OUTER HOUSE, COURT OF SESSION

[2006] CSOH 78

OPINION OF LADY DORRIAN

in the Petition of

SUKHWAT SINGH GILL
Petitioner;

for

Judicial Review of a decision of the Secretary of State for the Home Department to certify his claim as "clearly unfounded" in terms of section 94(2) of the Nationality Immigration and Asylum Act 2002

Petitioner: Devlin; Anderson Strathern
Respondent: A F Stewart; J C Mullin; Office of the Solicitor to the Advocate General

18 May 2006

[1] By letter dated 25 October 2004, the Immigration and Nationality Directorate advised the petitioner that a decision had been made by the Secretary of State for the Home Department (a) to refuse the petitioner's application for asylum in the United Kingdom; and (b) to certify the petitioner's application as "clearly unfounded" in terms of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). In this petition, the petitioner seeks declarator that the decision to certify the claim as "clearly

unfounded" was unreasonable *et separatim* unlawful and also seeks reduction of that decision.

Petitioner's submissions

[2] In support of those claims, counsel for the petitioner drew attention to the statutory framework against which the petition arose. Section 82 of the 2002 Act makes general provision for a right of appeal to an adjudicator. That right is qualified by Section 94 of that Act, sub-section 2 of which provides that a person may not bring an appeal under Section 92(4) if the Secretary of State certifies that the asylum claim or human rights claim (or both) is or are clearly unfounded. In the case of certain listed States, (to which India was added in 2005), the Secretary of State is obliged to certify the claim unless satisfied that it is "not clearly unfounded". There is no practical distinction, it was submitted, between these two tests, under reference to the case of *R ex parte Husan* v *The Secretary of State for the Home Department* 2005 EWHC 189 (admin) and *R (L and Another)* v *The Secretary of State for the Home Department* [2003] 1 WLR 1230.

[3] Counsel submitted that the phrase "clearly unfounded" should be given the same meaning as "manifestly unfounded" in Section 72(2)(a) of the Immigration and Asylum Act 1999, under reference to *Hansard HL*, volume 638, column 342 per Lord Falconer of Thornton LC. He referred to *R (Yogathas)* v *The Secretary of State for the Home Department* [2003] 1 AC 920 in which the Home Secretary's consideration was described as a "screening process" in which the Secretary of State had to address his mind to the question of whether the claim is "so clearly without substance that the appeal would be bound to fail". Counsel submitted that the test of whether an application was "clearly unfounded" is capable of several interpretations namely (a) whether the application is capable of belief by an adjudicator and if so,

whether it is capable of being within either convention; (b) whether an adjudicator could be reasonably and conscientiously and satisfied that the application must clearly fail; (c) whether the application is so clearly without substance that an appeal to an adjudicator would be bound to fail; or (d) whether it is plain that there is nothing of substance in the application.

[4] With that introduction, counsel turned to the reasons given in the decision letter which is 6/1 of process, submitting that there were two "limbs" to the reasoning in the decision letter: paragraph 17-24 which deal with the application for asylum and humanitarian protection; and paragraphs 25-30 which deal with the issue of internal relocation.

[5] Counsel submitted that the respondent erred in law in failing to ask whether the petitioner was a person who, owing to a well-founded fear of persecution, was unwilling to avail himself of the protection of that country. He submitted that Article 1A of the Refugee Convention 1951 set out two tests, namely, that first there is a well founded fear of persecution and second, that, owing to such fear, there is an inability or unwillingness to avail himself of the protection of his country of nationality. He referred to *Adan* v *The Secretary of State for the Home Department* [1999] 1 AC 293 at page 304B-E when Lord Lloyd of Berwick observed that nationals outside their country of origin and seeking asylum, must satisfy two separate tests "what may, for short, be called 'the fear test' and 'the protection test' ...". Counsel pointed out that there were two aspects to the "protection test" namely first, the question of ability to avail oneself of the protection of the country of origin and secondly, the question of willingness to do so. He drew attention to the opinion of Lord Justice Sedley in *Svazas* v *The Secretary of State for the Home*

Department [2002] 1 WLR 1891 at page 1899B where he noted this second aspect of the protection test, saying:

> ".....even though the home State may be able to provide protection, the fear now justifiably felt by the individual may be such that he is unwilling to rely on the State to protect him. .....Whether or not the (applicant) is 'able' to avail himself of the [home] State's protection, such as it is, against police brutality, he may justifiably be unwilling to try."

[6] Counsel submitted that there was no attempt in the decision letter to consider whether the applicant was unwilling to seek protection. In failing to address that question, the respondent erred in law.

[7] Counsel's second proposition was that the respondent had erred in law in finding that the petitioner had failed to avail himself of the protection of his country of origin because he failed (a) to make a formal approach to the police, the Punjab State Human Rights Commission or the National Human Rights Commission; or (b) to raise proceedings before the Indian courts. He submitted that a person who, owing to a well founded fear of persecution, is unable or unwilling to avail himself of the protection of State agencies such as the police is not obliged to approach Human Rights organisations or raise proceedings in the courts of that country in order to qualify as a refugee. A person subject to persecution by the police may justifiably be unwilling to ask for their protection. Counsel submitted that the actions of rogue officials should be treated as the actions of the State for the purpose of considering a claim for asylum, under reference to the case of *Vraw* v *M. I. M. A.* [2004] FCA 1133 an unreported decision of the Federal Court of Australia. It was not the purpose of organisations such as the Punjab and National Human Rights Commissions to provide protection against criminal acts. Moreover, both offer redress after the events and

protection after the event is not protection for the purposes of the convention. Reference was made to *Kinuthia* v *Secretary of State for the Home Department* [2001] INLR 133.

[8] Counsel's third proposition was that the respondent failed to adopt the correct test for determining whether the petitioner had a well founded fear of persecution. Counsel submitted that the correct test is set out in a passage in *Hathaway, Law of Refugees Status* at page 125-126 where it is stated that:

> "The most obvious form of persecution is abuse of human rights by organs of the State, such as the police and military. This may take the form of either pursuance of a formally sanctioned persecutory scheme, or non-conforming behaviour by official agents which is not the subject of a timely and effective rectification by the State. In such cases, it is clear that the citizen can have no reasonable expectation of national protection, since the harm feared consists of acts or circumstances for which governmental authorities are responsible ..."

Counsel then went on to refer to page 1897D-E of *Svazas* v *Secretary of State for the Home Department* [2002] 1 WLR 1891 where Lord Justice Sedley said:

> "... The concept of 'non-conforming behaviour by official agents which is not subject to timely and effective rectification by the State' seems to me to give a precise edge to the convention scheme ... and to make the key distinction between State and non-State agents of persecution. While the State cannot be asked to do more than its best to keep private individuals from persecuting others, it is responsible for its agents unless it acts promptly and effectively to stop them."

In paragraph 22 of that same opinion, referring to a situation where the persecutors wear official uniforms, he went on to say:

> "Rather than require to be satisfied that the State is actively or passively complicit in persecution by other citizens, the decision maker in a case like the present (which does not concern isolated rogue activity) is faced with the State's undoubted responsibility and must examine what the State is doing about it ...".

Counsel submitted that the petitioner's case does not involve isolated rogue activity. The question to be asked is whether the behaviour was subject to timely and effective rectification, a question which the respondent did not address.

[9] Counsel next addressed the issue of relocation, submitting that the respondent failed to give sufficient weight to the fact that the persecution feared by the petitioner was at the hands of State officials. He referred to *Symes and Jorro on Asylum Law and Practice* (2004) at page 223, paragraph 5.13 where the authors comment that "internal relocation will often be an inappropriate consideration where the persecution feared flows from the State." He then referred to the case of *M.I M. A.* v *Jang* [2000] FCA 1075 at paragraph 27 where the court stated:

> "... However, where the feared persecution arises out of action taken by Government officials to enforce the law of the country of nationality, or to implement a policy adopted by the Government of that country it will be much more difficult for [a] decision maker to reach satisfaction that there is no real risk of the refugee applicant being persecuted if returned to that country."

He then referred to *Quin Shue Lin* v *The Secretary of State for the Home Department* 2005 SLT 301, at 304 paragraph 12, where the court observed that where the petitioner feared persecution at the instance of officials of the State, apparently in pursuit of official policy, *prima facie* this made it unlikely that internal flight was a safe alternative for him.

[10] Counsel's fifth proposition was that the respondent erred in law in that the country background information on which he based his findings was not sufficiently free from controversy to admit of the conclusion that the petitioner's claim was incapable of being believed or of being within the convention; or that it would be bound to fail; or was plainly without substance. He said that in relation to internal flight reference was made in the decision letter to several sources, including the Europa Year Book 2003 and the Danish Immigration Service fact finding report of 2000 (6/6) but no reference was made to the Indian country report of 2004 issued by the respondent (6/8). In that document, the question of internal flight for Sikhs is dealt with at page 39, paragraphs 6.132-6.136. Paragraph 6.134 states that there are no checks on newcomers [in other areas] and paragraph 6.136 talks about willingness of Punjabi police to follow a "wanted suspect". Counsel said that a person may be free from harassment from local police if he moves, but would not necessarily be free from Punjabi police who may choose to follow him. The Danish Immigration Service Report referred to in paragraph 6.135 predates the Country report by four years and merely provides one source - the Director of the South East Asia Human Rights Documentation Centre who it is said believed that it would be possible for a low profile person to move elsewhere in India without being traced. Counsel submitted that the petitioner was not low profile given that the police interest stems not from his own political position but his perceived association with Punjabi separatists. The information so far relied on was described as quite distinguishable from the US Citizenship and Immigration Services information (2003) referred to at paragraph 6.136 of the Country report which states:

> "Observers generally agree the Punjab police will try to catch a wanted suspect no matter where he has relocated in India. Several say, however, that the list of

> wanted militants has been winnowed down to 'high profile' individuals. By contrast, other Punjab experts have said in recent years that any Sikh who was implicated in political militancy would be at risk anywhere in India. Beyond this dispute over who is actually at risk, there is little doubt that Punjab police will pursue a wanted suspect. 'Punjab police and other police and intelligence agencies in India do pursue those militants, wherever they are located, who figure in a list of those who were engaged in separatist political activities and belonged to armed opposition groups in the past' a prominent Indian human rights lawyer said. ..."

Counsel submitted that the reference in the 2004 to "a wanted suspect" should not perhaps be understood literally - it refers to people on lists of those involved in certain activities. He submitted that it was quite reasonable to assume that harbouring militants could come within the phrase "engaged in separatist political activities". If there was an element of doubt one may engage in rational speculation in favour of the asylum seeker but not against him.

[11] Counsel's final proposition was that the effect of the aforesaid errors in law was to vitiate the whole decision. If any of the errors had a material effect on the decision, that was enough to vitiate the whole decision.

Respondent's submissions

[12] Counsel for the respondent took no real issue with the submissions of counsel for the petitioner on the appropriate framework but drew attention to the fact that India, since 15 February 2005, was a listed country under Section 94(3) which he said added weight to the respondent's decision. He referred to the explanatory memorandum at paragraphs 7.2-7.4 for the proposition that the purpose of the list is to reduce the number of unfounded claims. Individual cases must be looked at but it is

against a background that very few cases involving countries on the list will succeed. He referred *R (L)* v *The Secretary of State for the Home Department* 2003 1 WLR 1230 at paragraph 59 to submit that the change in terminology between the first and second parts of the section was more than just an accident of language - in the case of specified states the background facts can be expected to weigh against the validity of an asylum claim. The purpose of the "clearly unfounded" test was to try to ensure that the system does not remain swamped with wholly unmeritorious appeals.

[13] Counsel then went on to look at the material which was before the decision maker and went through Production 6/5 of process, the Statement of Evidence form completed by the applicant, submitting that there was a certain vagueness in the answers given in that form.

[14] In answering the Petitioner's submissions he commenced with the question of relocation, referring to the case of *Januzi* v *The Secretary of State for the Home Department* [2006] UK HL 5 for the proposition that a person will be excluded from refugee status if under all the circumstances it would be reasonable to expect him to seek refuge in another part of the same country. Even where the feared persecutor is a national authority there is no absolute presumption against relocation internally. The more closely the persecution is linked to the state the more likely that a victim of persecution will be equally vulnerable in another place within the state, but the converse may also be true. The real issue was whether it would be unduly harsh to expect a person to relocate internally. In paragraph 50 in *Januzi*, in the speech of Lord Hope of Craighead, it was stated that country guidance cases issued by the IAT provide guidance as to how cases that originate from areas of particular difficulty should be dealt with. Counsel then turned to a number of such cases relating to Sikh separatists, the first of which was *Ajit Singh* v *The Secretary of State for the Home*

Department CG [2002] UK IAT 05994 where the application was rejected on the basis that internal relocation was available to a Sikh who had advocated a separate Sikh state and whose brother was a high profile person in an organisation promoting the same. Similarly the case of *Manjit Singh* [2003] UK IAT 00098S (India) involved a Sikh who had been subject to a cycle of arrests and beatings which were frequent and more long-term than in the present case. They also involved payment of a bribe effecting his release. That applicant was a serious political activist and a trainer of fighters. He had not had trouble elsewhere than in the Punjab. It was acknowledged that if he went to his own home area he would be persecuted but the view was taken that there was another area to which he could go where he would not be at risk of persecution or Article 3 harm. The IAT therefore held that relocation was acceptable for a Sikh with much greater involvement than the present asylum seeker. The third case was *Lakwinder Singh* v *The Secretary of State for the Home Department* CG [2002] UK IAT 04714 where counsel referred to the obiter remarks in paragraph 15, supporting the suggestion that internal relocation outside the Punjab was a viable option for Sikhs in India. He submitted that these cases showed a clear pattern of authority to the effect that internal relocation is possible for Sikhs.

[15] He then referred to the Home Office Operational Guidance Note for India (2004) which highlights the freedom of movement guaranteed under the Indian Constitution (paragraph 3.6.7.) and asserts that there is no evidence to suggest that those involved in low-level activities in Punjab would be pursued by police outside Punjab (3.6.8, 3.6.9, 3.6.12)

[16] In addressing the argument that insufficient weight was given to the fact that the feared persecution was at the hands of State officials, Counsel submitted that the authorities relied on have one thing in common to distinguish them from the present

case - they all relate to situations where there was an official policy to use the police as the agents of persecution and the actings were thus of State agents. The passage from *Symes and Jorro* deals with persecution flowing from the State. The case of *Jang* deals with action taken to enforce law or policy and the case of *Lin* was in pursuit of official policy. He submitted that these present a very different situation from that of Sikhs in the Punjab. There is no suggestion of official policy by central Indian authorities to persecute Sikhs.

[17] Counsel moved on to the submission that the country background information was not sufficiently free from controversy to support the decision, submitting that there was in fact sufficient information before the decision maker to enable him to come to the decision which he reached. The background information was sufficiently free from controversy to admit of the conclusion he reached. It has been sufficient for the IAT in one of the previous cases. For these reasons the petitioner's attack on the second part of the decision fails and the petition should be dismissed.

[18] In moving to the first aspect of the decision letter, Counsel submitted that this is a case of non-State activity. The dichotomy between State and non-State actors is a bit fuzzy round the edges but this case involves "rogue police", neither following official policy nor pursuing a course of action condoned by State authorities, but acting in a rogue capacity, such as was also the case in *Krysztof Wierzbickie* v *The Secretary of State for the Home Department* [2001] Imm AR 602. He submitted that the test for whether such activities should be treated as persecution was "whether they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection" see *McDonald on Immigration Law and Practice* 6th edition at paragraph 12.51. He submitted that the correct test had been applied, as can be seen from paragraph 9 of the decision letter where the exact words quoted

above were used. In subsequent paragraphs the decision letter addresses specific issues designed to consider the question of knowing tolerance.

[19] The decision maker considers first whether such activities are tolerated, then looks at whether the are "knowingly tolerated". Under reference to paragraphs 16 and 17, counsel submitted that unless the authorities knew, it could not be said that the State knowingly tolerated such activities. The reference to the Commissions is in the context of whether the abuses by the police were "knowingly tolerated". The existence of these Commissions, with the powers they have, is a strong indication that activities of the type complained of are not knowingly tolerated. The Punjab Human Rights Commission is set up under a former Chief Justice. It is an official body with power to inspect jails. It is not a human rights organisation in the sense that one might have a political or lobbying group. It is an official body set up by the State in an effort not to tolerate abuses. Similarly the National Human Rights Commission is an official body with powers of a civil court. That again indicates that abuses are not tolerated by the State. Paragraph 24 of the decision letter focuses again on the question of knowing tolerance of abuse.

[20] Counsel then went on to address the case of *Svazas* v *The Secretary of State for the Home Department* [2002] 1 WLR 1891 suggesting that the matter was not as simple as suggested for the Petitioner. The existence of some rogue police does not mean that the State is unwilling to afford protection. The second part of the protection test only arises if there is a well founded persecution under the first test. Before getting to the question of whether a person was unwilling to avail himself of national protection as a result of fear, it must be clear that there is a well founded fear of persecution which underlies the unwillingness. A fear of persecution which was not well founded would not require consideration of the issue of willingness. There is a

real difference between this case and the *Svazas* case, which, as can be seen from paragraph 37, involved systemic or at least endemic violation of rights. The position is not the same in India, where the situation is one of historic problems which have been getting better and where active steps have been taken to improve the situation. In *Svazas*, there was a "less than wholehearted readiness on the part of government to admit the extent of the problem and declining rate of intervention to remove delinquent police officers" (paragraph 37). It is clear from *Svazas* that what is required is the reaching of a practical standard of protection, not an absolute one. The question is whether the state can properly be said to be providing sufficient in the way of protection.

[21] On the submission that the respondent failed to ask whether owing to a well founded fear, the applicant was unwilling to avail himself of protection, he accepted that these precise words do not appear in the decision. It was not necessary to state that specifically in the decision. It is not actually necessary to apply one test then the other - a more holistic approach needs to be applied. Here, the decision maker has looked at the issues which relate to whether there is a well founded fear of persecution. He has looked at the claim about the police and assessed it in relation to issues of failure of discipline against policy and in light of what the claimant says about his own position and politics. It is implicit in what the decision maker says that he has found that the unwillingness of the claimant to seek the protection of the authorities is not justifiable, that it is not due to a well founded fear of persecution. It is a matter of balancing the evidence and seeing if there is any justification for the unwillingness. Nothing would allow the respondent to conclude that the unwillingness was justifiable. From paragraph 9 of the decision letter, the respondent builds up all that he founds on for his decision.

[22]. What the decision maker is doing in paragraphs 20 to 23 is addressing the question of knowing toleration.

[23] The petitioner's argument that it is not sufficient to allow recourse to the courts after treatment ignores the need for the State to find a practical balance and effectively puts the state in the position of having to provide a guarantee.

[24] The same point arose in relation to the submission that the respondent made no proper examination of the steps taken and that there was no evidence of timely rectification. This was too stark and absolute an approach. The correct approach lay in finding a practical balance.

Decision

[25] In my view the underlying basis of the Respondent's decision was essentially that it was not accepted that the Applicant had a well founded fear of persecution. As Lord Lloyd of Berwick observed in *Adan v The Home Secretary* [1999] 1 AC 293 @ 304, Article 1A(2) covers two categories of nationals outside their country of nationality; (i) those who are outside their country due to a well-founded fear of persecution and are unable to avail themselves of the protection of their country; and (ii) those who are outside their country owing to a well-founded fear of persecution and, owing to that fear, are unwilling to avail themselves of the protection of their country. In the present case the issue of unwillingness did not arise for consideration since the decision was that there was in the first place no well-founded fear of persecution.

[26] The respondent's observations relating to authorities which might have been approached by the applicant are all relevant to an aspect of whether there is a well-founded dear of persecution and to the question of ability to avail oneself of the protection of the country, namely whether the state in question has the ability and

willingness to protect its citizens. The respondent's counsel was correct in my view in submitting that in these passages the respondent as addressing the issue of "knowing tolerance". That is why the issue of whether the applicant approached higher officials in the police, or the courts, is a relevant consideration. In *Svazas* the court quoted the speech of Lord Hope of Craighead in *Horvath* v *Secretary of State for the Home Department* [2001] 1 AC 489 at p497 in which he observes that "persecution" implies a failure by the state to make protection available" going on to say at p500

> "...complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard, which takes proper account of the duty which the state owes all its own nationals".

In the same case Lord Clyde (p510) spoke of "a system of domestic protection and machinery for the detection, prosecution and punishment [of persecutors].....More importantly there must be an ability and a readiness to operate that machinery".

[26] The issues considered in paragraphs 10 to 19 include the Constitution of India; the way in which police are controlled; the relationship between the State and Central Governments; the sources of information considered; training of police officers; and the independence of counsel and the judiciary, all of which arise in the context of knowing tolerance and are relevant to the existence of a protection system and a willingness to operate it. The same applies to the existence of the Commissions referred to in paragraphs 21 to 23. Before a state can act timely and effectively to rectify offending behaviour it must be given the opportunity to do so. As Stuart-Smith L J said in the Court of Appeal in *Horvath* [2000] INLR 15 at p 26,

> "...the existence of some policemen who are corrupt .....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."

The case of *Svazas* relied on by the petitioner is far from the circumstances of this case. *Svazas* was a case in which the evidence accepted by the fact-finding tribunal depicted "a police force which systematically and endemically abuses its power". Similarly the cases of *M.I.M.A. v Jang* and *Que Shue Lin* related to action taken in pursuit of official policy or to enforce the law of the country which is manifestly not the case here. I do not consider that in the present case the Secretary of State either applied the wrong test or failed to give due consideration to relevant factors.

[27] As to the background information, I am of the view that there is sufficient correspondence to conclude that a person in the position of the applicant would not be likely to be followed from the Punjab and that relocation was a valid option in his case. I do not accept the submission of counsel for the Applicant that the phrase "wanted suspect" requires to be given anything other than its normal meaning, especially when the phrase occurs in the context of an actual list of wanted suspects.

[28] Accordingly I will sustain the respondent's plea in law and dismiss the petition.