OUTER HOUSE, COURT OF SESSION

[2007] CSOH 128

P2844/06

OPINION OF LORD MACFADYEN

in the Petition of

M K

Petitioner;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

For

Judicial Review of a decision dated 9 October 2006

Petitioner: Forrest; Drummond Miller LLP.
Respondent: Carmichael; Office of the Solicitor to the Advocate General.

12 July 2007

Introduction

[1] The petitioner is a twenty four year old national of Turkey, who fled from Turkey on 1 August 2006 and arrived in Glasgow on or about 8 August 2006. On the following day he claimed asylum in the United Kingdom. By letter dated 9 October 2006 ("the decision letter") the respondent rejected the petitioner's asylum claim as

well as his related human rights claim, and certified them in terms of section 94(2) of the Nationality, Immigration and Asylum Act 2002 ("the Act") as clearly unfounded. In this petition the petitioner seeks judicial review of that certification.

Certification

[2] The process of certification under section 94(2) must be seen in the context of other legislative provisions contained in Part V of the Act regulating rights of appeal against immigration decisions. Section 82(1) makes the general provision that:

> "Where an immigration decision is made in respect of a person he may appeal to the [Asylum and Immigration] Tribunal".

Section 92(1), however, provides that:

> "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."

Section 92(4) provides that"

> "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, ..."

Section 94 provides *inter alia* as follows:

> "(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).
>
> (2) A person may not bring an appeal to which this section applies in reliance on section 92(4) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded."

[3] The effect of these provisions is that the right of appeal which the petitioner would otherwise have had under sections 82(1) by virtue of section 92(4) against the decision of 9 October 2006 to refuse his asylum and human claims is excluded by the respondent's certification of those claims as clearly unfounded. With a view to opening up a right of appeal to the Tribunal, the petitioner seeks in this petition to challenge the validity of the certification. He seeks reduction of paragraphs 64 and 66 of the decision letter, in which the certification was expressed.

The circumstances

[4] The circumstances founded upon by the petitioner in presenting his claims are set out in the decision letter at paragraph 6. Since I did not understand Mr Forrest, who appeared for the petitioner, to take issue with that narrative, it is convenient to use it as the basis of the following summary.

[5] The petitioner was born in Gaziantep, Turkey. He is a Sunni Muslim. He attended local schools, and then, between the ages of 15 and 18 the Anadolu Hotel and Tourism School, where he obtained a diploma. In February 2004 he met a girl named AB ("A"), who lived close to his sister. They communicated by letter because her family had very strict traditional values. A suggested that the petitioner's family formally request a meeting between her and the petitioner. He did not take action on that suggestion because he realised that her family was Kurdish, and he was Turkish. He was also aware that they had a tradition of marrying their daughters to a relative within the family. At the end of April 2004 the petitioner found an opportunity to be alone with A when her family were attending a wedding. They spent five or six hours together and talked about their futures. She told him that a cousin was expected

formally to propose to her. A and the petitioner had sexual intercourse on that occasion.

[6] A continued to suggest that the petitioner's family should formally approach hers, and in mid May the petitioner and his father visited A's family and formally asked permission for A to marry the petitioner. A's father replied that their tradition did not allow his daughter to marry outside the family and that they did not wish her to marry a Turkish man.

[7] In July 2004 A's family discovered that she and the petitioner had been together. The petitioner, while on holiday, received a telephone call from his sister informing him that A had been killed. She warned him that he should move away because A's family had already inquired as to his whereabouts. The petitioner believes that A died as a result of an "honour killing" within her family.

[8] In these circumstances the petitioner did not return home, because he believed his own life was in danger. He contacted a student friend, who allowed him to hide in a house in Alanya until the end of January 2005. He was too frightened to leave the immediate vicinity of the house. By keeping in touch with his family by mobile telephone, he learned that members of A's family had visited his sister two or three times in the months after her death, but not thereafter. At the end of January 2005 the petitioner travelled to Rize because he felt the need to run away from A's family. He stayed there for nine or ten months with a maternal uncle, confining himself to the house and garden. In September 2005 he moved to the Sultanbeyli area of Istanbul, where he stayed with an aunt.

[9] The petitioner did not go to the police because he believed that, if he did, members of A's family would be able to find him.

[10] Because he was still living in fear, the petitioner decided to leave Turkey. Arrangements were made by his father for him to travel to the United Kingdom, where he finally arrived in Glasgow on or about 8 August 2006 and was picked up by a friend of his father.

[11] The petitioner believes that if he returned to Turkey he would be found and killed by A's family.

The decision letter

[12] The petitioner's claim for asylum was based on the assertion that he had a well-founded fear of persecution under the terms of the 1951 United Nations Convention relating to the Status of Refugees ("the Refugee Convention"). In paragraph 8 of the decision letter, that claim was rejected in the following terms:

> "The reason you have given for claiming well-founded fear of persecution under the terms of [the Refugee Convention] is not one that engages the United Kingdom's obligation under the Convention. Your claim is not based on a fear of persecution in Turkey because of race, religion, nationality, membership of a particular social group or political opinion."

[13] Without prejudice to that conclusion, the decision letter went on (in paragraphs 9 *et seq.*) to consider whether, if the persecution feared by the petitioner had been for a Convention reason, he would be able to seek the protection of the authorities in Turkey should he encounter further problems with A's family on his return to Turkey. In paragraph 10 it was pointed out that, in order to bring himself within the scope of the Refugee Convention he would have to show that the incidents were not merely the random actions of individuals but were a sustained pattern or campaign of persecution directed against him which was "knowingly tolerated by the

authorities, or that the authorities were unable or unwilling, to offer him effective protection". The decision letter went on to consider in paragraphs 12 to 21 a considerable body of objective evidence on the question of the willingness of the Turkish authorities to protect against "honour killings". In paragraph 22 the following conclusion was reached:

> "It is clear, from the sources mentioned above, that the Turkish authorities are committed to stopping "honour killings" in their territory. The criminalisation of such violent acts has been enshrined in legislation and offers protection not only to the female victims of such situations but also to men who, like yourself, have been accused of bringing "dishonour" to a family. Consequently it is clear that the state authorities in Turkey would be willing to offer you protection if you asked for assistance."

[14] Having reached that conclusion on the willingness of the Turkish authorities to afford protection against "honour killing", the decision letter went on, in paragraphs 23 to 28, to address objective evidence on their ability to provide sufficient such protection. At paragraph 29 the following conclusion was expressed:

> "It is therefore considered that the Turkish authorities would be able to offer you protection if you sought their aid. However if individual officers were unwilling to offer you help then there are avenues of redress available you could approach to obtain protection."

Objective evidence on that matter was discussed in paragraphs 30 to 34, and in paragraph 35 the following conclusion was expressed:

> "It is therefore concluded that if a local police constable was unwilling to aid you could approach higher ranking members of the Turkish police force or other

police stations. It is therefore considered that redress is available for any localised failing to offer you assistance."

The discussion continued in paragraphs 36 to 46, and in paragraph 47 it was concluded that there were other bodies besides the police from whom protection might be sought in the event of localised failure to help.

[15] In paragraph 48 of the decision letter it was stated:

"Without prejudice to the above, it is noted that you did not at any time call on the protection or assistance of the authorities even though you claim that you lived in constant fear ... As you have failed to approach the police you have failed to establish that they would be unwilling or unable to protect you."

At paragraph 49 the decision letter continued:

"The reason you have given for not seeking police protection, "If I'd gone to the police I thought that they would be able to find out my whereabouts" ... is not accepted as reasonable. You have described the family of AB as Kurds who were involved in the construction industry, there is no reason to believe that they would have the ability to either influence, or gain information from, the police authorities in Turkey."

[16] In paragraphs 50 to 57 of the decision letter the issue of relocation to another part of Turkey was considered, and in paragraph 58 the view was expressed that:

"It is not considered unduly harsh for you to relocate to another part of Turkey in order to avoid your localised problems with the family of AB."

[17] The petitioner's human rights claim was considered in paragraphs 60 and 61 of the decision letter, and the conclusion was reached that his removal to Turkey would not constitute a breach of Article 2 or 3 of the European Convention on Human Rights.

[18] Finally, in paragraphs 64 and 66 of the decision letter respectively the petitioner's asylum and human rights claims were certified under section 94(2) as being clearly unfounded.

The proper approach to whether a claim is "clearly unfounded"

[19] Mr Forrest submitted that for the respondent's decision under section 94(2) to be valid, it was necessary for it to have been taken applying the correct test and the appropriate degree of scrutiny. He cited *Regina (Yogathas)* v *Secretary of State for the Home Department* [2003] 1 AC 920, a case which raised an issue under the Dublin Convention and concerned the Secretary of State's power under section 72(2)(a) of the Immigration and Asylum Act 1999 to certify an allegation of breach of human rights as "manifestly unfounded". Reference was made to the following passage from the speech of Lord Bingham of Cornhill at paragraph 14:

> "Before certifying as 'manifestly unfounded' an allegation that a person has acted in breach of the human rights of a proposed deportee the Home Secretary must carefully consider the allegation, the grounds on which it is made and any material relied on to support it. But his consideration does not involve a full-blown merits review. It is a screening process to decide whether the deportee should be sent to another country for a full review to be carried out there or whether there appear to be human rights arguments which merit full consideration in this country before any removal order is implemented. No matter what the volume of material submitted or 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 clearly fail."

Reference was also made to the speech of Lord Hope of Craighead at paragraph 34 where his Lordship, after agreeing with Lord Bingam's description of the process as a screening one, went on to say":

"By adopting the language of the international instruments Parliament has made it clear that the issue as to whether the allegation is manifestly unfounded must be approached in a way that gives full weight to the United Kingdom's obligations under the [European Convention on Human Rights]. The question to which the Secretary of State has to address his mind under section 72(2)(a) is whether the allegation is so clearly without substance that the appeal would be bound to fail."

Reference was also made to the speech of Lord Hutton at paragraphs 74.

[20] Mr Forrest then cited *R (L and Another)* v *Secretary of State for the Home Department* [2003] 1 WLR 1230, a case concerned with transitional provisions in section 115(1) of the 2002 Act which were similar in terms to section 94(2). He referred to two passages in the judgment of Lord Phillips of Worth Matravers MR. First, at paragraphs 41, his Lordship said:

"Asylum applications lead the Secretary of State, the Immigration Appeal Tribunal and, on occasion, the courts to consider in depth whether a particular state is one where persecution of a particular class or group takes place. ... The conclusion reached ... is likely to be one of the following: (i) the state is not one where persecution currently takes place; (ii) the state is one where persecution of members of the group or class is, on occasions, encountered; (iii) the state is one in which persecution of members of the group or class is endemic."

At paragraphs 56 and 57, his Lordship said:

> "56. Section 115(1) empowers ... the Home Secretary to certify any claim 'which is clearly unfounded'. The test is an objective one: it depends not on the Home Secretary's view but upon a criterion which a court can readily re-apply once it has the materials which the Home Secretary had. A claim is either clearly unfounded or it is not.
>
> 57. [In the process which section 115(1) calls for] 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 part 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 view succeed, then the claim is clearly unfounded; if not, not."

Mr Forrest submitted that in the present case the respondent had given no consideration to points (iii) and (iv) listed by the Master of the Rolls in the latter passage, but there is, in my view, no merit in that criticism. The decision letter contains no challenge to the credibility of the petitioner's subjective evidence as such. It proceeds, as I read it, on an acceptance of that evidence as true and credible, but then proceeds to measure it against the available background evidence to see whether the petitioner's fears are objectively justified. The points identified therefore did not arise as live issues for consideration.

[21] For the respondent, Miss Carmichael resisted any suggestion, drawn from paragraph 56 in Lord Phillips' judgment in *R (L and Another)*, that the court should substitute its own view of whether the claims were "clearly unfounded" for the view

taken by the Secretary of State. She referred to the speech of Lord Hutton in *R (Yogathas)* at paragraph 74 and to *Atkinson* v *Secretary of State for the Home Department* [2004] EWCA Civ 846 at paragraph 7 where Scott Baker LJ approved an observation by the judge of first instance (Mr Michael Supperstone QC) to the effect that:

> "The question for the court on an application for judicial review is whether the Secretary of State was entitled to be satisfied that the claims were clearly unfounded."

In that case the Secretary of State's decision was set aside on the ground that there was a "real question" as to sufficiency of protection (paragraph 51).

[22] I entertain some doubt as to whether the approach to certification under section 94(2) should necessarily be precisely the same as the approach adopted in *R (Yogathas)*. That is because the effect of certification under section 94(2) is to open the way for the applicant's return to the country where he fears persecution, whereas, in the Dublin Convention context, certification merely means that the human rights allegation will be fully examined elsewhere than in the United Kingdom. Be that as it may, however, I am of opinion that it is correct that, as was said in *Atkinson* (at paragraph 7), in the context of an application for judicial review the court's task is not to make a fresh decision of its own, but to consider whether the decision made by the Secretary of State was one that was properly open to him on the material before him when he made it. The question is whether on that material, properly and carefully considered, the Secretary of State was entitled to conclude that the claims were such as would be bound to fail (*R (Yogathas)*, paragraphs 14 and 34). The existence of a real unresolved question on the evidence and submissions would suffice to preclude certification (*Atkinson*, paragraph 51).

Persecution for a convention reason

[23] The first principal submission advanced by the petitioner was that the respondent erred in paragraph 8 of the decision letter in concluding that the reason given by the petitioner for having a well-founded fear of persecution was not one that engaged the United Kingdom's obligations under the Refugee Convention. The Refugee Convention is concerned only with fear of persecution on certain grounds. One of these is "membership of a particular social group". That is the ground relied upon by the petitioner. He maintains that he falls into a particular social group which he defines as "persons in Turkey whose death is sought by the family of a person whose honour they are perceived to have offended". He alleges that the existence of such a group is verified by the prevalence of honour killings in Turkey of persons in situations similar to that of the petitioner. He asserts that the respondent has fallen into error in law in failing to acknowledge that such a social group exists. Mr Forrest cited *Montoya* v *Secretary of State for the Home Department* [2002] EWCA Civ 620, and in particular, paragraph 55B of the Tribunal's determination, quoted at paragraph 8 of the judgment of the court delivered by Schieman LJ. He quoted in particular the following subparagraphs of paragraph 55B:

> "(x) in order to avoid tautology, to qualify as a particular social group (PSG) it must be possible to identify the group independently of the persecution;
>
> (xi) however the discrimination which lies at the heart of every persecutory act can assist in defining the PSG. Previous arguments excluding any identification by reference to such discrimination was misconceived;
>
> (xii) a PSG cannot normally consist in a disparate collection of individuals;
>
> (xiii) for a PSG to exist it is a necessary condition that its members share a

common immutable characteristic. Such a characteristic may be innate or non-innate. However, if it is the latter, then the non-innate characteristic will only qualify if it is one which is beyond the power of the individual to change except at the cost of renunciation of core human rights entitlements;

(xiv) it is not necessary, on the other hand, for such a group to possess the attributes of cohesiveness, interdependence, organisation or homogeneity".

In the light of these considerations, Mr Forrest submitted, it was arguable that the petitioner was a member of a particular social group and persecuted by reason of being such a member.

[24] For the respondent, Miss Carmichael submitted that there was no merit in the attack on that part of the respondent's decision expressed in paragraph 8 of the decision letter. The petitioner was not, in the circumstances, a member of a particular social group, and the persecution which he claimed to fear was not by reason of membership of such a group. Miss Carmichael referred to *Islam* v *Secretary of State for the Home Department; Regina* v *Immigration Appeal Tribunal ex parte Shah* [1999] 2 AC 629, per Lord Steyn at 639F:

> "... [I]t is an unchallenged fact that the authorities in Pakistan are unwilling to afford protection to women circumstanced as the appellants are. ... Two issues remain: (1) Do the women satisfy the requirement of 'membership of a particular social group?' (2) If so, a question of causation arises, namely whether their fear of persecution is 'for reasons of' membership of a particular social group. I will now concentrate on the first question. It is common ground that there is a general principle that there can only be a 'particular social group' if the

group exists independently of the persecution. In *Applicant A* v *Minister for Immigration and Ethnic Affairs* (1997) 71 ALJR 381, 410 McHugh J neatly explained the point:

> 'If it were otherwise, Article 1(A)(2) would be rendered illogical and nonsensical. It would mean that persons who had a well founded fear of persecution were members of a particular social group because they feared persecution. The only persecution that is relevant is persecution for reasons of membership of a group which means that the group must exist independently of, and not be defined by, the persecution.'"

Reference was also made to *Fornah* v *Secretary of State for the Home Department* [2006] 3 WLR 733.

[25] In my opinion the respondent rightly rejected the petitioner's asylum claim as not engaging the United Kingdom's obligations under the Refugee Convention. The basis on which the petitioner claims to fear persecution for reasons of membership of a particular social group is not well founded. Applying *Islam and Shah* and *Fornah*, those at risk of honour killing do not, in my opinion, constitute a particular social group in the sense required for the application of the Refugee Convention. The group, in so far as it can be regarded as having any existence, is defined, according to the petitioner's approach, by its fear of persecution, but has no existence as a group independent of that fear of persecution. Moreover, it seems to me that the petitioner fears honour killing not because he is a member of a social group, but because he, as an individual, has caused dishonour to A's family. If her family wish him harm, it is not because he is a member of any group of which they disapprove, but because of his own individual behaviour towards A and her family. I am therefore of opinion that the respondent rightly held that the petitioner had not brought himself within the

protection of the Refugee Convention, and that on that account his asylum claim was clearly unfounded.

Sufficiency of protection

[26] The second main branch of the petitioner's argument was that the respondent's decision that the Turkish authorities were willing and able to protect him from honour killing by A's family was unreasonable or irrational. The starting point of the petitioner's case is that honour killing continues to be encountered in Turkey, and is more prevalent in Kurdish areas. I do not understand the respondent to dispute that. Nor do I understand it to be disputed that, if the petitioner had a well founded fear of honour killing, or persecution with a view to honour killing, to return him to Turkey would contravene his human rights under Articles 2 and 3 of the Human Rights Convention. The question which arises in that context is whether the Turkish authorities are willing and able to protect him against such treatment. Mr Forrest rightly emphasised that it was necessary to consider not only whether the authorities were willing to afford protection, but whether they were able to do so. Those issues were considered in sequence in the decision letter, with the conclusion on willingness expressed at paragraph 22, and the conclusions on ability expressed at paragraphs 29, 35 and 48. Mr Forrest, in his submissions, placed great emphasis on the petitioner's own evidence as expressed in the record of his asylum interview at Q. 80, where in response to the question:

"Why didn't you go to the police and tell them of your fears?"

the petitioner replied:

> "If I'd gone to the police I thought that they [sc. A's family] would be able to find out my whereabouts, and I was thinking that even if I'd gone to the police there wouldn't be much chance".

Mr Forrest submitted that it would not be right to say that the petitioner could go to the police, if he himself says that if he went to the police he wouldn't have much chance. I do not understand that point. The petitioner's subjective belief cannot be regarded as conclusive. It was for the respondent to assess the subjective evidence of the petitioner, and he was entitled to do so in the context of the objective evidence. I do not consider that it can be said that it was not open to the respondent to do as he did in paragraph 49 of the decision letter, namely reject the petitioner's position on this point as unreasonable.

[27] Sufficiency of protection does not involve an absolute guarantee of safety. Miss Carmichael cited *Horvath* v *Secretary of State for the Home Department* [2001] 1 AC 489, and in particular passages from the speeches of Lord Hope of Craighead at 494G and 496E, Lord Lloyd of Berwick at 507B and Lord Clyde at 510E to 511B. Lord Clyde said, at 510H:

> "There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected. More importantly, there must be an ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case."

Miss Carmichael pointed out that the petitioner did not challenge the objective evidence relied upon by the respondent, but relied exclusively on his own subjective

evidence in answer to Q. 80. Such subjective evidence was not by itself sufficient to support a conclusion of inadequacy of protection.

[28] In my opinion, the respondent had before him objective evidence which it was open to him to construe as supporting the conclusion that the Turkish authorities were not only willing, but able to a sufficient degree, to afford the petitioner sufficient protection from the threat of honour killing. The petitioner's contention, founded as it was essentially on his own subjective view as expressed in answer to Q. 80, while it was material that the respondent was bound to consider, did not preclude that conclusion. It was open to the respondent to regard the petitioner's stated position as, in the circumstances, unreasonable, as he did in paragraph 49 of the decision letter. I am therefore of opinion that the attack on the reasonableness of the respondent's conclusion on the issue of adequacy of protection must fail. The respondent was, in my opinion, entitled to conclude that both claims were on that account clearly unfounded.

[29] Mr Forrest also advanced an argument in relation to the part of the decision letter dealing with internal relocation, but since that does not arise if the respondent was entitled to hold that there was adequacy of protection and that on that account the human rights claim was clearly unfounded, I need say no more about that aspect of the case.

Result

[30] For these reasons I refuse reduction of paragraphs 64 and 66 of the decision letter of 9 October 2006 containing the respondent's certification of the petitioner's asylum and human rights claims in terms of section 94(2) of the Act as clearly unfounded.