Appeal No.HX87092-1997
MI (Fair Trial-Pre-Trial Conditions) Pakistan CG [2002] UKIAT 02239

IMMIGRATION APPEAL TRIBUNAL

Dates heard: 9 January 2001, 24 April 2002
Date notified: 28 06 02

Before: -

DR H H STOREY (CHAIRMAN)
MR R HAMILTON

Between

MUZAFAR IQBAL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1.This case raises the issue of prosecution versus persecution. The particular context concerns an appellant facing prosecution on false charges in Pakistan.

2.The appellant, a citizen of Pakistan, has appealed with leave of the Tribunal against a determination of adjudicator, Mr L V Waumsley, dismissing his appeal against the decision of the Secretary of State giving directions for his removal having refused to grant him asylum. The Tribunal had originally refused leave to appeal, but that refusal had been quashed by Order of the High Court. Ms J Farbey of Counsel instructed by Darby`s Solicitors appeared for the appellant and Mr P Deller appeared for the respondent. There was also a hearing resulting in an adjournment at which Mr J Gulvin appeared for the respondent.

3. Proceedings in this case have been protracted. That is never desirable. At the close of the first hearing the Tribunal felt handicapped by not having

objective country materials dealing with the workings of the justice system in Pakistan since the military take-over by General Pervez Musharraf. In the event more recent materials were produced, although not comprehensive.

4. At the original hearing, the Tribunal consisted of three members, the present two plus Mr R Baines. For administrative reasons it was not possible for Mr Baines to sit at the resumed hearing. Both parties indicated they had no objection to the Tribunal continuing with two members.

5. It must be borne in mind that the subject of this appeal is a decision dated 23 December 1996. Being a date well before the Human Rights Act 1998 came into force on 2 October 2000, the fair trial issues examined in the context of a human rights claim in the starred Tribunal determination of *Devaseelan* [2002] UKIAT 00702 are not as such relevant, although we will have occasion to refer to that decision together with another case dealing with a human rights claim raising issues of detention as a result of prosecution, that of *Fazilat* [2002] UKIAT 00973.

6. The appellant`s claim was in essence that he was a member of the Muslim League who had fled Pakistan after members of the local PPP (Pakistan People's Party) in Tehsil and District Jhelum had brought serious false charges against him. The adjudicator had accepted the appellant`s evidence that a riot took place on 12 August 1995 at which a member of the PPP was killed and in consequence the appellant had been issued with two warrants for his arrest. He further accepted that if the appellant were to come to the attention of the Pakistani authorities following his return, he would be likely to be arrested and brought to trial. He found further that:

> " he might also be at risk of a possible revenge attack from members of the deceased man`s family who believe, rightly or wrongly, that the appellant was responsible for his death".

7. Relying mainly on the submissions made to the High Court in the course of an application for judicial review, Ms Farbey said the appellant`s case was one of persecution rather than prosecution. The adjudicator had accepted that, as a result of an incident in August 1995, the appellant`s political opponents had brought serious charges against him and that he was a "wanted man". The appellant`s case was that those charges were false charges. The adjudicator, she submitted, had erred in two key respects. First he had erred in holding that whether or not these charges were true or false and whether or not the appellant would get a fair trial as a result of these charges were not at all matters for him, but only matters for the Pakistan courts. The adjudicator ought, contended Ms Farbey, to have considered whether the accusations were true or false as well as whether or not he would get a fair trial. Second he had erred in overlooking that, even if the appellant would receive a fair trial, he would face serious harm at the pre-trial detention stage. The outcome would be that, as a result of serious harm instigated by non-state agents - in this case PPP members bringing false charges - the appellant would receive ineffective protection from the state. The likelihood of ill treatment at the pre-trial stage was borne out by the objective country

materials including the UNHCR report of May 1998, the Human Rights Watch report of 2001 and the US State Department report of February 2001. The latter indicated that torture in detention still occurred “regularly”, that police corruption was widespread, that prison conditions were bad and that there was significant delay in the prosecution process. The appellant in this case was able to show, not only that he would face persecution against which the state could not protect him, but also a Convention reason of political opinion which in this case was the opinion which his political opponents (the PPP) would either ascribe or impute to him.

8. Ms Farbey asked the Tribunal to attach particular weight to the expert report from Dr Martin Lau dated 11 April 2001. His report confirmed that despite the arrest warrant being nearly 7 years old, it would remain valid and in any event fresh charges and warrants could still be issued regarding the 1995 offence. He concluded that PPP supporters would recognise the appellant as one accused of killing a PPP supporter and would still be likely to press charges, as would the family of the victim. There was still strong local support for the PPP in some areas and prominent PPP members remained able to exert influence over police officers and judicial officers in their localities. Should the authorities seek the appellant in connection with an alleged murder, continued Mr Lau, they could find him irrespective of the locality or region in which Mr Iqbal happened to live or hide.

9. For the respondent Mr Deller argued that it was not the job of a refugee decision maker or of an adjudicator to analyse whether charges brought against a claimant were true or false or whether he was innocent or guilty of those charges. It would impose an impossible burden on the decision-maker if he had to make such evaluations, since in most cases, as here, the best available evidence would be limited to the oral evidence of the person who claimed to be the victim of false accusations. The fair trial system in the country of origin must take precedence. Mr Deller asked the Tribunal to hold that there was insufficient evidence to establish that a person held in detention at the pre-trial stage would face serious ill treatment. If the risks of ill treatment during pre-trial detention were as serious as claimed, there would be virtually no one involved in Pakistan politics at liberty. As regards the claim to a Convention ground of political opinion, Mr Deller said that the appellant`s argument amounted to a claim to “remote control” persecution in which the criminal justice authorities were said to act as the “blunt instruments” of the real perpetrators, in this case certain members of the PPP. At the relevant time in 1995 the Muslim League was the party of government, so the state authorities at that time would not have had any sectarian motive hostile to the appellant. The appellant`s argument also left unclear what was the persecutory act. If it was the act of the state authorities in ill-treating him in detention, then the issue was whether the state would be likely to persecute him; non-state agents would only be involved in a limited way. If it was the act of his political opponents in bringing false charges, then how in itself, without some follow-up action by the state authorities, could that amount to serious harm? There was also real doubt in this case in any event whether his political opponents were targeting him for political reasons or for purely personal reasons. The acts they complained of concerned the use of violence at a

political meeting. On his own account he had gone there with the intent of disrupting that meeting. Someone had been killed. They thought it was him. There was no direct linkage between the Convention ground and the claimed persecution. Even if the PPP had political motives for harming him, it was unwarranted to say that the authorities would do their bidding and fail to rectify any unfairness. The risk of revenge attacks must have considerably diminished and, even if the family were thought to still have a vendetta, there would in that respect be no effective Refugee Convention ground either.

10. As regards the background country evidence, Mr Deller urged the Tribunal to bear in mind that whilst Pakistan remain under military rule there were concrete indications of steps being taken towards restoration of democracy with a much greater political consensus. It was not reasonably likely that the local PPP members would, in the changed conditions of current-day Pakistan, still wish to continue with a malicious prosecution. Although the background reports continued to detail a significant number and variety of human rights abuses, the reports of incidents of human rights abuses in prison had diminished. There was also a possibility the appellant could obtain pre-arrest bail as well.

11. The Tribunal has decided to dismiss this appeal.

The issue of the Convention ground of political opinion

12. For reasons which will become apparent, the Tribunal has not found it necessary to consider whether there was a Convention ground of political opinion in this case.

The issues of the charges against the appellant and the fairness or otherwise of any consequent trial

13. The Tribunal would accept that the adjudicator was mistaken to a limited extent in his stated approach to the interrelated issues of whether the charges against the appellant were true or false or whether he would face a fair trial. What he said was:

> "The Appellant states that the charge against him is false, and that it has been filed on the basis of false accusations made against him by local members of a rival political party. Possibly that is so. However, that is a matter for the Pakistani Criminal Courts, not for me. I have not heard evidence from those who have accused the Appellant, and am therefore in no position to assess his guilt or innocence. That must remain a matter for the Pakistan Courts alone.
>
> The Appellant states that he would not receive a fair trial on return from the Pakistani Courts. In considering that assertion, I have given careful consideration to the background material and other documentary evidence which has been placed before me. However I see no evidence to support that assertion. The Appellant also claims that the police would cause false evidence against him in order to secure his conviction rather than lose face by admitting that they had made a mistake. Once again, I have given careful consideration to the

> background material before me, but as before there is not the slightest support for the Appellant`s assertion that the Pakistani police would be prepared to swear away the life of an innocent man rather than admit that they had made a mistake. There is nothing in the evidence before me to indicate that the Appellant would not in fact receive a fair trial if he were to be brought to justice following his return on the charges files (sic) against him following the incident of 12 August 1995."

14. If all the adjudicator had meant here was that it is not the purpose of refugee law to pronounce on whether accusations made against an appellant are true or false or whether an appellant is guilty or innocent of charges levelled against him, we would wholeheartedly agree. Indeed it would be entirely wrong to use the Refugee Convention, an international treaty based on comity between states, as an instrument to pronounce definitively on an appellant`s guilt or innocence under the laws of his or her country of origin. A refugee decision maker should not seek in this way to stand in place of the domestic authorities in the country of origin tasked with deciding such matters. In this regard the refugee decision-maker is in a similar position to a magistrate or judge hearing an extradition request. It is not the role of either to decide whether there is a real risk that a claimant is innocent.

15. However it does not follow that refugee decision makers can entirely exclude evaluation of such matters in the course of their assessment of whether a claimant is at risk of persecution as opposed to prosecution. As is stated at para 56 of the 1979 UNHCR Handbook:

> "Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim – or potential victim – of injustice, not a fugitive from justice".

16. It follows that a refugee decision-maker will always need to be alive to issues of justice or injustice in the case of persons who fear persecution as a result of criminal charges brought against them. If in fact all a claimant faces is proper prosecution for an ordinary criminal offence, the Convention is not engaged at all. But if the legal process he will go through is one that would subject him to injustice, the harm he faces may well amount to persecution. That approach has been endorsed by the Tribunal in such cases as *Ozov* (12233), *Woldemichael* and by the courts in such cases as *Ameyaw* [1992] Imm AR 206, *Sivakumar* [2001] EWCA Civ 1196 judgment of 24 July 2001, *R (Tientchu) v IAT* C-2000-6288(CA) judgment of 18 October 2000 and *Kinuthia* [2001] EWCA Civ 2100 a judgment of the Court of Appeal dated 18 December 2001.

17. In assessing such issues the refugee decision maker will more often than not have very little to go on. But incomplete or one-sided evidence about specific charges facing a claimant cannot be a valid reason for declining to assess in a relevant case what evidence there is as to the source and nature of those charges. As paragraphs 195-197 of the 1979 Handbook underscore, incomplete evidence is a difficulty which faces a refugee decision-maker at

every turn. If this factor were to be relied upon in the way canvassed by the adjudicator in this case, relatively few claims raising the prosecution versus persecution issue would ever receive a proper assessment.

18. That the drafters of the Convention intended issues of justice and injustice to be evaluated at least to some degree is also evident from the fact that its text includes Exclusion clauses as well as Inclusion clauses. The focus of the Exclusion clauses at Article IF are persons seen as undeserving of international protection because of their commission of serious human rights crimes. These clauses are not intended to be operated in isolation from each other. As UNHCR has stated, "Inclusion and exclusion are integral aspects of the status determination process. Both should be regarded as part of a comprehensive examination of all relevant facts underlying a refugee claim…" (Report on Article 1F Exclusion Clauses, Standing Committee of the UNHCR Executive Committee C, para 15(I)(1998). Thus Art 1F(b) mandates that:

> "The provisions of this Convention shall not apply to any person with respect to whom there are *serious reasons for considering* that:
> …
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.
> …". (emphasis added)

19. The adjudicator should, therefore, have decided whether he thought it reasonably likely the appellant had been a victim of injustice. (Indeed, as we will go on to note, there did come a point where he himself found it necessary to abandon his position of neutrality and take a view on this issue).

Relevant principles in assessing the issue of prosecution versus persecution.

20. Before proceeding further, we think it may assist to summarise important principles decision makers should bear in mind when assessing a case concerned with the prosecution versus persecution issue. We believe these principles can be extracted from leading cases here and abroad.

21. One such principle is that just identified. Although it is not the purpose of refugee law to adjudge guilt or innocence, the type of examination which the refugee decision-maker must conduct when considering the issue of prosecution versus persecution is no less evaluative than it is in respect of any other issue.

22. Another cardinal principle is that highlighted by Lady Justice Arden in the case of *R (Tientchu*) in the following passage:

> "Whether a prosecution amounts to persecution depends on a consideration of all the factors. It is, in effect, a question of fact. It is not the case that every political activity is necessarily legal, but the adjudicator has to determine on the facts presented to him whether the prosecution in fact is really a disguised persecution".

23. To similar effect are cases requiring all the relevant circumstances relating to prosecution versus persecution to be considered on a case-by-case basis, such as the Tribunal cases of *Munir Ahmed* (00TH00024), *Koffi Nestor Brou* (19259), *Balendran* (16864) and *Belhadi* (12157); and the Court of Appeal judgment of 6 November 1997, Mirza *Mahmum Hussain v The Secretary of State for the Home Department* LTA 97/6637

24. Another key principle is that the decision-maker consider the prosecution process as a whole.

25. Where evaluation of issues of prosecution versus persecution must be made, it is vital decision-makers avoid a fragmented approach. Particular care must be taken to focus on the criminal justice process involved as a whole. Which ever parts of the criminal law process are being examined – be it the initial laying of information, the bringing of charges, the arrest, the detention, the consideration of bail, the trial itself, the subsequent punishment - the refugee decision-maker must be alert to how these stages interact and what safeguards apply at each stage. Also relevant will be the nature of the law in question and whether its provisions adequately ensure justice. Only a holistic approach to this issue can ensure the decision-maker weighs any harms involved cumulatively, not just separately. Thus in *Ozer* (12233) the Tribunal noted that relevant questions in assessing whether treatment in that case was prosecution or persecution included proportionality of punishment to the offence, pre-trial detention conditions and the manner in which a trial is conducted.

26. A fourth principle is that set out at paragraph 59 of the UNHCR Handbook. It consists in the importance of evaluating the prosecution versus persecution issue by reference to objective international human rights standards. Noting the difficulties involved in evaluating the laws of another country, para 59 concludes by exhorting that:

> "…recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights…"

27. The House of Lords judgment in the case of *Horvath* [2000] 3 All ER 577 confirmed the central importance of defining persecution (and protection) by reference to human rights norms. Explaining why matters to do with a state's operation of a system of criminal law can sometimes engage the Convention, Professor James Hathaway in his book, Law of Refugee Status (Toronto, Butterworths 1991) Professor Hathaway observed at page 179:

> "While it is true that genuine criminality is not a form of civil or political status which attracts protection, the criminal law is not infrequently manipulated as a tool of persecution".

28. There is a particular utility behind the application of international human rights norms to the analysis of the prosecution versus persecution issue. Not

only do major international human rights instruments contain specific guarantees relating to the criminal justice process (see under the UN International Covenant on Civil and Political Rights, articles 26, 14(2), 9(1), 9(2), 9(3), 9(4) 10(1), 10(2), 14(1), 14(3), 14(4) and 17), but increasingly the major general country reports contain specific assessment of the performance of a State`s criminal justice system by reference to these same guarantees.

29. The overall question the adjudicator must ask, therefore, is whether or not the criminal justice process considered as a whole is compatible with core human rights entitlements relating to a person`s physical integrity, his right to liberty and security of person and his right to a fair trial and a proportionate punishment. If the process as a whole as it affects the claimant is incompatible with such entitlements, then there is serious harm amounting to persecution.

30. However, basing evaluation on human rights norms carries with it an important limitation of scope. In line with the human rights approach to the definition of persecution and its basis in a notion of a hierarchy of human rights, account must be taken of the fact that the right to a fair trial is not an absolute, non-derogable right. Although international human rights law casts the right in less qualified terms than rights to freedom of assembly, association and expression, the fact that it is not an absolute right justifies limiting its application in the context of international protection against refoulement to interferences with the right that are sufficiently severe. Here, there is a useful insight to be drawn from what international human rights law has said about the extraterritorial application of the right to a fair trial. In *Soering v UK* (1989) 11 EHRR 439, the European Court of Human Rights accepted that a person`s removal could violate Article 6 of the ECHR (guaranteeing the right to a fair hearing) but only when the risk was of a flagrant denial of that guarantee. The Court stated at paragraph 113:

> "The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risk suffering a flagrant denial of a fair trial in the request country".

31. In *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745 the [now defunct] Commission had written in similar terms that contracting states to the ECHR were obliged to refuse international co-operation in the administration of justice "if it emerges that the conviction is the result of a flagrant denial of justice".

32. This Tribunal in cases dealing with human rights grounds such as *Nhundu v Chiwera* (01/TH/0613), *Kacaj* [2001] INLR 354 *Devaseelan* [2002] UKIAT 00702 and *Fazilat* [2002] UKIAT 00973 has further developed this approach. In *Fazilat*, which dealt with a claimant facing prosecution in Iran, the President wrote:

> "So far as the question of fair trial is concerned, Article 6 can be engaged if an individual is to be removed from this country. That is made clear by the decision of the Tribunal in *Kacaj* following the Court of Human Rights decision in *Soering v United Kingdom.* But, it is only if the breach of Article 6 would be flagrant, that is to say that there would clearly be a thoroughly unfair trial, that Article 6 could be engaged. Again, it is not for the signatories to the Convention to impose their system on the entire world. One has to consider whether looking at again in the round, it can be said that the Respondent will be able to receive what amounts to a reasonably fair trial. So far as criminal charges are concerned, and the alcohol offences are criminal charges, as would be any charges relating from unauthorised leaving of the country or indeed from unauthorised escape from custody, if anything were done in relation to these student offences, there is no reason to believe that there would be any flagrant breach of Article 6 whatever may be the shortcomings, and there are shortcomings, of the Iran system of trial"".

33. These cases were of course concerned with human rights issues directly. However, as the Tribunal has demonstrated in *Kacaj*, the criteria for assessing serious harm in the context of the Refugee Convention are built out of the same public international law principles. Thus when assessing under the Refugee Convention whether prosecution is persecutory it is equally necessary for a claimant to demonstrate not simply that the system of trial in question has shortcomings. More must be demonstrated. Those shortcomings must be serious enough to threaten the very existence of the right to a fair trial.

Application of these principles to the facts of this case

34. Bearing these main principles in mind, we would assess the appellant`s claim in the light of the adjudicator's principal findings as follows:

The evidence in this case concerning the falsity or not of charges

35. The appellant claimed he was innocent of any crime and that the charges brought against him were false. The adjudicator took no clear position on this issue, stating merely that it was possible. However, he made no specifically adverse finding of credibility and in a number of passages proceeded on the basis that this claim was true. Having ourselves looked at all the available evidence, including the documentary evidence, we consider the appellant had established that, albeit he had gone to the PPP meeting with the intention of disrupting it, he had not in fact been responsible for killing anyone there. Whether or not the PPP members who subsequently filed a First Information Report were falsely or in good faith describing him as the killer is less clear, but again there is no specific finding by the adjudicator that the appellant is not to be believed in relation to his statement at interview that: "I am framed in a fake murder case…" Put another way, the evidence such as it is does not show there was any genuine substance to the charges brought against this appellant.

36. One obvious consequence of this conclusion is that there was no question in this case of the appellant falling to be considered under the Convention`s Exclusion Clauses: he had not in fact committed any crime.

37. What else flows from this? In many countries, democracies in particular, the fact that a person is the subject of false or malicious accusations does not give rise to persecution because sufficient safeguards exist in the subsequent stages of the criminal justice process to rectify matters. What was and is the position in this case, bearing in mind that Pakistan under President Musharraf cannot be classified as a democracy?

38. In this case it would appear that the Pakistan police did not exercise any check on whether the accusations were false at the initial stage of deciding to press charges in the light of the First Information Report. However, for reasons given below, we are not satisfied there would be a failure of safeguards later on in the criminal justice process, As the adjudicator appeared to find in at least one passage of his determination, we have concluded that it would come to light that the charges laid against this appellant were false or at least baseless.

39. Bearing in mind our earlier point that assessment of this issue must take into account the entire criminal law process, there are three further stages that require particular examination and comment in this case, the pre-trial detention stage, the trial stage and the punishment stage.

The issue of ill-treatment by the police during pre-trial detention

40. The alleged failure of the adjudicator to consider this issue formed the principal ground on which the appellant sought judicial review and on which this appeal is argued before us.

41. If in a particular case the evidence establishes that an appellant would face a real risk of ill-treatment at the hands of the police prior to trial, then that would amount to persecution, since it would violate the appellant`s basic human right not to be subjected to serious harm in the form of inhuman or degrading treatment or punishment. Furthermore, as Pill, LJ observed in *Kinuthia*, the availability of effective *ex post facto* legal remedies does not make the risk of maltreatment during the pre-trial process any the less persecutory.

42. Even if the ill treatment was from police officers misconducting themselves, it would not be easy to show that the authorities would be able to effectively protect its citizens against such treatment. As the Court of Appeal held in *Svazas v Secretary of State for the Home Department* C/2001/1964 31 January 2002, the ability and willingness of the State to provide the necessary protection must be more clearly demonstrated to a higher standard in the case of misconduct by officials of the State.

43. The Tribunal would accept that the adjudicator erred in failing to address directly the issue of serious harm at the pre-trial detention stage. However, we

consider we are in a position to assess it for ourselves, building on the adjudicator's findings of fact otherwise.

44. The closest the adjudicator got to addressing the issue of the appellant`s ill treatment in detention was when he was considering whether the police were likely to harass the appellant further. He stated:

> "It is also clear from the background material before me that there is widespread corruption amongst the Pakistani police who are frequently suborned from their duty to the public and allow themselves to be influenced by those local politicians who happen for the time being to be in the ascendancy into taking improper action against members of rival parties. However there is no evidence before me one way or the other as to whether this situation has changed to any significant degree since the recent overthrow of the former Muslim League Government of Prime Minister Nawaz Sharif by the military government, which is currently in control in Pakistan.
>
> I am therefore prepared to accept if the Appellant were to return to some part of Pakistan where the local police are under the influence of members of the rival PPP, and if he were to be seen to be active locally on behalf of the Muslim League, he might then run the risk of further harassment, either from the PPP members themselves or possibly from corrupt elements in the local police acting under their influence."

45. However, here the adjudicator went on to conclude the appellant would be able to relocate "with complete safety" to some other part of the country where the roles were reversed and the Muslim League was in the dominant position. The flaw with this application of the "internal flight alternative" principle was that he had elsewhere proceeded on the basis that, if the appellant went to Pakistan, the authorities would come to know "wherever he went" that there were outstanding charges against him. Furthermore, both of the arrest warrants accepted as genuine by the adjudicator required the appellant's surrender to his home district. Additionally the expert evidence of Dr Martin Lau indicated that these arrest warrants would remain valid, notwithstanding the passage of time.

46. Plainly, therefore, the adjudicator should have accepted that the outstanding charges against this appellant would at least bring him to the attention of the authorities wherever he went in Pakistan and to his being handed over to the police in his home area.

47. As to whether the appellant would thereafter face detention pending trial, the evidence is less clear-cut. As Mr Deller pointed out, there is some suggestion in the objective country materials that even persons on serious charges are able to secure bail. However, given that the charges he might face in this case were serious – possibly murder charges – we are prepared to approach the case on the basis that he would indeed face a real risk of pre-trial detention.

48. The question was, therefore, would the appellant face ill treatment whilst in pre-trial detention? The appellant based his claim that he would on two grounds. The first was that the police, having specifically targeted him for political reasons in the past, would have a motive for harming him. The second ground was that he would face such ill treatment simply by falling into the category of pre-trial detainees or detainees.

49. As regards the appellant`s claim that the police would (still) have (politically motivated) reasons for maltreating him, we find ourselves unable to accept it. The adjudicator effectively declined to take a view, stating that there was "no evidence before me one way or the other" as to whether Pakistani police were less likely than previously to be suborned from their duty to the public and allow themselves to take improper action against members of rival parties. However, we cannot agree that there was no evidence either way as to what the situation would be now for this appellant. Even assuming the local police in 1995 might have had an interest in maltreating him, we do not think it reasonably likely they would now. Our reasons have to do with the elapse of time and the changed context of Pakistan politics since then.

50. The actions taken against the appellant occurred five years ago and at a time when he was actively involved in local politics. On his own account, the past adverse interest of the police in him had arisen during a time when Pakistan politics at both the national and local level was dominated by conflicts between rival political parties. The basis of his claim was that the police in his area had acted under the influence of members of the PPP intent on asserting their power vis a vis their political adversaries. Thus, when describing three arrests he had experienced prior to the August 1995 incident, he said the police put pressure on him to leave the Muslim League and to cease trying to hold meetings in support of that party.

51. However we agree with Mr Deller that the context in which conflict between these two political parties, the PPP and the Muslim League, continues has changed considerably since 1995. Neither party is any longer in control at the national level. Whilst military rule under General Musharaff has not seen the elimination of police corruption or susceptibility to political influence either at the national or local level, the police are clearly aware that political parties are no longer the principal political masters. Mr Martin Lau has stated in his report that the PPP are still a force on the local level in many areas of Pakistan and could influence police conduct. We are prepared to accept that that is the case. But we are not satisfied there would any longer be any real interest by the police in the appellant`s home area in going so far as to maltreat the appellant whilst in detention. And we think it would be fanciful to suggest, given the curtailment of party politics, that the police would have a continuing interest in forcing him to switch his party allegiance.

52. Hence we consider that if the appellant might face any real risk of ill treatment, it would be no more than the level of risk facing the generality of detainees held in Pakistan presently.

53. As to the risk to detainees in general, the Tribunal would accept that the objective country materials show that there would be a possibility of ill treatment at the hands of the police. But we do not think they show there would be a real possibility of such ill treatment.

54. At this point we must confront a common problem confronting assessment of claims based on the treatment of some category of citizens generally. The background evidence relating to Pakistan does bear out that, notwithstanding some steps taken by the government during 2000 to reduce police corruption, such as transferring several senior police officers to other provinces to circumvent their local ties, police corruption is widespread. The April 2001 CIPU report reported that:

> "Police and prison officials frequently use the threat of abuse to extort money from prisoners and their families. Certain individuals pay police to humiliate their opponents and to avenge their persona grievances."

55. At paragraph 5.2.8 dealing with torture it noted:

> "The suspended Constitution and the Penal Code expressly forbid torture and other cruel, inhuman or degrading treatment. Police however regularly torture and abuse people. Police routinely use force to elicit confessions, although there were fewer reports and greater police co-operation in investigating such incidents during 2000. Human rights observers suggest that because of torture, suspects usually confess to crimes regardless of their actual culpability".

56. The US State Department report of February 2001 noted that "Prison conditions remained extremely poor, and police arbitrarily arrested and detained citizen… Case backlogs led to long delays in trials, and lengthy pre-trial detention is common: later on it specifies that: "in many cases, trials do not start until 6 months after the filing of charges". . " It further notes that according to Amnesty International at least 100 persons die from police torture each year. It notes also that prisoners are routinely shackled and that the class "C" cells which generally hold common criminals and those in pre-trial detention have dirt floors, no furnishings, and poor food. "Prisoners in these cells reportedly suffer the most abuse, including beatings and forced kneeling for long periods of time".

57. However damning of pre-trial detention standards such materials are, it is important to note what they do not assert. Whilst they speak of corruption or abuse being "widespread" or "routine" or "frequent", they do not state that the pattern of abuse is gross and systematic. That is important because in cases which rest not on a personal risk of harm (e.g. where the police or prison staff would have cause to target a claimant) but on a risk of serious harm said to face people generally, e.g. in this case all persons detained pending trial, it cannot be said that they would face a real risk of serious harm unless in that country there is a consistent pattern of gross and systematic violations of their human rights whilst in detention.

58. The "gross and systematic" standard is not chosen arbitrarily. It has been in use as a minimum international standard by the UN ever since the introduction in 1967 of Resolution 1235 authorising the Commission on Human Rights to "examine information relevant to gross violations of human rights" and to "make a thorough study of situations which reveal a consistent pattern of violations of human rights". Article 3 of the 1984 UN Convention Against Torture, which prohibits return of a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture enjoins at paragraph 2:

> "For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights".

59. Whilst not even under Article 3 of the Torture Convention has this standard been used on its own to establish risk of torture in the context of refoulement, the case law of the Committee Against Torture on Article 3 does confirm that, in the absence of personal risk, it is difficult for a person to show a breach of Article 3 unless the level of abuse of human rights in the country of return is at least as serious as that of "a consistent pattern of gross, flagrant or mass violations of human rights"; indeed even the existence of such a pattern may not be enough: see *Kisoki v Sweden*, Comm.No.41/1996, reported in Report of the Committee against Torture, U.N. GAOR 51st Sess., Supp. No. 44 9.2, U.N. Doc A/51/44. Where, however, one has a situation in which it is accepted that a claimant would face prosecution and pre-trial detention, it would seem sufficient for him to establish a consistent pattern of gross, flagrant or mass occurrences of ill-treatment in detention.

60. The objective country materials dealing with pre-trial detention in Pakistan fall short of describing the existence of such a pattern. They do show that ill treatment of those in detention is widespread, but not that there is a consistent pattern of gross or systematic abuse of the right not to be exposed to ill treatment. In the absence of evidence to show that such practices are gross or systematic it cannot be concluded, therefore, that there is a real risk to pre-trial detainees in general or to this appellant in particular.

61. It is true that delay in the trial being brought on, said often to be in the region of six months, would cause hardship, as would poor prison conditions and shackling. But in the context of assessing risk upon return to a person under his country's criminal justice process, we do not think this would amount to serious harm.

The issue of the fairness or otherwise of the trial itself

62. As already noted, we consider that in approaching this issue the relevant criterion is not whether the appellant would receive a trial that was fair in every respect. Serious harm will not arise unless the shortcomings in the trial process are thoroughgoing or extensive and would add up to flagrant denial of a fair trial.

63. As already noted, the adjudicator expressly stated at one point that it was not for him to evaluate this issue, describing it as entirely a matter for the Pakistani courts. However, he did eventually go on to evaluate it to some extent at least. His conclusion was that there was “no evidence” to support the assertion that the appellant would not receive a fair trial.

64. Insofar as he did address the issue, the Tribunal would agree with Ms Farbey that the adjudicator was wrong to state that there was “no evidence” that the appellant would face an unfair trial. From the background country materials it was plain there was some evidence that defendants do not always receive a fair trial.

65. The US State Department report chronicles that the judiciary remains subjected to executive branch influence and notes that “[l] ow salaries, inadequate resources, heavy workloads, and corruption contributed to judicial inefficiency, particularly in the lower courts”. However, the same report also records that the “higher level judiciary is considered competent and generally honest”. It notes that because of widespread torture by police leading to suspects confessing to crimes regardless of their actual culpability, the court subsequently throw out many such confessions. It notes that in the face of police impunity the judiciary faults the police for presenting weak cases that do not stand up in court. The CIPU report notes that although the Musharraf regime has encroached on the independence of the judiciary in specific respects, its general independence is claimed to remain intact. The government insists that all legal proceedings since the coup have remained open to the media and totally transparent. International observers have been invited to visit and observe court proceedings. At paragraph 4.2.4. it is noted that in April 2001 the judiciary demonstrated its capacity to act independently when it acquitted on charges of murder and arson, including the murder of a policeman, 10 activists of the MQM.

66. Considering these reports in the round, we do not consider they establish that an appellant facing serious charges in current-day Pakistan arising out of a 1995 incident at a demonstration would face a real risk of a flagrant denial of a fair trial. We bear in mind here that the appellant would be the subject of pre-trial detention, even though not in fact guilty of the charges laid against him. But, given existing safeguards in later stages of the trial process, we do not think it reasonably likely that he would not be exonerated during those later stages.

67. What this means in our view is that the evidence certainly establishes that it is possible he would face a trial process with shortcomings. But it falls short of establishing a real possibility of a thoroughly unfair trial.

68. We note that Ms Farbey herself conceded that the evidence overall falls considerably short of establishing that defendants in Pakistan routinely fail to receive a fair trial.

The issue of any likely punishment

69. In view of our findings on the likely nature of the trial the appellant would receive, we do not consider the issue of any likely punishment to be relevant.

70. However, for the sake of completeness we would observe that we found the adjudicator's treatment of this issue open to question. At the hearing the appellant's representative submitted that if the appellant were to be convicted of murder, he would then face the possibility of receiving a death sentence and that this would amount to "persecution" within the meaning of the 1951 Convention because it would be contrary to international human rights standards. The adjudicator did not agree, pointing to the fact that Article 2 of the ECHR did not prohibit the death penalty. However, if the ECHR was to be used as a benchmark, then it should have to be referred to in full. In this regard the adjudicator overlooked that the Sixth Protocol prohibits the death penalty except in time of war. Be that as it may, it must be said that, outside the ECHR context, the basis in public international law for treating the death penalty in the context of refoulement as illegitimate per se is less well established. Therefore, to the extent that international human rights law furnishes a relevant point of reference for defining persecution, it cannot be said definitively that return to a country to face the death penalty would always constitute persecution. Fortunately we do not need to decide this question in this case.

The issue of risk to the appellant of revenge attacks

71. The grounds of appeal also allege that the Pakistan authorities would be unable to protect this appellant against "revenge attacks" from friends or relatives of the person who had died at the demonstration.

72. We find it difficult to follow the argument raised in the grounds on this point. The adjudicator is said to have erred in not realising that those seeking to revenge this death would get to know of the appellant`s whereabouts through the fact that he would come up in court. We agree that, since the appellant might have to go to court to face charges arising out of the August 1995 incident, his presence back in Pakistan would come to the knowledge of the dead man's relatives. However, even if the adjudicator failed to make that point sufficiently clear, we are satisfied he was entirely correct to conclude that the evidence did not demonstrate that the authorities in Pakistan would be unable or unwilling to protect him against any such attacks. Even assuming at the end of the trial process the appellant would be unsafe remaining in the same area, there would be no difficulties in him relocating elsewhere in Pakistan.

73. The appeal is dismissed.

74**. Summary of conclusions**

1. **Although it is not the purpose of refugee law to adjudge guilt or innocence under the national law of the country of origin, the type of examination a refugee decision-maker must conduct when considering the issue of prosecution versus persecution is no less**

evaluative than it is in respect of any other issue. Incomplete or sketchy evidence is not a valid reason for failing to decide whether a claimant faces justice or injustice.

2. **Whether a prosecution amounts to persecution is a question of fact. All the relevant circumstances have to be considered on a case-by-case basis.**

3. **Particular care must be taken to focus on the criminal justice process as a whole. Only a holistic approach to this issue can ensure the decision-maker weighs any harms cumulatively and not just separately.**

4. **Whether prosecution amounts to persecution must be analysed by reference to international human rights norms. The utility behind doing so is that international human rights instruments contain specific guarantees relating to the criminal justice process and that these are increasingly used in major general country reports to assess the performance of a State`s criminal justice system.**

5. **In line with the human rights approach to the definition of persecution (and protection) approved in *Horvath* and its basis in a notion of a hierarchy of human rights, account must be taken of the fact that the right to a fair trial is not an absolute, non-derogable right. Just as under international human rights law examining the issue of fair trial in the context of return or refoulement there is no violation unless the risk faced is that of a flagrant denial of a fair trial, so too under the Refugee Convention prosecution does not amount to persecution unless likely failures in the fair trial process go beyond shortcomings and pose a threat to the very existence of the right to a fair trial.**

6. **When considering whether the generality of citizens face a real risk of persecution under the criminal justice system of their country of origin, it is important to establish the scale of any violations of relevant human rights such as the right not to be exposed to ill treatment during detention or the right to a fair trial. A useful benchmark is that set out in Article 3 of the Convention Against Torture, namely whether the level of abuse of human rights rises to the level of a "consistent pattern of gross, flagrant or mass violations of human rights".**

7. **Applying these principles to this case, the adjudicator had sufficient evidence before him to establish: (i) that the police would no longer have any reason to target the appellant; (ii) however, the charges facing the appellant might proceed, even though false; (iii) but the Pakistani courts would recognise they were false and would exonerate him at least by the time of the trial; (iv) that he might nevertheless first undergo a period of pre-trial detention; (v) although this would mean he experienced hardships, these would not rise to**

the level of serious harm so as to make his a case of persecution rather than prosecution; (vi) even on the assumption that he might still face a real risk of serious harm from the relatives of the man killed at the demonstration (against which the authorities could not protect him), he would be able to avail himself of an internal flight (protection) alternative.

DR H H STOREY
VICE PRESIDENT