Case No: C/2001/1336

Neutral Citation Number: [2002] EWCA Civ 567
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 26th April 2002

Before:

LORD JUSTICE AULD
LORD JUSTICE WALLER
and
LADY JUSTICE ARDEN

- -

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
SKENDERAJ	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Stephen Vokes (instructed by **Nelsons**) for the **Appellant**
Eleanor Grey (instructed by **The Treasury Solicitors**) for the **Respondent**

- -

Judgment
As Approved by the Court

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Lord Justice Auld:

1. This appeal concerns the definition of refugee in Article 1(A) of the Geneva Convention of 28th July 1951 in its application to non-state persecution. In particular, it is concerned, in the context of Albanian blood feuds, with the definition and consequence of membership of a "particular social group" and the availability and sufficiency of protection when it is not sought. The material words of Article 1A are that:

> " … the term 'refugee' shall apply to any person who:… owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; … "

2. Hasan Skederaj, a citizen of Albania, appeals against the decision of the Immigration Appeal Tribunal declining to uphold the determination of an adjudicator that he should be granted asylum. The facts as found by the adjudicator, though of a somewhat general nature, are not in dispute. Mr Skederaj, with his wife and two children, entered this country illegally in July 1999 and immediately claimed asylum. He did so, having initially left Albania in 1997 to spend two years in Italy, then returning to Albania in May 1999 before leaving again in July 1999 and travelling to this country via France. In interview he said that he had left Albania because of a dispute between his and another family about ownership of land, that the dispute had led to violence and the death of one of the other family's members and that he feared being killed by the other family.

3. The Secretary of State, in his decision letter refusing Mr. Skenderaj's claim for asylum: 1) expressed doubts as to the veracity of his account, given his lengthy stay in Italy and return to Albania before finally making his way to this country; 2) said that, in any event, his claim was not for a Convention reason, in particular it did not amount to a claim of a well-founded fear of persecution for reason of his membership of a particular social group; 3) said that even if his account was true he had not exhausted domestic legal remedies before seeking international protection; and 4) added that he had failed to claim asylum at the first available opportunity on his route to this country.

4. I summarise the account that Mr. Skenderaj gave to the adjudicator on appeal from the Secretary of State's decision and which the adjudicator accepted. When the Communist State in Albania collapsed, land that had been in public ownership was returned to private owners. Mr Skenderaj's family received a particular plot, their entitlement to which was disputed by a neighbouring family. There was a confrontation between the two families with some minor violence followed by a further more serious one in which Mr Skenderaj's uncle shot and killed one of the other family. This killing, as the adjudicator found, "set up a blood feud between the two families which the … [other] family wished to resolve by a revenge killing".

5. Mr. Skenderaj remained at his house under fear of that threat until his uncle died of natural causes some two years later. Because he then felt that he or a cousin would become the primary object of the feud, he left for Italy and stayed there for two years. However, the other family discovered his whereabouts and he decided that he was no longer safe in Italy. So he returned to Albania, collected his family and finally sought asylum in the United Kingdom.

The adjudicator's determination

6. The adjudicator, in the light of that account, found that Mr. Skenderaj had a well-founded fear of persecution in a blood feud. The question was whether the risk of persecution was because of his membership of a particular social group so as to engage the Refugee Convention. The adjudicator found that he was a member of such a group and that the persecution was therefore for a Convention reason, relying on an obiter observation of Laws J, as he then was in *R. v. IAT, ex p. de Melo & Anor.* [1997] Imm AR 43, at 49; and *R v. IAT, ex p. Shah* [1999] 2 WLR 1015, HL. He said:

> "13. I accept that the Appellant, as a male in a family which is part of a blood feud in Albania, is a member of a social group and the persecution is therefore for a Convention reason."

7. The adjudicator then turned to the sufficiency of state protection. He found that it was custom –not fear of persecution – that stopped those involved in blood feuds in Albania from seeking police protection and that prompted them to look after themselves. He added, however, that if they had sought such protection, the police would not have been able to provide it. This is how he put it, referring to the sufficiency of state protection test laid down by the House of Lords in *Horvath v SSHD* [2002] 3 WLR 379:

> "14... The question is whether in fact … [Mr. Skenderaj] could obtain protection from the State … Mrs Walker argues that it is not that the police are unable to offer protection in these cases. It is the choice of the parties not to seek police protection and to pursue their feuds according to the custom of the country … Taking the evidence overall, I have come to the conclusion that while it is reasonable for Mrs. Walker to argue that the parties to the feuds do not seek police protection nevertheless even if they did so the police would not be able to offer it. Using the test in the case of Horvath I accept that although in theory the machinery of prosecution may be in place the authorities do not in fact have the ability to stop blood feuds or to protect this particular appellant...
>
> 16. ...using the appropriate standard of proof for asylum cases I consider that the Appellant has established that he has a well-founded fear of persecution for a convention reason and that the State is not able to offer him protection against that."

The Tribunal's decision

8. The Secretary of State appealed to the Immigration Appeal Tribunal on two grounds:

1) that the adjudicator should have found that the social group argued for does not exist independently of the persecution – put more shortly, a social group is not created by a common fear; and

2) that the adjudicator failed to consider whether the family was being persecuted for a convention reason.

As those grounds indicate, the Secretary of State did not challenge the adjudicator's acceptance of Mr Skenderaj's account nor his finding that Mr Skenderaj would not receive effective protection from the Albanian authorities even if he asked for it.

9. The Tribunal did not decide the matter on the issues raised by the grounds of appeal. It acknowledged that the grounds went straight to the root of the claim in arguing that fear of persecution arising from a blood feud was not capable of founding a case under the Refugee Convention. However, apart from referring to the adjudicator's brief ruling on that issue and making oblique references to it in considering some authorities, it left it unresolved and disposed of the appeal on the issue of failure to seek state protection. The Tribunal appears to have accepted, in paragraphs 3 and 8 of its decision, that the state would not have been able to protect Mr. Skenderaj even if he had sought protection, though this reasoning shades in paragraph 9 so as to focus more on the reluctance of those involved to seek protection:

> "3 … For present purposes, we accept the adjudicator's rather general analysis of the background evidence as showing that the Albanian authorities would not have been able to protect the asylum-seeker, even if he had gone so far as asking them to. Since the internal flight alternative has not been raised in the grounds of appeal, we accept for present purposes only that this inability would extend to the country at large; so there was no point in the asylum-seeker seeking to engage the machinery of State protection at all. …
>
> 8. We can see well enough that there is a serious protection problem for men involved in blood-feuds in Shkoder: [the region in which Mr. Sjebnderaj and his family lived]: on the adjudicator's findings … this may extend to the country as a whole. However, what is also quite clear is that the police, typically in a traditional blood-feud culture, are faced with a wall of silence. …
>
> 9. Certainly in a situation of this kind the authorities are unable to protect those involved; but there is no question of their practising any discrimination against them in the protection they do not extend. The problem is not one caused by the State

> apparatus, … but by the traditional unwillingness of ordinary people to involve it in their quarrels. As will be remembered, the adjudicator accepted the presenting officer's argument that those involved in feuds do not by their custom seek police protection; but, taking the view that it would not be effective in any case, he regarded that as no obstacle to the claim."

10. The Tribunal developed that reasoning in paragraphs 10 and 11 of its decision:

> "10 It is a commonplace of refugee law that international protection is a surrogate for national. Clearly where seeking national protection would itself be risky, or where, as in *Shah,* the national system itself is the cause of risk, then an asylum-seeker is not bound to take pointless or counter-productive action to claim it. On the other hand, the nature of the Albanian blood feud system (as no doubt with most of its kind) is such that no question of State protection ever arises. Not only is there no discrimination against blood feudsmen either in law or police practice: the community as a whole has simply taken the stand that the feud system falls outside those areas, and is in effect autonomous. While it is perfectly possible, on the adjudicator's findings, to say that this asylum-seeker faces persecution, in the ordinary sense, from members of the opposing Alikaj clan, because he is a member of his own, there has not been the failure of State protection which would turn it into Convention persecution as a member of a particular social group, because it has simply never occurred to anyone to engage the State machinery.
>
> 11. The asylum-seeker himself did not claim to have tried to do so; …. Without deciding what view should be taken of an asylum-seeker who had clearly put himself outside the blood feud consensus by seeking some solution within Albania, that is not this case. To say that this asylum-seeker should be entitled to asylum here, because State protection is not available in Albania, in effect because neither he nor anyone else caught up in a feud is prepared to seek it, is in our view to use the Refugee Convention for a purpose for which it was never intended, and which does not fit."

11. In summary, therefore, the Tribunal seems to have been prepared to accept that the Albanian authorities were unable to protect Mr. Skenderaj. However, it found that the Albanian blood feud system, by the consent of the community, stood outside the law, with the result that, as the state machinery of protection was never engaged, there was no failure of protection.

The issues on this appeal

12. Mr. Skenderaj now appeals to this Court on the state protection issue. He maintains that the Tribunal wrongly relied on his failure to seek state protection when it accepted that there was a consensus in Albanian society that the state was not expected to, and would not, provide protection to victims of blood feuds.

13. It seemed to the Court before the start of the hearing of the appeal that it was unsatisfactory in this case that the Tribunal had largely ignored the two issues raised by the appeal before it and had taken the short-cut to deciding the case on the simple failure of Mr. Skenderaj to seek State protection. All three issues are important under the Convention and any of them could be determinative in this case or future cases like it. The first is whether the potential victim of a blood feud in Albania or other country with similar traditions may, on that account, be a member of a particular social group within the Convention. If so, the second is whether, on the facts of the case the persecution feared is "for reasons of" such membership. And the third – the only one raised by Mr. Skenderaj's appeal - is the sufficiency of state protection in Albania, whether or not it is available, if it is not sought in such cases. Accordingly, at the beginning of the hearing of the appeal we invited Miss Eleanor Grey, for the Secretary of State, to consider advising him to serve a respondent's counter-notice out of time so as to enable the Court to deal with all those issues.

14. The Secretary of State then, with the consent of Mr. Stephen Vokes, for Mr. Skeneraj, and the permission of the Court, filed and served a counter-notice, seeking to uphold the order of the Tribunal for the reason it gave and also on the two issues whether Mr. Skenderaj was a member of a particular social group and, if so, whether he was persecuted for that reason. The grounds in the Secretary of State's counter-notice are that the Tribunal should have allowed his appeal for the following two reasons in addition to the one it gave::

    i) that Mr. Skenderaj had failed to establish that his family constituted a particular social group within the meaning of the Convention, in particular because such a group did not and cannot exist independently of the persecution, that is, of the common fear; and

    ii) that Mr. Skenderaj had failed to establish that he was persecuted "for reasons of" his membership of a particular social group.

15. To succeed in his claim Mr. Skenderaj had to establish three things: first, that he was a member of a particular social group; 2) that his fear of persecution flowed from such membership; and 3) that the state was unable to protect him from such persecution or that, owing to such fear, he was unwilling to avail himself of such state protection as was available.

Particular social group

16. Before turning to the submissions of counsel on this issue, we should briefly refer to the meaning of the term "particular social group" and to its main non-contentious and contentious elements. In doing so, we recognise that it is an imprecise and fact-sensitive term which, depending on the circumstances, can also involve difficult questions of judgment. We also acknowledge the number of recent and highly authoritative judicial analyses of the term in this and other common law countries and do not intend what follows to be another attempt at a comprehensive analysis of the topic.

17. To put counsel's respective submissions in context, we suggest that membership of a particular social group exhibits the following uncontroversial and sometimes over-lapping features: 1) some common characteristic, either innate or one of which, by reason of conviction or belief, its members, cannot readily accept change; 2) some shared or internal defining characteristic giving particularity, though not necessarily cohesiveness, to the group, a particularity which, in some circumstances can usefully be expressed as a setting it apart from the rest of society; 3) subject to possible qualification that we discuss below, a characteristic other than a shared fear of persecution; and 4) subject to possible qualification in non-state persecution cases, a perception by *society* of the particularity of the social group.

18. Though guidance can be derived from the particular groups identified in Article 1A)(2) and the application of the ejusdem generis rule, there is potential for a broad range of collectivities. Whether there is a particular social group of which a claimant is a member is essentially a mixed question of fact, policy and judgment in the context of the society in which it is claimed to exist. Persons with common innate characteristics, such as persons of the same gender or family, do not necessarily constitute a particular social group. And particular social groups can be very large or very small and, depending on the circumstances, can consist of a clan or a family. See e.g. *In re Acosta* (1985) I & N 211; *Re GJ* [1998] INLR 387, NZRSA; *Attorney-General of Canada v.* Ward [1993] 2 SCR 689; *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997) 71 ALJR 381; Minister *for Immigration and Multicultural Affairs v.* Sarrazola [1999] FCA 1124; *ex p. Shah; Chen Shi Hai v. The Minister for Immigration and MulticulturalAffairs* [2000] HCA 19*;* Refugee *Appeal No 71427/199* [2000] INLR, 608; and *R v. SSHD, ex p. Montoya,* (00TH0016), IAT, 27th April 2001.

19. Those familiar with the issue and the authorities may wonder why, in the light of the House of Lords' treatment of the matter in *ex p. Shah*, we have qualified the notion of "setting apart from society" and have made no mention of discrimination or stigmatisation as defining characteristics of a particular social group. We acknowledge that the protection provided by the refugee test as a whole is undoubtedly inspired by anti-discrimination notions; see, e.g., *Refugee Appeal No 71427/199* and *ex p. Shah*. But we have held back on them for the moment because they have been live issues in this appeal and because we believe it is open to question whether, in a non-state persecution case as here, it is a *necessary* defining characteristic of a particular social group. There is a particular difficulty where the

persecution is by somebody other than the state. In such a case, if setting apart, discrimination or stigmatisation is an essential element, who is doing the setting apart, discriminating or stigmatising? Not necessarily society. It may just be those doing the persecuting. The state comes into it if it fails to protect, as some of their Lordships observed in *ex p. Shah,* but that failure, though a product or symptom of discrimination, goes to a different part of the refugee test. In short can a claimant, in a non-state persecution case, establish that he is a member of a particular social group simply by proving that someone - anyone- has marked out his group - in this case a family - for special attention, say, a quarrelsome and violent neighbour or a gang leader in pursuit of some private spite or vengeance?

20. Mr. Vokes initially appeared to accept the need to establish some setting apart or discrimination on this part of the refugee test. He submitted that Mr. Skenderaj was a member of particular social group that faced discrimination amounting to persecution because he was a male in a family involved in a blood feud prompted by his uncle's killing of a member of the other family. Such family membership giving rise to such discrimination, he argued, amounted to an immutable social characteristic rendering him a member of a social group "set apart from society" and thus within the Convention. To the Court's enquiry whether that did not infringe the principle that the group should not be defined by the persecution, he submitted that it was only "partially defined" by the persecution since there was also the immutable tie of kinship.

21. Miss Grey acknowledged that a family group could be a particular social group, since society recognises the family bond as distinct and attaches importance to it, but only if society also sets it apart in such a way as to stigmatise or discriminate against it for that reason. She maintained that Mr. Skenderaj had failed to establish before the adjudicator that his family constituted a particular social group within this meaning. She submitted that there was no discrimination here other than that identified by the persecution itself, that is, the social grouping was based solely on the blood feud manifested in the persecution.

22. Miss Grey submitted that there was no evidential basis for recognising Mr. Skenderaj's family as a "group apart" or stigmatised in any way or discriminated against. She said that the family was not on the facts of this case recognised as a distinct group by society and to the extent that it was so regarded by the family with whom it was feuding, it was essentially a private matter, as in *Pedro v. IAT* [2000] Imm AR 489, CA. And the state's non-intervention, to the extent that it resulted either from incapacity, unwillingness or ignorance of the matter did not provide the discrimination, because it did not intervene generally in such feuds. She added that unless every land owning family in Albania were to constitute a particular social group, which is not Mr. Skenderaj's case, only the start of a feud can mark a family group out. Such an approach would impermissibly rely on the act or acts of persecution to define the group. Accordingly, she submitted, neither Mr. Skenderaj's family nor the male members of it formed a particular social group within the Convention.

23. Now that we have identified the area of dispute on this issue, we return to *ex p. Shah*. There was clear discrimination of Pakistani women in that case, but we doubt whether that factor was necessary to the House of Lords' determination that they or some of them constituted a particular social group. The main reason for the resort to anti-discriminatory principles was to dismiss the notion that cohesiveness was a necessary element of such a group. Given the approach of the US Board of Immigration and Appeals in *Acosta* and of the reasoning of La Forest J. in the Supreme Court of Canada in *Attorney-General of Canada v. Ward* [1993] 2 SCR 689 on which their Lordships drew heavily in *ex p. Shah*, it may be that, on this part of the refugee test at least, discrimination was not an essential. Thus, as Lords Steyn and Hoffmann mentioned, at 1026e-h and 1033b-h respectively, in *Acosta*, the Board said that a particular social group was one distinguished by an immutable characteristic; and in *Ward*, La Forest J. said simply, and by reference, to the whole refugee concept, that it could include individuals fearing persecution on "such bases as gender, linguistic background and sexual orientation".

24. Lord Hope seemingly did not regard the notion of discrimination as essential to the definition of a particular social group, as distinct from the whole concept of refugee status. He said, at 1038e-g and1039c-d:

> "In general terms a social group may be said to exist when a group of people with a particular characteristic is recognised as a distinct group by society. The concept of a group means that we [are] dealing here with people who are grouped together because they share a characteristic not shared by others, not with individuals. The word 'social' means that we are being asked to identify a group of people which is recognised as a particular group by society. …
>
> The rule that the group must exist independently of the persecution is useful, because persecution alone cannot be used to define the group. But it must not be applied outside its proper context. This point has been well made by *Goodwin-Gill* ... He observes at pp 47-48 that the importance, and therefore the identity, of a social group is an open-ended one, which can be expanded in favour of a variety of different classes susceptible to persecution … Persecution may be but one facet of broader policies and perspectives, all of which contribute to the group and add to its pre-existing characteristics."

25. Lord Millett, in his dissenting speech (which turned on the reason for persecution of the women applicants), clearly found a degree of difficulty in the overlap of the two concepts of discrimination and persecution, a difficulty which, with respect, we share. Persecution of members of a particular social group only qualifies as persecution for a Convention reason if it is for reasons of such membership, which of necessity must be discriminatory. It is otiose and circular that the group should have to be defined by some discriminatory element before consideration of whether it is persecuted for that reason. Providing that there is a social group in the *Acosta* sense, the discrimination is to be found in the persecution. Lord Millett said, at1043f-g and 1044d-e:

> "… it is not enough for the applicant for asylum to establish that he or she is a member of a particular social group and is liable to persecution. The applicant must also establish that he or she is liable to persecution because he or she is a member of the group. The applicant must be the subject of attack, not for himself or herself alone, but because he or she is one of those jointly condemned in the eyes of their persecutors for possession of the characteristic which is common to the group. …
>
> Whether the social group is taken to be that contended for by the appellants, however, or the wider one of Pakistani women who are perceived to have transgressed social norms, the result is the same. *No cognisable social group exists independently of the social conditions on which the persecution is founded. The social group which the appellants identify is defined by the persecution, or accurately (but just as fatally) by the discrimination which founds the persecution.* It is an artificial construct called into being to meet the exigencies of the case. [my emphasis].

26. We also draw strength in this regard from the judgment of the High Court of Australia in *Chen,* where one of the issues was whether black children in China constituted a particular social group. The Court was firmly of the view that discrimination is not an essential defining characteristic of a particular social group:

> "22 …the group constituted by children born in those circumstances is defined other than by reference to the discriminatory treatment or persecution that they fear. And so much was recognised by the Tribunal in its finding that a 'child is a black child' irrespective of what persecution may or may not befall him or her.
>
> 23 The circumstance that 'black children' receive adverse treatment in China is descriptive of their situation and, as McHugh J pointed out in *Applicant A*, that may facilitate their recognition as a social group for the purposes of the Convention *but it does not define it*. Accordingly, there was no error in the Tribunal's finding that, for the purposes of the Convention, the appellant is a member of a particular social group." [our emphasis]

27. There is plenty of scope for giving effect to anti-discriminatory principles underlying the protection of refugees when considering whether membership of such a group attracts persecution of all or, as in *Shah*, *some* of them. Put another way, it is not necessary to insist upon discrimination as a defining element of a particular social group to satisfy McHugh J's proposition in *Applicant A*, at 401, that the latter must exist independently of, and not be defined by, persecution. If, we are right about this, it could explain the thinking behind McHugh J's qualification of the proposition, at 402, that "while persecutory conduct cannot define the social group, the actions of

persecutors may serve to identify or even cause the creation of a particular social group." Professor Goodwin-Gill in *The Refugee in International Law*, 2nd ed. (1996) at, 362, expressed much the same view:

> "In *Ward* the Supreme Court was clearly of the view that an association of people should not be characterised as a particular social group, 'merely by reason of their common victimisation as the objects of persecution'. The essential question, however, is whether the persecution feared is the *sole* distinguishing fact that results in the identification of the particular social group"

He added, referring to state persecution, which is not this case:

> "Taken out of context, this question is too simple, for wherever persecution under the law is the issue, legislative provisions will be but one facet of broader polices and perspectives *all* of which contribute to the identification of the group, adding to its pre-existing characteristics."

28. Moreover, as Miss Grey commented in argument, McHugh J's proposition that a particular social group must have an existence independently of the persecution is difficult to fit with non-state persecution. Lord Steyn's and Lord Hope's concern in *ex p. Shah*, at 1027d-e, and 1039c-d respectively, that it should not be given a reach which neither logic nor good sense demands also found expression in relation to non-state persecution in the caution of Lord Hoffmann, at 1036C-E, that such cases should be considered by adjudicators on a case by case basis. In, ex p. *Shah*, as he said, the distinguishing feature was the evidence of institutionalised discrimination against women by the state.

29. As we have already indicated there is powerful authority that kinship or family membership may, depending on the circumstances, qualify as membership of a particular social group. Lord Steyn indicated as much in Shah, at 1026e-h, drawing on what he described as "the seminal reasoning" of the United States Board of Immigration Appeals in In re *Acosta*:

> "Relying on an ejusdem generis interpretation the Board interpreted the words 'persecution on account of membership in a particular social group' to mean 'persecution 'that is directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic' The Board went on to say that the shared characteristic might be an innate one 'such as sex, color or kinship ties"

See also: *ex p. de Melo & Anor,* per Laws J at 49; *Quijano v. SSHD* [1997] Imm AR 227, CA., per Thorpe LJ at 229 and 230, per Morritt LJ at 233, and per Roch LJ at 234; and. *Sarrazola.*

30. In our view, on the evidence accepted by the adjudicator and not challenged before the Tribunal, Mr. Skenderaj has not made out his claim that he was a member of a particular social group so as to engage the other elements of the test of a refugee in Article 1A(2). We say that, not for the reason principally relied on by Miss Grey that there was no setting apart or stigmatisation of, or discrimination against, the family outside the persecution alleged since, for the reasons we have given, we do not regard that as a necessary part of the definition of a particular social group, particularly in a non-state persecution case. We say it because, as Miss Grey also submitted, the Skenderaj family was not regarded as a distinct group by Albanian society any more than, no doubt, most other families in the country. To rely on the attitude of the family with whom it was feuding, as a marking out of the Skenderaj family so as to make it a particular social group for this purpose would be artificial. The threat was, as in *Pedro* (which concerned the rape of a woman in Angola by a soldier) a private matter, just as would be a long-standing and violent feud between neighbours or threats of violence from criminals for some actual or perceived slight or with some motive of dishonest gain. It would be absurd to regard the first limb of the refugee test as engaged every time a family is on the receiving end of threatening conduct of that sort.

31. If, contrary to our view, some element of discrimination is required to establish the Skenderaj family as particular social group, it could not be found in the state's non-intervention, since that would arise, if at all, only as a result of the private persecution and then in the context of the second limb of the definition of refugee concerned with lack of protection. Nor could it be found in the other family's persecutory attitude since, again, it is impermissible to rely on persecution to establish the group for Convention purposes where no other distinguishing feature other than that it is a family is made out. As Miss Grey observed, unless every land-owning family in Albania were to constitute a particular social group, which is not Mr. Skenderaj's case, only the start of a feud can mark such a family group out.

Persecution "for reasons of" membership of a particular social group

32. On the issue whether, if, contrary to our view, Mr. Skenderaj's family is a particular social group, he fears persecution for reasons of that membership, Mr. Vokes submitted that he fears persecution for who he was, that is, a member of a family involved in a blood feud resulting from the Government's re-distribution of land. In fact, as we have said, the adjudicator's finding was narrower, namely that Mr. Skenderaj feared persecution because he was a member of a family, a senior member of whom had killed a member of another family

33. Miss Grey submitted that Mr. Skenderaj had failed to establish that the reasons for his fear of persecution was membership of his family. She said that the effective cause of his fear was the threat of reprisal for his uncle's unlawful killing of a member of the other family, the threat flowing from his relationship with his uncle. She added that the deceased's family could have targeted anyone whom they regarded as associated with the uncle, whether or not a member of the family. In short, the effective cause was criminality – a threat of a revenge attack by another individual - rather than action taken for a Convention reason.

34. Their Lordships' reasoning in *ex p. Shah*, in particular of Lord Steyn at 1028a-d, Lord Hoffmann at 1034h-1036b and Lord Millett at 1044a-b, favours an "effective cause" rather than a "but for" test. That is of a piece with the common-sense approach urged by Kirby J. in *Chen*, at paras. 32 and 66-69.

35. In *Quijano*, there was a claim for asylum on the ground of persecution by reason of the claimant's membership of his stepfather's family. The Secretary of State did not contest that in certain circumstances a family could be a social group within the Convention. However, the Court of Appeal rejected the claim because it arose, not because the claimant was a member of his stepfather's family, but because the stepfather was being persecuted for refusal to co-operate with a drug cartel, which was not a Convention reason. The Court considered that, as persecution of the stepfather had not been for a Convention reason, persecution of the claimant could not be transformed into persecution for such a reason simply because he was a member of the same family. In doing so they took a different view from that of Laws J in *ex p. de Melo*, who had said obiter that persecution of a person for a non-convention reason could lead to persecution of other members of his family for the same reason becoming persecution of them for a Convention reason, because their membership of the family made them a particular social group. Thorpe LJ said, at 232:

> "… I conclude that the persecution arises not because the appellant is a member of the Martinez family but because of his stepfather's no doubt laudable refusal to do business with the cartel. The persecution has that plain origin and the cartel's subsequent decision to take punitive action against an individual related by marriage is fortuitous and incidental as would have been a decision to take punitive action against the stepfather's partners and their employees had the business been of that dimension."

Morritt LJ said at 233:

> "… the fear of each member of the group is not derived from or a consequence of their relationship with each other or their membership of the group but because of their relationship, actual or as perceived by the drugs cartel, with the stepfather of the appellant. The stepfather was not persecuted for any Convention reason so that their individual relationship with him cannot cause a fear of a Convention reason either. In short, the assumed fear of the appellant is not caused by his membership of a particular social group."

Roch LJ made the same point, but in more general terms, at 234:

> "Where … the ground relied upon by the applicant for refugee status is 'a well-founded fear of being persecuted for membership of a particular social group' the persecution feared must be persecution of the social group as a social group. A family is a social group. For the family to become a 'particular

> social group' within the meaning of the Convention, it must, in my judgment, be a family which is being persecuted or likely to be persecuted because it is that family."

36. *Quijiano* must now be read in the light of *ex p. Shah* in that the definition of a particular social group does not depend on whether all its members are persecuted by reason of their membership. However, the reasoning still stands on the issue whether, given that a family is or may be a particular social group, the fear of persecution is "for reasons of" that membership. And it is important in the distinction that it draws between identification of the group where there is some societal discrimination or, as here, a dispute between two neighbouring families, and the conduct prompting fear of persecution. The relationship of members of a family to one of their number facing persecution for a non-convention reason is one thing, the membership of a family which, as a family, faces persecution is another. As always, the decision on causation in such cases will be one of fact and degree and decision-makers should keep their feet on the ground, notwithstanding the heady issues that Balkan blood feuds can engender. We are talking about neighbours' quarrels, albeit of a most serious nature, in which the action of one individual, here a killing, may lead to persecution of him and/or those associated with him. The following remarks of the Tribunal in *Correa* (01TH01177), 7th June 2001, are pertinent:

> "In our view, a straightforward family feud does not engage the protection of the Refugee Convention, unless for example there is some evidence of a differential lack of protection, or some Convention content over and above the family background (as required in *Quijano*). Otherwise one might be faced with bizarre situation that one man would not be protected against fear of his personal enemies; but if they took out vengeance on his brother, then the brother would be protected. No doubt if the first man sought to protect his brother, and brought down the wrath of his enemies on himself while engaged in that, then he too could expect protection."

37. For those reasons, we are of the view that, even if Mr. Skenderaj's family is a particular social group, his fear of persecution was not because of that membership but because of fear of reprisal for his uncle's act of killing one of the other family.

Failure to seek State protection

38. Mr.Vokes challenged the conclusion of the Tribunal that Mr. Skenderaj's failure to invoke the protection of the State because that was the norm in Albania blood-feud cases took his claim outside Convention because of failure to "engage the State machinery". He relied on the reasoning of the House of Lords in *Horvath*, in particular of Lord Hope, at 498E-H, 499H and 500E-H, and of Lord Clyde, at 510E-H, in support of the proposition that states cannot, by a known "helpless acceptance" of third party persecutory acts accepted by society, be relieved of the obligation to provide sufficient protection against them. He submitted that in non-state persecution claims the availability or otherwise of sufficient state protection is not the sole test,

since a product of a well-founded fear of persecution may well be an unwillingness to seek it. He drew attention to the wording of the second limb of Article 1A(2) which, for convenience, we repeat:

> " … is unable or, owing to such fear, is unwilling to avail himself of the protection of that country .."

He stressed the breadth of the state's obligation in this respect, citing the words of Lord Lloyd in *Adan v. SSHD* [1999] AC 293, HL, at 306C, in his discussion of both limbs of the definition, which he called respectively the "fear" and "protection" tests:

> "But if, *for whatever reason*, the state in question is unable to afford protection against factions within the state, then the qualifications for refugee status are complete. Both tests would be satisfied." [our emphasis]

39. Mr. Vokes sought to support this challenge by reference to much literature showing the prevalence of blood feuds in Albania and of the unwillingness and/or inability of the Albanian police to protect persons who are potential victims of such feuds. He also drew particular attention to the following passage from the speech of Lord Clyde in *Horvath*, at 510A-C:

> "Professor Goodwin-Gill …, p. 73 .. observes: 'where the state is either unable or unwilling to satisfy the standard of due diligence in the provision of protection, the circumstances may equally found an international claim.' The important consideration here to my mind is that the persecution is encouraged or permitted by the authorities or they are unable or unwilling to prevent it. Even in cases where the state may not initiate or direct the acts complained of, its encouragement, permission, toleration or helpless acceptance of the act may constitute a case of persecution. Thus the acts may be seen as constructively acts by the state and so be within the kind of acts which the Convention is concerned to cover."

40. Miss Grey also took the Court to their Lordships' treatment of the topic in *Horvath*, in which, having taken into account the guidance of the European Court of Human Rights in *Osman v. UK* (1998) 29 EHRR 245 and applying the principle of surrogacy, they identified the test and standard as one of relative sufficiency, not an absolute guarantee, of protection. See also *Hari Dhima v. IAT* [2002] EWHC 80 (Admin). She submitted that the Tribunal correctly applied that test and standard to the circumstances here, where Mr Skenderaj did not, and no one would, invoke the protection of the state in a case involving a blood feud. She said that, to hold that the state had failed in its duty to protect him would, paraphrasing the words of the European Court in *Osman*, ignore the constraints on the provision of police protection and impose an impossible or disproportionate burden upon the authorities. The root cause of the inability of the state to protect him was his and other blood feud victims'

unwillingness to seek its protection rather than any inherent inability or unwillingness of the state to provide it if asked.

41. The difficulty about that submission is the adjudicator's finding, purporting to apply the *Horvath* test, that even if victims of blood feuds in Albania did seek state protection, the police could not provide it. As we have noted, the Secretary of State did not challenge that finding on his appeal to the Tribunal, confining his grounds to fear of persecution. The matter only arises for consideration now because of the Tribunal's reliance on it, seemingly as a short cut, to its decision.

42. As Lord Clyde pointed out in *Horvath*, at 516F-517D, there are two alternative parts of the lack of protection limb of the definition of a refugee, and each case must be considered on its own facts. Satisfaction of either alternative will meet it. The first is a claimant's inability to avail himself of state protection, which may be because it is non-existent or insufficient; see, for example, in the context of Albanian blood feuds, *Bregu v. SSHD,* IAT Decision 01TH02286, 17th October 2001. Or it may be because he is in some way personally disabled from seeking it. The second is his unwillingness to avail himself of it because of fear of persecution for a Convention reason. Such fear must be a well-founded fear of persecution, not just an expectation, however well founded, that the police cannot or will not do anything about it. Thus, if the state cannot or will not provide a sufficiency of protection, if sought, the failure to seek it is irrelevant. And that is so whether the failure results from a fear of persecution or simply an acceptance that to do so would be futile.

43. There may be difficulty, where the sufficiency of protection has to be measured against the practical limitations on a state to protect its citizens from violence or threats of violence to which it is not alerted and its protection is deliberately not sought. To stigmatise a state so hampered as providing insufficient protection would wrongly impose on it a duty of guarantee, which, as Lords Hope and Clyde said in *Horvath¸* respectively at 500F-H and 510F-H, would be beyond what is required or, as the European Court held in *Osman*, at paragraph 116 in relation to Article 2 of the ECHR, would be disproportionate. Effective policing depends heavily on policing by consent. The Court has recently determined that such an approach conforms with Strasbourg jurisprudence; see *Dhima v. IAT* (CO/2392/2001), …. 2002. However, given the adjudicator's finding and the Tribunal's acceptance of the Albanian authorities' inability to provide protection even if sought, this difficulty does not arise in this case.

44. On the other hand, if the state can provide a sufficiency of protection which an applicant is not disabled from seeking, he can only rely on the alternative of his unwillingness to do so, if it flows from a well-founded fear of persecution, for example of collusion of the authorities with his persecutors, in effect, an insufficiency of protection rendering him unable to avail himself of it. It would not qualify under this alternative that he does not seek protection because he has a well-founded belief that the state won't provide it or, as the adjudicator appears to have found, because of a societal norm not to seek it. We do not regard Lord Lloyd's use of the words "for whatever reason" in the passage from Lord Lloyd's speech in *Aden*, on which Mr. Vokes relied, as applicable to inability to afford protection produced by unwillingness

of an applicant to seek protection for reasons other than fear of persecution, since that would make the second alternative of unwillingness "owing to such fear" otiose. If the reason is a well-founded belief that the State would not provide protection, such a construction is, in any event, unnecessary, since such a state of mind would amount to well-founded fear that would satisfy the first alternative of inability to avail himself of protection. Lord Lloyd touched on this point in *Horvath*, at 507D-E:

> "As for the second part of the protection test, there will not be many cases in which an applicant who is able to avail himself of the protection of his country of origin, will succeed on the ground that he is unwilling to do so. Here the applicant's case … is that he regards the local police as ineffective and indifferent. But he is not the sole judge of that. The test is objective. The Immigration Appeal Tribunal has found as a fact that the available protection satisfies the Convention standard. There are no special circumstances which would enable the applicant to succeed on the second branch of the protection test, having failed on the first. …"

45. In our view, it was inappropriate for the Tribunal when considering the issue of state protection, on which it based its decision, to argue that there was no discrimination by the state because the absence of protection flowed from unwillingness of blood feud victims to seek it rather than the state's failure to extend it to them. Such reasoning begs the essential question under Article 1A (2) whether unwillingness, as distinct from inability, is "owing to" a fear of persecution. As Mr. Vokes submitted, such a blanket exclusion from state protection is plainly discriminatory, amounting as it would to an autonomous persecutory system lying "outside society". In any event, despite the close inter-relationship of the fear and protection tests, it is, in our view, unhelpful and unnecessary in non-state persecution cases to turn to discrimination or the lack of it when focusing on the latter.

46. The critical factor in cases where a victim of non-state persecution is unwilling to seek state protection is not necessarily whether the state is able and willing to provide a sufficiency of protection to the *Horvath* standard, though in many cases it may be highly relevant to the victim's well-founded fear of persecution. The test is whether the potential victim's unwillingness to seek it flows from that fear. As we have said, the Tribunal clearly accepted, in paragraph 9 of its decision, the adjudicator's finding that those involved Albanian blood feuds, including by implication Mr. Skenderaj, do not seek police protection because they consider it would not be effective.

47. However, as we have said, the Tribunal appears to have been satisfied, as was the adjudicator, that, whatever Mr. Skenderaj's reason for not seeking protection, the state could not have provided it anyway, thus bringing his claim within the first alternative of inability to provide protection. Nevertheless, for the reasons we have given earlier in relation to the fear of persecution limb of the definition of refugee, we are of the view that he has not established he had such a fear for a Convention reason so as to take advantage of the second limb of the definition. Accordingly, we dismiss his appeal.

Lord Justice Waller:

48. I agree.

Lady Justice Arden:

49. I also agree.

Order:

1. **The appeal be dismissed**

2. **The Appellant to pay Respondent's costs of the appeal and that there be detailed assessment of such costs**

3. **Detailed legal aid assessment of the Appellant's costs.**

(Order does not form part of the approved judgment)