Heard at Field House SS (Moslem – False Charges) India CG [2002] UKIAT 03340

Appeal No CC50101-2001

On 27 June 2002

IMMIGRATION APPEAL TRIBUNAL

Date Determination Notified

1 August 2002

Before

Mr S L Batiste (Chairman)
Mr P Rogers JP

SHEZAD SHEIKH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. The Appellant, a citizen of India, appeals, with leave, against the determination of an Adjudicator, Mr B Andonian, dismissing his appeal against the decision of the Respondent on 12 August 2001 to issue removal and refuse asylum

2. Ms M Hodgson, instructed by Messrs Ashley Bean & Co, represented the Appellant. Mr M Pichamuthu, a Home Office Presenting Officer, represented the Respondent.

The Proceedings

3. The Appellant lived in Ratnagiri in Maharashtra State and claimed that he was forced to leave India after the murder of his wife's brother because he was falsely accused of the murder. He was a Moslem who had worked for the Moslem League. For some years he had opposed a programme of forced religious conversion promoted by the RSS, a Hindu nationalist organisation, and he had been beaten five or six times by people from the RSS. When there was trouble between the Hindus and the Moslems, the police would arrest him. The RSS blamed him for his brother-in-law's murder and there were charges pending against him. However his brother-in-law had been murdered because he protested against the murder of the Appellant's father, who had died of a heart attack following a bombing.

4. The Adjudicator made various findings. The attacks against the Appellant were reported to the police and investigated by them. Their inability to apprehend the perpetrators could not in the circumstances be construed as complicity in or support for such attacks. The arrests of the Appellant by the police were a legitimate part of their investigations into incidents of violence and unrest. If false charges were pending against the Appellant, the judiciary in India is independent and the Appellant would be entitled to proper legal representation. The Appellant also had a viable internal flight option.

5. Leave to appeal was granted solely on the basis of the outstanding charges against the Appellant in relation to his brother-in-law's murder. It was submitted on behalf of the Appellant in the leave application that the objective country material shows that torture by police in detention throughout India is widespread and there were a number of cases of death in police and judicial custody. The Adjudicator failed to consider whether the Appellant would receive such treatment and whether this would be in breach of his human rights under Article 3.

6. Ms Hodgson in fact argued wider points, though still arising from the murder charges. She submitted that the Adjudicator erred in not considering the risk of ill treatment that the Appellant might suffer in police and judicial custody, as a consequence of the charges brought against him. Nor did he consider whether the Appellant would receive a fair trial and a fair sentence, if convicted, on account of his religion. She then took us in detail through the background evidence concerning the situation in India. Those submissions are fully set out in the record of proceedings but they may be summarised as follows. Police violence is widespread and endemic. The police abuse of prisoners with impunity. Because there are murder charges against the Appellant, which are serious, he is more likely to be at risk than as a political activist. Prison conditions are very poor. There are a number of deaths in custody and extrajudicial killings by the police. Human rights safeguards have not been properly implemented. The governing party in India, the BJP, is an offshoot of RSS and many of the senior members of the government, including the Prime Minister, are members. RSS seeks the Indianisation of Moslems and Christians. There is religious based conflict between India and Pakistan, which generates a serious inter-communal tensions within India. The police do not protect Moslems when they are attacked. Moslems are more likely to suffer at the hands of the police and in prison on account of their religion. Internal flight was not relevant in the context of murder charges. This was not a case concerning sufficiency of protection by the state because the police themselves were agents of the state controlled by the State and acting with impunity. She cited **Svacas C/2000/1964 CA**.

7. The Tribunal invited Ms Hodgson to comment on the general principles set out in the Tribunal decision of **Fazilat [2002] UKIAT 00973**. She said that this was not a starred decision was not therefore in any way binding. It related to prison conditions in Iran but the situation in India was worse because of the large number of deaths in custody and the extrajudicial killings. In any event each case had to turn on its own facts.

8. Mr Pichamuthu argued that the issue in this appeal was about the risk to the Appellant. If Ms Hodgson were right then any of India's 110 million Moslems accused of a crime would be entitled to international protection. The reality was that the Appellant would be returned on temporary documentation and would not come to the attention of the authorities at all. If he were arrested then there would be a sufficiency of protection

available to him as described in Horvath. There was an independent judiciary from which he could expect a fair trial as he had in the past. The police were not able to act with impunity as the government was implementing human rights initiatives, which were resulting in the prosecution of hundreds of abusive policemen. Human rights organisations were also increasingly active in monitoring the situation in India. The main areas of inter- communal violence in India were limited to Kashmir and Gujerat, and did not include Maharashtra. The rest of India was largely untouched by the violence. There were many Moslem organisations represented in the Indian state Parliaments and these included the Moslem League with which the Appellant was associated. There was no evidence of discrimination against Moslems in the courts nor was there any evidence that Moslems would be more severely sentenced on account of their religion.

9. The Tribunal reserved its decision.

The Issues

10. As we have described, the sole issue upon which leave to appeal has been granted is the risk to the Appellant of breach of his human rights, arising from detention for the charges which he claims are outstanding against him in respect of his brother-in-law's death. We agree that the Adjudicator erred in not considering this matter at all but all the necessary findings of fact and evidence are before us, and we can cure the defect by making our own assessment. The issue was originally argued in terms of Article 3. However as the argument was developed by Ms Hodgson to include the possibility of death in detention and also of persecutory treatment as a Moslem from the police, the courts, and in judicial detention, we have included in our consideration as well Articles 2 and 6 and the 1951 Convention.

Our Assessment of the Background Evidence

11. The standards and indeed the objectives of policing, detention, trial and sentencing may vary considerably in different countries. Our starting point therefore was to establish the minimum standard required by the 1951 and 1950 Conventions. In **Fazilat [2002] UKIAT 00973**, the Tribunal, whilst considering the situation in Iran, made observations about the proper tests to apply when assessing the risk of a breach of Article 3 to a person facing criminal charges and detention in his own country. It said

> "We do not doubt that [prison conditions in Iran] may not measure up to what is expected in this country, or perhaps in any country, which is a signatory to the European Convention on Human Rights. As the Court at Strasbourg has recognised, it is not for signatories to the Convention to impose the standards of the Convention on all the world. Recognition has to be had to the situation in individual countries and to the standards that are accepted and expected in those countries. Of course in relation to Article 3, there is a line below which the treatment cannot sink, if we may put it in that way. That is to say that is always possible that the sort of treatment that may be routinely expected in prison in a particular country falls so far below the standards that would be excepted in a civilised country, that it could properly be said to amount to inhuman or degrading treatment. But, as again the court in Strasbourg has

> indicated, the threshold has to be a high one because otherwise it would be, as one recognises, quite impossible for any country to return to a non-signatory an individual who faces prosecution, rather than any sort of persecution. …….. So far as the question of a fair trial is concerned, Article 6 can be engaged if an individual is to be removed from this country. That is made clear by the decision of the Tribunal in Kajac, following the Court of Human Rights decision in Soering v UK. But it is only if the breach of Article 6 would be flagrant, that is to say there would clearly be a thoroughly unfair trial, that Article 6 could be engaged. Again it is not for signatories to the Convention to impose their system on all world. One has to consider whether, looking at it in the round, it can be said that the Respondent will be able to receive what amounts to a reasonably fair trial."

12. This is not a starred decision and of course each case turns on its own facts. We are presently concerned with India and not Iran. However we agree with the reasoning for this approach to the requirements of Articles 3 and 6, and consider that the same principles should apply to whether the conduct complained of could cross the high severity threshold required to constitute persecution under the 1951 Convention. We have applied this approach to the evidence in this appeal.

13. India is a very large and diverse country with a robust parliamentary democracy. It has over 1 billion citizens, most of whom are Hindu but with a number of minorities of which the largest are Moslems. It has 26 languages, 720 dialects and 23 tribal languages. It is divided into 28 states and 6 territories. The responsibility for many functions, including security, is divided between the federal government and the states. It has faced violent insurgency and separatist movements in various states to which it has at varying times responded with violence. As a consequence many of the rather sweeping generalisations, which are made about policing and inter-community violence and the reactions of the authorities, have relatively little value when one has to assess the risk for a specific individual in a particular state. It is mainly in those states, which are subject to such violence that the excesses of the security forces in responding to them, in extra-judicial killings and otherwise, have been worst. Jammu and Kashmir is the worst examples currently. However one cannot fairly apply the behaviour of the authorities there to Maharashtra, the Appellant's home state, which does not suffer from insurgency. Similarly the serious violence between Hindus and Moslems which erupted in Gujerat cannot be taken as typical of the country as a whole. We do not accept, as Ms Hodgson at times implied, that we should apply to every state the standards of those beset by violent terrorism.

14. With regard to the judiciary, the background material shows the Indian Constitution provides for independence and the government generally respects this in practice. There are problems in Jammu and Kashmir due to the high levels of violent insurgency, inter alia targeted at judges, but we cannot find evidence that experiences there are of wider application or could justify a complaint under Article 6 in Maharashtra. We invited Ms Hodgson identify specific material evidence of unfairness or bias against Moslems by the judiciary in the conduct of cases or in their sentencing. She was unable to do so and we can find no significant evidence of such abuse either. She asked us to infer such bias from general political developments such as the tensions between India and Pakistan but we can see no reliable evidential basis for doing so.

15. The ruling government party, BJP, is an offshoot of the RSS and many of its leading politicians, including the PM, are members of RSS. However the constitutional guarantees for minorities, and other religions than Hindu, remain in force. Inter-communal relations outside the flashpoint areas of violence such as Jammu and Kashmir and Gujerat are not as bad as Ms Hodgson invited us to believe. The UN Special Rapporteur on Religious Intolerance concluded that the situation in India relating to tolerance and non-discrimination remained satisfactory. A report on religious liberty around the world states that "India is a secular state in which all faiths generally enjoy freedom of worship; government policy does not favour any religious group. However tensions between Muslims and Hindus continue to pose a challenge to the concepts of secularism, tolerance and diversity on which the state was founded."

16. We cannot infer from the evidence, as Ms Hodgson argued, that the very specific and serious violence in for example in Gujerat, or the policies advanced by the RSS, would interfere with a criminal investigation against a Moslem in Maharashtra, or lead per se to problems in detention on account of his religion.

17. The National Human Rights Commission, created by statute, monitors and investigates human rights violations, advises the government and raises human rights awareness. Whilst it is inhibited from investigating the armed forces, it has the powers of a civil court in conducting its investigations, including enquiries into the police and prisons. Deaths in custody have to be reported to it within 24 hours, though the authorities in Jammu and Kashmir have not complied. The background material about the issue of abuse of detainees in police and judicial custody tends to be expressed in generalisations by a variety of organisations and media coverage of various specific serious incidents. There are articles by individuals in which the finger of blame is pointed at politicians and others, but we are given no information about the viewpoints of the writers. There is much material on Jammu and Kashmir and Punjab and on the recent violence in Gujerat.

18. Having said that, the consensus of reports is that there is widespread torture and rape by police and there is a problem of custodial abuse. This we accept in general terms. There are also deaths in custody, as there are in every country. But we have to make a realistic estimate and quantification of the extent of the risk of death or torture in custody for the Appellant. India has a large population and a large prison population. Prisons are extremely overcrowded. No-one suggests that every detainee is tortured. Perspective is needed.

19. The CIPU report shows at paragraph 4.34 that in the year from April 1998 to March 1999, there was a nationwide prison population of about 246,000. There were complaints to the National Human Rights Commission of 1,297 deaths in custody of which 1,114 were in judicial custody and 183 in police custody. These figures are probably reasonably reliable as there is a statutory obligation to report deaths and rapes in custody. A large proportion of the deaths in judicial custody were due to natural causes, in some cases aggravated by poor conditions. In respect of deaths in custody only, Maharashtra in 1999-2000 was amongst the worst in India, with 30 deaths in police custody and 126 in judicial custody. But it is also reported that most of these deaths in custody result from natural causes, which is not surprising with a prison population of about a quarter of a million. We cannot therefore conclude from these bare statistics that these deaths were mainly caused by the abusive actions of the

authorities or of individual police or security officers or were targeted at Moslems. Not can it be inferred from these statistics that a detainee in any state in India, including Maharashtra, is at real risk of the near certainty of death, which is the requirement for the engagement of Article 2, according to the Tribunal decision in **Minakovo 01/TH/1400**, with which decision we agree.

20. We have accepted that torture is widespread in India. However we also note that 54 % of the 20,514 complaints nationwide made in 1996/7 to the NHRC of police abuses, relate to Uttar Pradesh and Bihar. These figures must logically be treated with caution. It is likely there is underreporting of abuses, and also some complaints made may not be justified. There is no detailed analysis before us of the nature of these complaints, or of their seriousness, or of what proportion of the complaints are upheld. However it would appear from the evidence before us that the worst excesses occur in the states such as Jammu and Kashmir, Uttar Pradesh and Bihar. Also, the police can also overreact when controlling large demonstrations and this accounts for a number of complaints. Ms Hodgson has urged us to accept that human rights organisations are weak and police abuse is undertaken with impunity. Whatever may have been the position in the past, there is now evidence of the prosecution of some hundreds of abusive police officers and of the growth and status of human rights organisations with significant powers at national and state level. We note that Maharashtra is one of a number of states that has established its own human rights organisation with investigative powers. We find that there is progress being made and that police impunity cannot be assumed. As to the risk of ill-treatment in police custody or other custody, the most relevant evidence relating to Maharashtra is that of the Appellant himself, to which we shall turn shortly

Our Findings

21. We conclude that we must assess the risk to the Appellant as being related to Maharashtra state, where the charges were made. Mr Pichamuthu invited us to conclude that it was unlikely the Appellant would be identified on return to India with emergency travel papers as being wanted in Maharashtra because the country was so large. There may be some force in this point, but given that the charges relate to murder we consider there must be a real risk that his name is on a wanted register and if identified he will be returned to his home area to face the charges. In this respect internal flight is not a viable option, though as the Adjudicator found it may be the answer to his other problems.

22. This appeal must be decided on its own facts. Actually this makes our task rather easier, because the Appellant has had repeated exposure to police investigation and detention and the courts in his home area. This gives an additional dimension to our task in that it enables us to form a view of how they behave in practice rather than having to rely only on inferences based on evidential generalisations. We also note at this point that the evidence before us from the Appellant is that the charges against him are false and have been brought on the basis of complaints by his local opponents.

23. The Appellant described himself in his written statement as a respected and well-known person in his area. He has long established links with local newspapers and journalists. He is therefore a person of some visibility. He has been arrested on a number of occasions in the past by the police in the course of their investigations into inter-

communal violence. In his written statement he said he was always able to obtain his release through the normal procedures by going to court and he did not claim that he was ill-treated in custody. These incidents show that he has in the past in his home area not experienced any ill-treatment by the police, even though the detentions arose from inter-communal violence and he was involved by reason of his perceived activities for the Moslem cause. He has not suffered from delays in the court procedures. Indeed his willingness later to go to the police himself to seek redress when attacked by the RSS also indicates a lack of fear on his part of the police, and the expectation that they would investigate, as they did. The past conduct of the police and the courts in his home area towards the Appellant has not been abusive and does not we find indicate any real risk that it would be in the future.

24. Ms Hodgson argued that the murder charges increase the risk profile. We disagree. The evidence before us, and the Adjudicator, about the murder charges is vague, though it was accepted as credible by the Adjudicator. But what does it actually amount to? He claims that the charges against him were false and brought by members of the RSS. That may well be true. It is not an uncommon event for false FIRs to be made maliciously. But it is not for us to judge criminal issues like this. It is a matter for the relevant courts. The evidence given by the Appellant in his statement was that he "understood there are outstanding police charges against me in India for murdering my brother-in-law and also for violence against the Hindu communities." This does not necessarily imply anything more than that false First Information Reports about the murder were filed against him by the RSS and the police are seeking him to investigate them. Insofar as any public order charges are outstanding, they have been found to lack any substance in the past and there is no evidence that any new charges have any greater substance. In those investigations, the police will be aware of the past problems between the Appellant and the RSS and will take this into account. If the charges are complete fabrications as claimed, it may be reasonably presumed that there will be little valid evidence of significance against the Appellant. Also as he was able to deal with his problems with the police in the past, through the usual channels and the courts, there is no real reason to suppose that he could not do so again, even though the charges now relate to murder.

25. We find there is no real risk, given his evidence that the accusations are completely false, that he will be unable to rebut them fairly readily. Indeed, he may never be detained by the police at all, if there is no adequate evidence against him. Even if he were detained, we find that there is no real chance in all the circumstances that he will face death in detention, or material ill-treatment or persecution in the future, when he has not so suffered on several separate occasions in the past. Nor will his religion be a material adverse factor in what is a purely criminal matter.

26. In summary we find that, arising from the outstanding charges against him, there is no real risk on return to India of persecution for his religion contrary to the 1951 Convention, or of a breach of his human rights under Articles 2, 3 or 6 of the 1950 Convention. For these reasons this appeal is dismissed.

Spencer Batiste
Vice-President