at Cantt Court, the District Courts and the Defence area. Some lawyers and politicians gave speeches at the same time. In the Bar there would be 250 to 300 people present. Where the casualties took place the figure would be much higher. In total you gave 50 to 60 speeches. You continued to give speeches mostly in Lahore, Defence, Cantt area, High Court right up until you fled Pakistan.

c) In July 2007 you produced a leaflet which carried the message that terrorism was against the principles of Islam. The leaflets had your name on them. You distributed them for 1 month from 1 July 2007.

d) You began to receive threatening phone calls from Moulvi Muhammed Arshad and Moulvi Muhammad Ashrav on both your mobile and home telephone saying they would kill you if you do [not] discontinue your work and distributing anti-jihad leaflets. They are terrorists who belong to a Jihadi organisation. They are small terrorist groups and when they get together they are known as Al Qaeda and your lawyer colleagues say this is the group that wants to kill you. You would receive about 3 to 5 calls a week threatening to kill you if you do not stop speaking about terrorism. Moulvi Muhammed Arshad and Moulvi Mohammed Ashraf's men would threaten you by telephone but people in the Mosque would approach you and tell you not to distribute leaflets against Jihad. You did not stop because you wanted to make a stand. One of the other men who gave speeches, Hafiz Kalim, told you he had been threatened but you do not know if he reported this to the police.

e) You reported most of the calls you received to the police in the Defence and the Cantt area. The calls between August 2007 and April 2008 were received on both your landline and mobile. In the beginning in February 2007 the calls were a bit polite. They asked you not to speak about Jihad. Then after July you received 13 calls within 3 weeks. They were quite serious. They threatened to kill you and your family. At the same time they stated that

'Unfortunately we cannot get hold of you. Whenever we get hold of you we will blow you up.'

f) On 10 August 2007 you were attacked from behind when leaving court. You had been in court that day in your role as a lawyer. You managed to push your attacker away and run back inside. You heard some gunshots as you ran. Later you and some colleagues went and reported this incident to the SHO Saqlain at Lahore District Police Station. A report was filed but they said they could do nothing to help you. You approached the area magistrate of Lahore Cantt, Ali Khan, and he referred you to the Superintendent of the Police Mustashan Shah. He arranged protection for you and you were given a bodyguard by the police. This protection was given for 1 month. However, you were unhappy with this as it was just one man and he took frequent breaks. He would protect you at home and during the office but he would disappear in between. You went to DSP Mustashan Shah to tell him that the person who was supposed to guard you disappeared for tea breaks and he responded by saying whether he should 'provide you with a bullet proof car, the problem you have we too have great tension'. You were not attacked whilst this man was protecting you though you did receive one threatening call. You were given protection from 11 August 2007 until 27 or 28 September 2008 when you received the threatening call. The police protection ended because the bodyguard was frightened by the threatening call and left.

g) On 1 December 2007 you went to Karachi in order to escape the threats. Whilst there you attempted to start work again and establish a new practice. This involved a change from one Bar to another so you had to obtain a certificate. You gave small speeches whilst in Karachi to friends or lawyers. You were not attacked in Karachi but you received a threatening call on 7 January 2008 informing you that the terrorists knew you were in Karachi and you can't escape. You received the call on your mobile. You did not change the number of your mobile because of 'the stupidity of these people'. You managed to escape because after receiving the threats you would take extra precautions by being aware of the threat. They would find your number anyway because of your profession. Your clients have your business cards.

Some lawyers and your family were the only ones who knew about you moving to Karachi. You then left Karachi on 8 January 2008 and returned to Lahore because the threatening call meant that they had traced you. You had not set up a new practice by that time.

h) You continued to receive threatening calls during the period since the August attack approximately once or twice a month. You were next attacked on 7 April 2008. You were returning to your car from court, as you continued to work and represent your clients, when shots struck the bonnet of your car. You managed to escape and reported this to the police at Lahore District Police Station and lodged an FIR. This was reported in local papers such as the Daily Mukhtar the next day

i) On 15 April 2008 you came to the UK for a visit. You did not claim asylum as you wanted to allow the situation to diffuse [sic]. You returned to Pakistan on 29 August 2008 and went to live with your aunt in Rawalpindi as you did not expect anyone to find out you had returned. Your wife and child were with you. Your wife would either stay home during the day or go shopping. You worked for 4 or 5 days as you did not need a new certificate as it falls under the Punjab Bar. You were trying to make new clients and get new premises. It was during those 4 or 5 days, on 18 or 19 November 2008, that you received a call on your mobile threatening to kill you. It was different then this time and they said 'whether you were in London or America they would kill you'. So you state that they probably knew you were in Rawalpindi. You were not physically attacked in Rawalpindi. You cannot hide anywhere in your profession as you have to give out your visiting cards to clients, meet clients and go to court. You decided to return to Lahore with your family that evening.

j) When you returned to Lahore you went to stay with your brother, however you twice visited your mother who was living in your home in the Defence area. She also visited you at your brother's home on 4 occasions. On 11 December 2008 you were returning to your mother's home from celebrating Eid with your family when your neighbour, Abid Butt, informed you that he had seen some men with guns in a jeep looking for you at your home. The

gunmen had asked him if you had returned from London.

k) You decided it was no longer safe for you and your family to remain in Pakistan so you and your family flew to the UK arriving on 13 December on a multiple visit visa that was valid from 25 November 2005 to 25 November 2010. Your mother and sisters remained in Pakistan. They used to receive threats because of you but they have disconnected the telephone line and left home to move to your aunt in Rawalpindi. If you return to Pakistan you state that you will be blown to pieces by the terrorists. You state that you are a well known person in Lahore. You cannot relocate to anywhere in Pakistan as you tried to relocate to Karachi and Rawalpindi but still received threatening calls.

l) You do not have any family in the UK. You suffer only minor ailments because of the tension.”

7. In paragraphs 20 to 22 of the decision letter the Secretary of State reached these conclusions:

"20. In summary it is considered that you have already successfully relocated within Pakistan and it is not unduly harsh to expect you to do so again. Furthermore the Pakistan authorities have shown a willingness to protect you. Therefore it is considered that you are not in need of international protection.

21. You have claimed that you will be subject to unlawful killing on return to Pakistan and that your removal would therefore be in contravention of Article 2 of the ECHR. For the reasons stated in paragraphs 9 to 20 above it is considered that you have already successfully relocated and can be expected to do so again. It is also considered that there is sufficient protection available to you in Pakistan. Therefore you have not demonstrated a real risk of such treatment.

22. You have stated that if you are returned to Pakistan you will be subject to torture or inhuman or degrading treatment or punishment but for the reasons stated in paragraphs 9 to 20 above it is considered that you have already successfully relocated and can be expected to do so again. It is

also considered that there is sufficient protection available to you in Pakistan. Therefore there are not substantial grounds for believing that there is a real risk that you would face treatment contrary to Article 3.

23. Therefore you do not qualify for Humanitarian Protection.”

This was after reviewing and commenting in paragraphs 9 to 19 of the letter. In particular I shall read paragraph 10, since this was the paragraph which HHJ Gilbert QC considered to be arguably irrational

"10. You moved to Karachi on 1 December 2007. You remained there for a period of five weeks in which you received one threatening call which stated that they knew you were in Karachi. You were not attacked during the period you were living in Karachi. It is considered that the terrorists stated only that they knew that you were in the city but did not state that they knew where in Karachi you were living. The Daily Times article 'Sindh government claims city's population has touched 18 million' dated 3 February 2009 states that 'Provincial minister for Local Government Agha Siraj Durrani informed the Sindh Assembly that the population in Karachi has reached about 18 million '. Therefore it is considered that as the city is so densely populated you could have remained in Karachi without being located ..."

8. In paragraphs 24 to 27 the defendant rejected any basis for discretionary leave to remain on Article 8 grounds.

9. The conclusion was in paragraphs 28 and 29 of the decision letter which I shall read, recording that at paragraph 29 was the one about which HHJ Gilbert QC said it was strongly arguable that the defendant gave no adequate, if any, reasons that the claimant's claim was clearly unfounded. This certification has the consequence that the claimant has no in-country right of appeal:

"28. In the light of all the evidence available, it has been concluded that you have not established a well-founded fear of prosecution and that you do not qualify for asylum. Your asylum claim is therefore refused under paragraph 336 of HC 395 (as amended). It has also been concluded that you have not shown that there are substantial grounds for believing that you face a real risk of suffering serious harm on return from the UK and that you do not qualify for Humanitarian Protection. Therefore

your application has also been refused under paragraph 339F of the Immigration Rules. Your application has been recorded as determined on 4 January 2010.

29. In addition, after considering all the evidence available to him, the Secretary of State has decided that your asylum claim is clearly unfounded and hereby certifies it as such under Section 94(2) of the Nationality, Immigration and Asylum Act 2002."

Claimant's claim/defendant's Acknowledgement of Service

10. In Section 5 of his claim form the claimant states:

"Should be given right to appeal within the country UK because of threat of life if claimant goes back to his country from fundamental list/terrorists. Further more conditions in Pakistan gone worst due to war against terror and the threat of life is more imminent."

He filed a background statement dated 14 January 2010 and statements from himself and his wife dated 24 December 2008 and a further statement from himself dated 15 January 2009.

11. In the Acknowledgement of Service dated 30 March 2010 the defendant submitted that the decision to refuse the asylum claim and certify it as clearly unfounded was lawful. The defendant cited authorities on the meaning of "clearly unfounded" and said this at paragraphs 15 to 17:

"15. The Defendant took the Claimant's claim at its highest (paragraphs 9 to 20 of the decision letter). Even assuming that the Claimant's account of threats to kill from the two named individuals and their associates was genuine, the claimant is also able to avail himself of the protection of the authorities in Pakistan. With reference to the objective material the defendant justifiably concluded that there is sufficiency of protection in Pakistan under the test as described in Horvath [2003] 2 WLR 379, and that the Claimant should avail himself of that protection in his home country (paragraphs 18 to 20).

16 . Furthermore, in the alternative, the defendant noted that the Claimant is able to relocate within Pakistan in order to escape from any potential threat by Moulvi Muhammed Ashad and Moulvi Muhammad Ashraf. The Defendant noted that the Claimant had successfully relocated in the past and would be able to do so again. The claimant raises

nothing new that justifies interfering without conclusion.

17. Karachi has a population of 18 million and it is inconceivable that Muhammed Ashad and Moulvi Muhammad Ashraf would be able to track the claimant throughout the whole of Karachi or even the whole of Pakistan (decision letter paragraphs 10 to 13). The claimant appears to be a fit and able man with a variety of family connections and assets in Pakistan. There is nothing to suggest that internal [relocation] would be unduly harsh under the test as described in Januzi v The Secretary of State for the Home Department [2006] UKHL 5."

The Nationality, Immigration and Asylum Act 2002

12. Section 94 of the Act provides:

"94. Appeal from within United Kingdom : unfounded human rights or asylum claim.

(1) This section applies to an appeal under section 82(1) where the appellant has made an asylum claim or a human rights claim (or both)....

(ii) person may not bring an appeal to which this section applies in reliance on section 92(4)(a) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded."

13. Section 92 of the 2002 Act provides :

"92. Appeal from within United Kingdom : general

A person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies....

This section also applies to an appeal against an immigration decision if the appellant—

(a)has made an asylum claim, or a human rights claim, while in the United Kingdom, ..."

14. Therefore the right to appeal from within the United Kingdom is excluded if the Secretary of State certifies the claim as clearly unfounded. Of course such certification must be lawful and is susceptible therefore to judicial review

Recent developments

15. The claimant filed a skeleton argument on grounds for judicial review (these are dated 30 August 2010 but appear to have been filed on 4 August 2010). After briefly reviewing the history the claimant made these points, amongst others:

i) Skeleton, paragraph 4 :

"That as per UNHCR that individuals can be tracked by their CNIC (Computerised National Identity Cards) information provided by NADRA (National Database and Registration Authority)

ii) Grounds, paragraph 7:

"The Secretary of State for the Home Department did not apply the provisions of law applicable to the claimant's case. The Secretary of State for [the] Home [Department] fail[ed] to follow the law properly, hence his decision cannot sustain in the eye of the law on the basis that the Secretary of State for Home [Department] has no power to take that decision / action"

iii) :

"8. The Secretary of State for the Home Department has failed to exercise his discretion in accordance with settled principles of exercise of discretion"

iv) :

"15. The Secretary of State had erred in law and acted in a perverse and unreasonable manner. It did not meet it in relation to the refusal of the asylum application since the misdirection by the Secretary of State. The material issue in that context, that there was evidence of attacks and threats by international Jihadi network was not dealt with and the informed reader cannot understand why the decision was taken and what considerations were taken into account. In the whole the Secretary of State had erred in law and acted in a perverse and unreasonable manner. "

There is then reliance upon the Wednesbury case.

16) On 15 September 2010 UKBA wrote a letter. Apart from reviewing the matters already referred to above, the letter was detailed and I shall quote from it:

"1. Following your application for permission to seek judicial review ... which you filed on 14 January 2010 and which was refused on 20 April 2010, your renewed application was allowed on 4 June 2010. Your case has been reconsidered in the light of the submissions made in your judicial review application and the comments made by the Judge in his decision of 4 June 2010. This letter supplements the Secretary of State (SSHD) asylum refusal letter of 4 January 2010 and should be read in conjunction with that letter

...

Consideration

5. The reasons for refusing your asylum and human rights claims were set out in detail in the SSHD's letter of 4 January 2010. However, the SSHD has now given further consideration to your case. Firstly, she has given careful reconsideration to your claim that you will be at risk of death from fundamentalists and terrorists if returned to Pakistan and that the authorities in Pakistan will be unable to protect you and your family from danger.

6. In her letter of 4 January 2010 the SSHD concluded that there was sufficiency of protection for you in Pakistan and she remains of that view. The test for sufficiency of protection was laid down in the case of Horvath [2000] UKHL 37, in which the House of Lords cited with approval the view expressed by Lord Justice Stuart-Smith in the Court of Appeal ... Stuart-Smith LJ stated :

'In my judgment there must be in force in the country in question a criminal law which makes the violent attacks by the persecutors punishable by sentences commensurate with the gravity of the crimes. The victims as a class will not be exempt from the protection of the law. There must be a reasonable willingness by the law enforcement agencies, that is to say the police and courts, to detect, prosecute and punish offenders.' (para 22]

'It must be remembered that inefficiency and incompetence is not the same as unwillingness unless it is extreme and widespread. There may be many reasons why criminals are not brought to justice including lack of admissible evidence even where the best endeavours are made; they are not always convicted because of the high standard of proof required, and the desire to protect the rights of

accused persons. Moreover, the existence of some policemen who are corrupt or sympathetic to criminals, or some judges who are weak in the control of the court or in sentencing, does not mean that the state is unwilling to afford protection. It will require cogent evidence that the state which is able to afford protection is unwilling to do so, especially in the case of a democracy ' [para 22]

7. In the same case Lord Clyde further approved the judgment as follows :

'The sufficiency of state protection is not measured by the existence of a real risk of an abuse of rights but by the availability of a system for the protection of the citizen and a reasonable willingness by the state to operate it.'

' ... persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community'.

8. In her letter of 4 January 2010 the SSHD referred to the 'Country of Origin Information Service Report Pakistan' dated 28 July 2009 when explaining that she was satisfied that the Pakistan police force and the wider Pakistan authorities were willing and able to provide you with sufficiency of protection. In considering your case the SSHD has taken note of the more recent 'Country of Origin Information Service Report Pakistan' dated 18 January 2010 which states at para 9.04:

'Pakistan's provincial police forces are independent entities that take orders from federal government on issues of national security only. Large conurbations maintain separate forces that fall within the provincial chain of command. There are no police in the Federal Administrative Tribal Areas of North West Province [NWFP]. Each force is headed by an inspector general whose deputies oversee police operations within specific provincial sectors. Inspector generals are directly accountable to the central Ministry of the Interior whereas all levels junior to that report to the provincial civil service. District superintendents are key figures in implementing the edicts of their superiors on a day-to-day basis'

And at Para 9.05:

‘In 2005 President Asharaf reissued the amended 2002 Police Order, which transfers over site responsibility of police from provinces to districts and calls for the establishment of local over site bodies. In the Punjab and MWFP, public safety commissions were established and functioned; however, according to SHARP [Society for Human Rights and Prisoners’ Aid] and the Global Foundation, the commissions existed but operated under a vague mandate. During the year district public safety commissions in Punjab, Sindh, and a majority of districts in NWFP and Balochistan were established but their effectiveness was undermined because of inadequate staffing.’

And at para 9.08:

‘The National Police Bureau website, accessed 11 September 2009, stated that the ‘National Police Bureau is a statutory body mandated to act as a national focal point on police related matters. It coordinates and monitors the state of implementation of police reforms, as envisaged in police order 2002, across Pakistan. Though the National Police Bureau is an integral part of the Ministry of the Interior, it has a separate budget due to its peculiar role. Director General of the bureau has full financial and administrative powers.’

9. Having considered the ‘Country of Origin Information Service Report Pakistan’ dated 18 January 2010, the SSHD remain satisfied that Pakistan has an operating police force which, although not always efficient and still suffering from corruption and vagueness in the mandate of the public safety commissions, would be able to offer you sufficiency of protection to the ‘Horvath’ standard as set out above. Furthermore the SSHD remains of the view that the Pakistan authorities have ensured that further avenues of complaint are available to you, as detailed in paragraph 19 of her letter of 4 January 2010.

In addition to the question of sufficiency of protection, the SSHD has also carefully reconsidered the question of whether or not it would be open to you to relocate within Pakistan in order to avoid the threats to which you claim to have been subjected.

In paragraphs 10 to 16 of her letter of 4 January 2010, the SSHD addressed this point and noted that you have relocated to different cities within Pakistan on a number of occasions in order to avoid the threats to which you claim to have been subjected. Specifically, you moved from Lahore to Karachi in December 2007, returning to Lahore in January 2008 and moving to Rawalpindi in August 2008."

Then there is another citation from the Country of Origin Information Service of Pakistan at paragraph 1.03, and then the letter continues:

"12. The SSHD remains of the view that relocation within Pakistan, a large country with a population of over 160 million and several large and populous cities, remains a viable option for you. The SSHD notes that you have relocated in the past to large densely populated cities such as Lahore, Rawalpindi and Karachi and considers that it would not be unduly harsh to expect you to relocate again on your return to Pakistan, as you have done successfully in the past.

13. The SSHD has also reconsidered the certification of your asylum and human rights claims, as was communicated to you in her letter of 4 January 2010. She remains of the view that it was appropriate to certify your claims as clearly unfounded under section 94(2) of the Nationality, Immigration and Asylum Act 2002. The 'clearly unfounded' test was considered by the Court of Appeal in ZL and VL v SSHD and another [2003] EWCA Civ 25 (in the context of the transition of provisions in section 115 of the 2002 Act, which are in materially identical terms to section 94). The Court considered the proper approach for the decision-maker to take in determining whether a claim is 'clearly unfounded' (paragraph 57) :

' ... the decision maker will

- i) consider the factual substance and detail of the claim
- ii) consider how it stands with the known background data
- iii) consider whether in the round it is capable of belief
- iv) if not, consider whether some of it is capable of belief

v) consider whether, if eventually believed in whole or in part, it is capable of coming within the convention.

If the answers are such that the claim cannot on any legitimate use succeed, then the claim is clearly unfounded; if not, not.'

13. The meaning of the phrase 'clearly unfounded' was also considered by the Court of Appeal in R (Bagdanavicius and Bagdanaviciene) v SSHD [2003] EWCA Civ 1605. The Court held (at paragraph 58) that the 'clearly unfounded' test: 'is essentially the same test as that adopted by Lord Hope in Thangarasa v Secretary of State [2002] UKHL 36, at para 34, in applying the 'manifestly unfounded' test in Section 72(2)(a) of the [Immigration and Asylum Act] 1999 ... namely that the claim is so wholly lacking in substance that the appeal would be bound to fail'.

In Thangarasa their Lordships affirmed that :

'No matter what the volume of materials submitted all the sophistication of the argument deployed to support the allegation, the Home Secretary is entitled to certify if, after reviewing the material, he is reasonably and conscientiously satisfied that the allegation must fail.' (Lord Bingham at paragraph 14)

The essential question on judicial review is 'whether the Secretary of State had *'adequately considered and resolved'* the issue whether the applicant's claims that his human rights have been breached is manifestly unfounded. The court should also have regard to the onus which rests on the applicant to show that there are substantial grounds for believing that if he were removed from the United Kingdom he would face a real risk that he would be subject to treatment contrary to Article 3 (Lord Hutton at para 74 ...]'

14. Having regard to all the circumstances of your case, including your past successful relocations within Pakistan and the availability of protection from the Pakistani police and authorities, the SSHD has concluded that your asylum and human rights applications are clearly unfounded under the test laid down in R (Bagdanavicius and Bagdanaviciene)

v SSHD [2003] EWCA Civ 1605 and ZL & VL v SSHD and Another [2003] EWCA Civ 25. "

The letter then went on to consider paragraph 395C of HC 395, but that is not a matter which has been put before me.

17. Finally on 20 October 2010 the defendant filed detailed grounds of defence drafted by Mr Karim. In those:

- i) The background and the claimant's grounds of challenge are summarised;
- ii) The submissions address the two bases of the grant of permission to apply for judicial review cited by HHJ Gilbert QC;
- iii) The authorities on "clearly unfounded" referred to in the letter of 15 September 2010 are repeated;
- iv) Reference is made to the case of Horvath [2001] 1 AC 489 in these terms:

"13. Article 1 A (2) of the Refugee Convention provides, so far as material, that the term, '*refugee*' applies to any person who owing to well founded fear of being persecuted for reasons of race, religion nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country ...' and Article 3 of the Convention provides 'No one shall be subject to torture or to inhuman or degrading treatment or punishment',

14. In Horvath ... questions arose in the asylum appeal as to persecution by a non-state actors as to those raised in the Article 3 context by this appeal, Lord Hope of Craighead, in an earlier passage in his speech ... identified two of them in the following terms :

'(1) does the word persecution denote sufficiently severe ill-treatment or does it denote sufficiently severe ill-treatment against which the state fails to afford protection? ...

(3) what is the test for determining whether there is sufficient protection against persecution in the person's country of origin - is it sufficient, to meet the standard required by the Convention, that there is in that country a system of criminal law which makes violent attacks by the persecutors punishable and a reasonable willingness to enforce that law on the part of the law enforcement agencies? Or must the protection by the state be such that it cannot be said that the person has a well-founded fear?'

15. The House of Lords... held that an asylum applicant's well-founded fear of violence by non-state actors did not amount to persecution within the Refugee Convention where he *could not show* that

the state was *unwilling or unable to provide him with a reasonable level of protection* from it. Whilst their Lordships did not express themselves in identical terms, the reasoning of the majority on this issue was in substance the same, namely that the well-founded fear -- the risk -- of persecution cannot be considered on its own -- but must be evaluated in the light of the measures provided by the state to meet it.”

There is then a citation at paragraph 16 of the Administrative Court in the case of Dhima [2002] Imm AR 394 at paragraph 16, part of that citation being:

"Whatever the correct analysis, all their Lordships were of the view that sufficiency of protection meant a system of criminal law rendering violence punishable and the reasonable willingness and ability on the part of the authorities to enforce it."

Mr Karim's written submissions were these:

"The defendant primarily refers to the following namely :

a) the Claimant claimed asylum on the basis of fear from terrorists/extreme Islamic groups in Pakistan as a result of producing a leaflet in 2007 in Lahore which stated that terrorism 'was against the principles of Islam'. He received verbal and physical threats as a result thereof, and subsequent relocated to Karachi. The Claimant entered the United Kingdom on various occasions between from 2005, and despite the alleged continuing threats only claimed asylum in September 2008;

b) The Claimant's claim can be summarised by reference to his statement dated 14th January 2010 which provides, ' if I go back to Pakistan me and my family should be killed, because those fundamentalists always inquires about me from my friends and relatives ... Government of Pakistan and law enforcing departments are even helpless against them ...'

c) The fundamental question based on any Convention or humanitarian analysis, is whether there is a sufficiency of protection in Pakistan against the threats alleged by the claimant if his actual version of events is accepted?;

d) This aspect of the claimant's case has been specifically considered at paragraph 18-19 of the first decision letter and paragraphs 5-14 of the

second decision letter. Pertinent factors include the following :

i) the first decision letter the Defendant refers to the Country of Origin Report dated 28th July 2008 and concluded at paragraph 19 that, 'therefore, it is considered that Pakistan had an operating police force' and

ii) the second decision letter considered the most recent Country Report dated 18th January 2010 and concluded at paragraph 8 that ...”

And then Mr Karim cites paragraph 8, which I have already cited.

"e) on that basis, it is submitted, that the Claimant has no claim for a Convention reason and/or for breach of human rights. Based on the most recent independent country report there is no evidence to suggest that the police force are *unwilling or unable to provide him with a reasonable level of protection*, as per the standard set out in Horvath.

f) The Defendant also relied (in both decision letters) on the fact that the claimant was unable to successfully relocate in Pakistan prior to claiming asylum, *fundamentally however*, the defendant was perfectly entitled to certify the claim as 'clearly unfounded ' given the failure to reach the Horvath standard and for the career reasons outlined at paragraph 14 of the second decision letter;”

Analysis

18. The defendant's submissions primarily rely on the Horvath case and the sufficiency of protection test. They rely also on the more recent Country of Origin Information Service report for Pakistan of 18 January 2010.

ii) In submissions before me the defendant did not rely on internal relocation in Pakistan as a separate ground of defence.

iii) It has been clarified by both parties that the claimant's case is not in reality an asylum case because it does not fall within Article 1A(2) of the Refugee Convention. It is an Article 3 claim.

iv) The claimant states that he fears "110 per cent" that he will be attacked and killed if he returns to Pakistan. I note that the claimant's credibility has never been put in issue.

"Humanitarian protection is leave granted to a person who is in the UK, does not qualify for refugee status and in respect of whom substantial

grounds have been shown for believing that he or she would face a real risk of suffering serious harm in the country of origin. The person must also be unable or, owing to the risk, unwilling to avail him or herself of the protection of that country" [Macdonalds Immigration Law and Practice 7th Edition paragraph 12.188]

Similar principles as regards efficiency of protection apply in such claims as in Refugee Convention claims. I also remind myself of the citation from Thangarasa referred to in paragraph 13 of the decision letter of September 2010 that: "...the onus...rests on the applicant to show there are substantial grounds for believing that if he were removed from the United Kingdom he would face a real risk he would be subjected to treatment contrary to Article 3" and the previous citation from Lord Bingham that the Home Secretary is entitled to certify if after reviewing the material he is "reasonably and conscientiously satisfied that the allegation must clearly fail."

vi) In paragraph 12.58 of Macdonald reference is made to the post-Horvath decisions in this way:

"A criticism of Horvath in New Zealand was specifically rejected by Auld LJ sitting in the Division Court in Dhima and in Bagnavicius the Court of Appeal reviewed the jurisprudence on the question of state protection from feared harm at the hands of non state agents, rejected all criticisms of the Horvath approach and concluded in a summary set out at the beginning of the judgment that :

(1) The threshold of risk is the same in both asylum and Article 3 ECHR claims. The main reason for introducing a human rights appeal is not to provide an alternative lower threshold of risk and/or a higher level of protection but to widen the reach of protection regardless of the motive giving rise to the persecution

2) An asylum claimant-is entitled to asylum if he or she can show a well founded fear of persecution for a Refugee Convention reason and that there would be a insufficiency of state protection to meet it: Horvath

3) Fear of persecution is well founded if there is a 'reasonable degree of likelihood' that it will materialise: Sivakumaran

4) Sufficiency of state protection (whether from acts of state agents or of non-state actors) means a willingness and an ability by the state to provide through its legal system a reasonable level of protection from ill-treatment of which the claimant for asylum has a well founded fear : Horvath, Dhima

5) The effectiveness of the system is normally to be judged by its systemic ability to deter and/or prevent the form of persecution to which there is a risk of not just punishment of it after the event...

6) Notwithstanding systemic sufficiency of state protection a claimant may still have a well-founded fear of persecution if its authorities know or ought to know of circumstances particular to his or her case giving rise to the fear that are unlikely to provide the additional protection of particular circumstances reasonably require : Osmar "

vii) The claimant alleges that there is substantial violence and corruption in Pakistan and that it is on the increase. The defendant does not dispute this but avers that her decision was not irrational (which is the test) and that she was entitled, on the materials before her and which she reviewed, to determine that the authorities in Pakistan are capable of providing the claimant with adequate protection.

viii) I have been troubled by this case because I believe that the claimant has a genuine fear but I have come to the conclusion that the court cannot determine that the defendant's decision to certify this claim as "clearly unfounded " was irrational or that she applied the wrong legal test.

8. Therefore based on that the claimant's application must be refused.

MR KARIM: My Lord, I have no instructions to seek costs.

JUDGE STEWART: OK Mr Akram. I have to apply the law as I see it and I am afraid that means your application fails. I am sorry it is such a long judgment but I had to go through the whole history. Although you may not have followed every single line I think you probably got ... did you get the drift of it? Do you understand the drift? Do you understand the substance of it? Yes. OK . All right, thank you very much for coming. Thank you very much.