Upper Tribunal
(Immigration and Asylum Chamber)

SA (political activist – internal relocation) Pakistan [2011] UKUT 30 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 November 2010	
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Before

LORD BANNATYNE
SENIOR IMMIGRATION JUDGE STOREY

Between

SA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L A Mulholland, Solicitor of Quinn, Martin & Langan
For the Respondent: Mr K Kyriacou, Home Office Presenting Officer

Requiring a political activist to live away from his home area in order to avoid persecution at the hands of his political opponents has never been considered a proper application of the internal relocation principle: see e.g. Nolan J in R v Immigration Appeal Tribunal, ex p.Jonah [1985] Imm AR 7. And (since October 2006) such a requirement cannot be considered to be consistent

with para 3390 of the Immigration Rules (Article 8 of the Qualification Directive). Indeed, the pitfalls of requiring a person to act contrary to his normal behaviour in order to avoid persecution have been further emphasised by the Supreme Court in HJ (Iran) [2010] UKSC 31.

DETERMINATION AND REASONS

1. The appellant is a national of Pakistan. In a determination notified on 14 October 2009 Immigration Judge (IJ) Morrow dismissed his appeal against a decision by the respondent dated 3 April 2009 to remove him as an illegal entrant having refused to grant him asylum.

2. The appellant's claim was that he feared persecution at the hands of opposition party members principally from the Pakistan People's Party (PPP). The latter had targeted his brother who was the town Nazim (a kind of local mayor) in a district of Rawalpindi (Choor Rawalpindi and surrounding villages) and who belonged to the Q League (PMLQ Party). Following the fall of President Musharaf in August 2008 there had been widespread riots in the appellant's home area and the tensions between the various political parties worsened, expressing themselves in violent clashes at demonstrations and election meetings. The appellant and his brother had suffered personal attacks from 2005 onwards. He had been very well off, owning shops and a restaurant; but in early 2009 members of opposing parties burnt them all down. In early March 2009 members of the opposing parties had shot and killed his brother at a party meeting. He and his family went to stay at his brother-in-law's house in Islamabad and later at a place in Muree where he had relatives. In Islamabad he and his family received threats to their life via friends and relatives.

3. Despite finding the appellant a reliable witness and so accepting his account of what had befallen him in Pakistan the IJ dismissed his appeal, concluding that: (1) he would be able to receive a sufficiency of protection from the police authorities in Rawalpindi because the main focus of the PPP supporters' attention had been against his brother and although politically involved, the appellant had not held any office and had not played any major part other than as a supporter of the party; and also because since early 2008 every time there were clashes between the political parties the police came and on many occasions arrested members from both sides; and (2) even if this were not the case, to avoid adverse attention from those who opposed his brother, he could relocate to another part of Pakistan, as indeed he had done for several weeks after his brother had been killed (in other parts of Rawalpindi, in Islamabad and in Tarnoul). There was no evidence, the IJ said, that the appellant's wife and children had been the focus of attention from the PPP supporters.

4. The grounds of appeal contended that the IJ had erred by failing properly to take account of various negative features of the police's treatment of the appellant, in particular: their failure on more than one occasion to charge those who had attacked the appellant; their failure, on the occasions they did charge his attackers, to raise a First Information Report (FIR); their release without charge of those accused of

burning down the appellant's shops; and their general readiness to side with the PPP because they were in power at a national level. The grounds noted that despite the appellant reporting PPP members to the police for the murder of his brother, what had happened was that the PPP had threatened to kill him and his family had been harassed and intimidated (his son had been assaulted). In addition, the grounds stated, it was unreasonable of the IJ to find the appellant would have a viable internal relocation alternative based on his having lived in Islamabad and other places during which time the appellant moved around to avoid detection.

5. We informed the parties at the outset that our provisional view was that the IJ had materially erred in law. In response Ms Mulholland relied on the grounds and her skeleton argument. Mr Kyriacou accepted there were shortcomings in the IJ's treatment of the appellant's case, in particular that he concentrated too much on the general question of whether or not there was a systemic failure of protection on the part of the authorities in Pakistan and in the appellant's home area without dealing fully with the appellant's particular circumstances. But even so, added Mr Kyriacou, he had addressed the implications and the steps the police had taken to protect the appellant and had also given attention in the alternative to the issue of internal relocation.

Legal framework

6. Regulation 4 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (implementing Article 7 of the Qualification Directive 2004/83/EC) defines actors of protection in a way that mirrors the principles set out by the House of Lords in Horvath v Secretary of State for the Home Department (2001) 1 AC 489 where it was held that whether protection was sufficient was a "practical standard which takes proper account of the duty which the state owes its nationals…" and that "the sufficiency of state protection is not measured by the existence of a real risk of an abuse of rights but by the availability of a system for the protection of a citizen and a reasonable willingness of the state to operate it". As noted by the Tribunal in IM (Sufficiency of Protection) Malawi [2007] UKAIT 00071, the House of Lords in Bagdanavicius [2005] UKHL 38 left undisturbed the propositions set out by Auld LJ on real risk and sufficiency of protection in the Court of Appeal (2005) EWCA Civ 1605. These propositions are in the following terms:

> "54. Summary of conclusions on real risk/sufficiency of state protection.
>
> *The common threshold of risk*
>
> 55 1) The threshold of risk is the same in both categories of claim; the main reason for introducing section 65 to the 1999 Act was not to provide an alternative, lower threshold of risk and/or a higher level of protection against such risk through the medium of human rights claims, but to widen the reach of protection regardless of the motive giving rise to the persecution.

Asylum claims

2) An asylum seeker who claims to be in fear of persecution is entitled to asylum if he can show a well-founded fear of persecution for a Refugee Convention reason *and* that there would be insufficiency of state protection to meet it; Horvath [2001] 1 AC 489].

3) Fear of persecution is well-founded if there is a 'reasonable degree of likelihood' that it will materialise; R v SSHD ex p. Sivakumaran [1988] AC 956, per Lord Goff at 1000F-G.

4) Sufficiency of state protection, whether from state agents or non-state actors, means a willingness *and* ability on the part of the receiving state to provide through its legal system a reasonable level of protection from ill-treatment of which the claimant for asylum has a well-founded fear; Osman v UK [1999] 1 FLR 193], Horvath, Dhima [2002] EWHC 80 (Admin), [2002] Immigration Judge AR 394].

5) The effectiveness of the system provided is to be judged normally by its systemic ability to deter and/or to prevent the form of persecution of which there is a risk, not just punishment of it after the event; Horvath; Banomova [2001] EWCA Civ.807. McPherson [2001] EWCA Civ 1955 and Kinuthia [2001] EWCA Civ 2100.

6) Notwithstanding systemic sufficiency of state protection in the receiving state a claimant may still have a well-founded fear of persecution if he can show that its authorities know or ought to know of circumstances particular to his case giving rise to his fear, but are unlikely to provide the additional protection his particular circumstances reasonably require; Osman.

Article 3 claims

7) The same principles apply to claims in removal cases of risk of exposure to Article 3 ill-treatment in the receiving state, and are, in general, unaffected by the approach of the Strasbourg Court in Soering; which, on its facts, was, not only a state-agency case at the highest institutional level, but also an unusual and exceptional case on its facts; Dhima, Krepel [2002] EWCA Civ 1265 and Ullah [2004] UKHL 26.

8) The basis of an article 3 entitlement in a removal case is that the claimant, if sent to the country in question, would be at risk *there* of Article 3 ill-treatment.

9) In most, if not all, Article 3 cases in this context the concept of risk has the same or closely similar meaning to that in the Refugee Convention of a 'well-founded fear of persecution', save that it is confined to a risk of Article 3 forms of ill-treatment and is not restricted to conduct with any particular motivation or by reference to the conduct of the claimant; Dhima, Krepel, Chahal v UK [1996] 23 EHRR 413.

10) The threshold of risk required to engage Article 3 depends on the circumstances of each case, including the magnitude of the risk, the nature and severity of the ill-treatment risked and whether the risk emanates from a state agency or non-state actor; Horvath.

11) In most, but not necessarily all, cases of ill-treatment which, but for state protection, would engage Article 3, a risk of such ill-treatment will be more readily established in state-agency cases than in non-state actor cases – there is a spectrum of circumstances giving rise to such risk spanning the two categories, ranging from breach of a duty by the state of a negative duty not to inflict Article 3 ill-treatment to a breach of a duty to take positive protective action against such ill-treatment by non-state actors; Svazas.

12) An assessment to the threshold of risk appropriate in the circumstances to engage Article 3 necessarily involves an assessment of the sufficiency of state protection to meet the threat of which there is such a risk – one cannot be considered without the other whether or not the exercise is regarded as 'holistic' or to be conducted in two stages; Dhima, Krepel, Svazas [2002] EWCA Civ 74.

13) Sufficiency of state protection is not a guarantee of protection from Article 3 ill-treatment any more than it is a guarantee of protection from an otherwise well-founded fear of persecution in asylum cases – nor, if and to the extent that there is any difference, is it eradication or removal of risk of exposure to Article 3 ill-treatment'; Dhima, McPherson; Krepel.

14) Where the risk falls to be judged by the sufficiency of state protection, that sufficiency is judged, not according to whether it would eradicate the real risk of the relevant harm, but according to whether it is a reasonable provision in the circumstances; Osman.

15) Notwithstanding such systemic sufficiency of state protection in the receiving state, a claimant may still be able to establish an Article 3 claim if he can show that the authorities there know or ought to know of particular circumstances likely to expose him to risk of Article 3 ill-treatment; Osman.

16) The approach is the same whether the receiving country is or is not a party to the ECHR, but, in determining whether it would be contrary to Article 3 to remove a person to that country, our courts should decide the factual issue as to risk as if ECHR standards apply there – and the same applies to the certification process under section 115(1) and/or (2) of the 2002 Act".

From the above it is clear that while it will always be relevant to ask whether or not there is in general a sufficiency of protection in a country, the critical question will nevertheless remain in an asylum case that set out in the sixth proposition by Auld LJ and in an Article 3 case that set out in the fifteenth proposition. Thus under either head a judge must address not only the matter of whether there is a general

sufficiency of protection in a country but also the question of whether the appellant's particular circumstances are such that he or she would receive adequate protection.

Our Assessment

7. This is a case in which the IJ accepted that the appellant had given a credible account (para 25) and the respondent has not sought to dispute any aspect of his account. It was not in dispute that the appellant and his brother had in the past suffered serious harm at the hands of political opponents.

8. We are satisfied that the IJ materially erred in law in three main respects. The first two concern the IJ's treatment of the issue of sufficiency of protection. We agree with Mr Kyriacou that this was not a case in which the IJ made the mistake of trying simply to deduce a sufficiency of protection for the appellant from a general sufficiency of protection afforded by the Pakistan authorities to its citizenry. The IJ did refer to the appellant's particular circumstances. However, his assessment of these circumstances was flawed. Despite accepting that the appellant was from a political family the IJ failed to consider the impact that this had on his own vulnerability to persecution. As noted at recital 27 of the Qualification Directive "[F]amily members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status".

9. Further, the IJ erred in his treatment of the appellant's own political profile. Certainly the IJ was entitled to find that the appellant did not have the prominent political profile of his brother, but the IJ did not dispute the appellant's evidence that he had nevertheless been an extremely active party worker attending numerous political gatherings over a lengthy period. Not to regard him as a political activist was unjustified. Not to have regard to the appellant's own adverse experiences after his brother had been murdered by the PPP was also unjustified, for on the accepted evidence his political opponents continued to make threats against him and to respond aggressively to his efforts to have them prosecuted. There had also been an assault on his son.

10. The family matrix to the appellant's circumstances had two important implications. One concerned the past: plainly he and his brother and their family had experienced past persecution against which the local police had failed to protect them: personal attacks, destruction of their shops, the murder of his brother, threats against his life, and an assault on his son. The police response, such as it was, was also partisan. Although on the appellant's own evidence some of the fighting that took place between his party and the PPP was two-sided, on a significant number of occasions attacks it had been instigated by their opponents. On the appellant's own evidence the response of the police on a significant number of occasions could not remotely be construed as even-handed: in 2005 and 2007 following being assaulted by PPP supporters, the police had released those concerned without raising charges. It was also the appellant's uncontradicted evidence that the police normally sided with the

PPP and against the appellant. For that reason the IJ should have considered the application of para 339K of the Statement of Changes in the Immigration Rules HC 395 as amended which states:

> "The fact that a person has already been subject to persecution or a serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated."

11. This leads on to the second implication of the IJ's failure to take account of the family matrix to the appellant's particular circumstances. The question the IJ should have asked was whether, given past persecution, there were good reasons to consider that such persecution or serious harm would not be repeated. In this regard, there was nothing in the evidence to indicate that the police locally would not continue to side with the PPP against the appellant, even though on any return to his home area it was reasonably likely that the appellant would again find himself frequently targeted for attacks by his political opponents and serious threats. We bear in mind at this point that the background evidence indicated that since the appellant had left Pakistan in early 1999 the political situation both in his home area and in Pakistan generally had become more, not less, violence-ridden.

12. A third error concerned the IJ's treatment of the matter of whether the appellant could relocate in safety. On the appellant's own evidence he had a number of legitimate complaints that he wished to pursue against his opponents arising out of past attacks on him and his properties as well as their murder of his brother; the only reason he had not stayed to pursue those was fear of further persecution. In addition, he was quite clear that he had been and would continue to be active in the PMLQ. His unchallenged evidence was that the there was strong support in his local area for him to stand for the Nazim post, which his brother had previously held. The significance of his and his family's political profile and ongoing involvement in the PMLQ was that his party and the PPP are national parties and that it was reasonable to expect that wherever else the appellant went in Pakistan he would continue his visible involvement in the PMLQ and that his opponents in Rawalpindi would come to learn where he and his family were.

13. When considering this matter the IJ attached particular significance to the fact that the appellant had been able to exercise the option of internal relocation already between the date of his brother's murder and his departure. However, whilst it was true that during this period the appellant had lived in other parts of Rawalpindi and in Islamabad and Muree, his unchallenged evidence was that he was having to move in order to avoid detection ("he had moved around different places when he was having trouble"). Further, during this period, even when he was living in Islamabad, the PPP had sent him serious threats via his relatives. His experience of internal relocation was not experience showing it had been viable and the IJ was wrong to assume to the contrary.

14. In our judgement the appellant should not be expected to return to Pakistan and give up his active involvement in the PMLQ and his pursuit of his legitimate grievances against local PPP members who had destroyed his property, frequently conducted personal attacks again him and his brother, murdered his brother and then subjected him and his family to serious threats and intimidation. Yet any return to his home area would expose him to a real risk of serious harm against which he would not receive adequate protection.

15. In our judgement also, the only way the appellant could achieve safety by relocation was if he effectively decided to live in hiding or in political exile. In UK asylum law, requiring a political activist to live away from his home area in order to avoid persecution at the hands of his political opponents has never been considered as a proper application of the internal relocation principle: see e.g. Nolan J in R v Immigration Appeal Tribunal, ex p.Jonah 1985] Imm AR 7. And (since October 2006) such a requirement cannot be considered to be consistent with para 339O of the Immigration Rules (Article 8 of the Qualification Directive). Indeed, the pitfalls of requiring a person to act contrary to his normal behaviour in order to avoid persecution have been further emphasised by the Supreme Court in HJ(Iran) [2010] UKSC 31.

16. Accordingly we conclude the IJ materially erred in law and we set aside his decision.

17. When we made known to the parties our decision as to material error of law both were content, so far as the matter of what decision we should re-make, to rely on their earlier submissions. In our view that properly reflected the fact that in this case the unchallenged evidence was such that, had the IJ properly considered the issue of sufficiency of protection and internal relocation by proper reference to the appellant's particular circumstances, he would have allowed the appellant's appeal. This was a case where past persecution was manifest and there was no good reason to consider that the PPP in particular would cease targeting the appellant for serious harm or that, when they did target him, the local police would alter their past pattern of siding with the PPP. There would not be a sufficiency of protection for this appellant. This was also a case in which internal relocation would only prove viable if the appellant were to forego his long-term political involvements, which he could not reasonably be expected to do.

18. For the above reasons the decision we re-make is to allow the appellant's appeal.

Signed Date

Senior Immigration Judge Storey
(Judge of the Upper Tribunal)