OUTER HOUSE, COURT OF SESSION

[2006] CSOH 59

P305/03

OPINION OF LORD KINGARTH

in the Petition of

MAHMOOD AHMED BUTT, (A.P.)

Petitioner;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

Petitioner: Blair; Drummond Miller, W.S.
Respondent: Stewart; Office of the Solicitor General for Scotland

5 April 2006

[1] The petitioner is a citizen of Pakistan. He entered the UK on 12 March 2000 and claimed asylum on 30 March 2000. His claim was refused by letter of the respondent dated 8 October 2001. He appealed to the adjudicator. Before the adjudicator, he also claimed to be entitled to the protection of Article 3 of the European Convention on Human Rights ("ECHR"). His appeal was refused by determination of the adjudicator dated 8 April 2002. He applied for leave to appeal to the Immigration Appeal Tribunal, which leave was refused by determination dated 13 May 2002. In the present petition - which was sisted for a substantial period to

await determination of a matter relating to the jurisdiction of the Court of Session - the petitioner seeks reduction both of the determination of the adjudicator and of the determination of the Immigration Appeal Tribunal. Before me, however, it was agreed that what the petitioner seeks, and all he needed to seek, was reduction of the determination of the Immigration Appeal Tribunal.

[2] It was agreed that in relation to his claim for asylum the appellant required to show that owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, he was outside the country of his nationality and was unable or, owing to such fear, unwilling to avail himself of the protection of that country. He required to demonstrate that there were substantial grounds for believing that he faced a real risk of being persecuted for a 1951 Convention reason if he returned to his own country. In relation to his claim under the ECHR, he required to demonstrate that there were substantial grounds for believing that he faced a real risk of relevant ill treatment (i.e. torture or inhuman or degrading treatment). The burden of proof was upon the appellant in respect of both claims. It was agreed that, in the circumstances of the case, no material distinction fell to be drawn between his claim for asylum and that under Article 3 of the ECHR.

[3] Before the adjudicator the respondent was not represented. The appellant gave evidence on his own behalf, confirming that he wished to rely upon a statement which he had lodged as his evidence in the case. The statement was summarised by the adjudicator in paragraph 11 of his determination. The appellant was married with six children, five of whom survived. One daughter, Taiba, died on 24 May 1999 at the age of three. In that respect he had the child's birth certificate, and the death certificate stating that she was murdered, together with photographs of the dead child. The

appellant lived in Rahwali and owned a grocer shop and then a poultry farm. As a Sunni Moslem, he joined the SSP in 1990. He became general secretary of the local branch, organising meetings and demonstrations. Sometimes the police would attack them with a view to breaking up processions or demonstrations. They warned them not to take any action against the Shias, but the police did not take any action against the Shias or protect them from them. The appellant attended meetings and spoke out against the Shia SM movement. On 15 January 1997 he and his brother were attacked in his shop by armed men. The appellant was shot in the stomach, which was confirmed by medical reports produced. He was hospitalised, taken to the police station for questioning and then hospitalised again. He understood that a first information report was prepared by the police. He was not aware, however, whether and, if so, what further action was taken. The men who had attacked him were members of the SM. For safety reasons, the appellant sold the shop and bought a poultry farm. On 7 January 1999, there was an attack on the poultry farm in the appellant's absence. There was damage to property and about 4,000 hens were stolen. The appellant reported this matter to the police. They made certain investigations. The people they thought responsible were arrested and they were taken to court. The court case was not yet complete. The suspects made compensation for the damage.

[4] On 24 May 1999 the appellant was taking his daughter to school when he was attacked by four men. One of the men kicked his daughter in the stomach when she ran to him and she died as a result. The appellant was again attacked on or about 9 November 1999 when he fought off a number of men who tried to force him into a car. He decided to leave the country and did so through an agent. Since he had left, his wife had told him that when he initially left, members of the SM had attended at his home wanting to know where he was. She told them he had gone and she did not

know where he was. The appellant understood that she still received phone calls asking about him but there had not been any attack on her or the other children. He believed he would be attacked and killed if he returned.

[5] The adjudicator also had before him certain objective evidence relating to the situation in Pakistan. In particular, he had a Canadian report of July 1999, a Home Office report of 2001 and a US report dated 4 March 2002. On the basis of that objective evidence, the adjudicator drew certain conclusions. He noted *inter alia* that the government of Benazir Bhutto was dismissed in 1997 and new elections held. Nawaz Sharif came to power. After further political and constitutional trouble, however, he was deposed on 12 October 1999 by a military coup led by General Pervez Musharraf. The SSP was noted to be an extremist Sunni organisation and said to be responsible for many acts of violence. It was outlawed by General Musharraf in August 2001, as was the SM, a Shia militant organisation formed as a reaction to Sunni violence.

[6] The adjudicator further found:

> "26. In early September 2001 police arrested about fifty people suspected of sectarian violence in Karachi, allegedly belonging to the LJ and SM militant groups.
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> 27. Earlier, it was reported in September 1997 that following the introduction of the Anti-Terrorism Act, sectarian killings and gun battles in Karachi and in Punjab significantly receded. Life was said to be returning to normal in Lahore and other Punjab cities since the security forces had been given sweeping powers under the new law.
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> 28. After incidents of February/March 2001, the government announced plans to tackle sectarian violence, with calls on the provincial governments to

take action against those making provocative speeches or publishing inflammatory literature.

29. Unrest and massacres have continued, with most victims being Shias.

30. It is misleading and inconsistent for the CIPU report to state at 5.3.57 that: "The Pakistani Government has been quick to respond to outbursts of sectarian violence although their action has not effectively curtailed sectarian murders." If one looks at the footnotes, one finds that this was information gleaned from the US State Department in 1996 and the BBC in 1997. It takes no account of the effect of the introduction of the Anti-Terrorism Act, nor of the crackdown by the military regime on religious extremists in August 2001, nor the advice to provincial governments.

31. The Canadian report of July 1999 observes that while high profile members of the respective communities were formerly targeted, there had been a switch to indiscriminate reprisal killings. Despite the age of the report, that is consistent with what is known of the situation to date. Its view, as stated, is that sectarian violence in one part of the country could lead to reprisals in another part. This is discussed in the context of internal flight, below."

[7] The essence of the adjudicator's determination is to be found at paragraphs 32-34. These are in the following terms:

"32. I consider the appellant to be credible and reliable as to his personal history. He presented himself for cross-examination, and the Home Office failed to take advantage of that opportunity. His account was consistent with the background evidence. His solicitor was not suggesting that, as a member of the Sunni majority, he was at risk merely for that reason. He

was, as I accept, a member of the SSP, a militant Sunni group. He has lost a child in tragic circumstances, and has been attacked by persons belonging to the local SM, a rival militant group. The degree of risk on return is, however, a matter for me.

33. In assessing the risk to the appellant, it is relevant to note that the tendency is towards indiscriminate attacks, mostly by Sunnis on Shias rather than the other way round. The government does not tolerate religious violence and has taken steps to counter it. There is no reason to believe that the police would not protect the appellant, and his lack of fear of the authorities can be seen in his obtaining official documents, and his willingness to approach them to lay FIRs. A new regime, less tolerant of religious violence, has come to power since the appellant left. The focus has turned away from individuals to indiscriminate attacks. Even accepting a failure of State protection in the past, I do not consider that there is a real possibility that on return, he would be targeted for attack, or if he were, that there would be a failure of State protection, given the current attitude of the authorities. In short, I do not consider that, taking his account *pro veritate*, he has shown a real risk of future persecution. Nor, on this analysis, has he shown any real risk of treatment exceeding the minimum threshold for the purposes of Article 3. If I were wrong on that, there would still be the question of internal flight.

34. The alleged inapplicability of the internal flight alternative in this case depended, in submissions, on a sentence in the Canadian report which reads: "Sectarian violence in one part of the country can lead to reprisals in another." However, the possibility of tit for tat violence elsewhere is not

the same as saying that there is any real likelihood that this individual would be pursued to the furthest reaches of that vast and populous country. He has no problems with the authorities. I consider that if the appellant did not return to his own area, then as a member of the majority Sunni population he could go virtually anywhere else. There was no evidence from which I could reasonably conclude that it would be unduly harsh for him to do so."

[8] In refusing leave to appeal the Immigration Appeal Tribunal said *inter alia*:

"3. The grounds of appeal are attached.

4. They argue that the Adjudicator's assessment of risk in paragraph 33 is at odds with his positive credibility finding in paragraph 32 and was in error. However, the acceptance in paragraph 32 of the Applicant's credibility, was subject specifically to the proviso that the degree of risk on return was a matter for the Adjudicator to decide. In making his assessment the Adjudicator took all the evidence into account and did not consider there was a real possibility that the Applicant would be targeted for attack. If he were, he found that there would be a sufficiency of State protection under the new government. The adjudicator was entitled to reach that latter conclusion on the basis of the background material before him. In any event the Applicant's problems were local and the Adjudicator found that as a member of the Sunni majority the Applicant could relocate internally within Pakistan and it would not be unduly harsh for him to do so. There is no arguable error in these conclusions.

5. An appeal would have no real prospect of success. Leave to appeal is refused."

[9] Counsel for the petitioner argued that the Immigration Appeal Tribunal erred in deciding that the appeal would have no real prospect of success.

[10] In the first place, the adjudicator failed to take into account (or, if he did, failed properly to take into account), the petitioner's own evidence, not merely as to what had happened to him in the past but which reasonably indicated that he remained at risk up to the date of the appeal. Stress in particular was placed on the petitioner's statement to the effect that, after he had left Pakistan, his wife had told him that when he initially left members of the SM had attended at his home wanting to know where he was and that thereafter she continued to receive phone calls about him. Although the adjudicator was entitled to reach the conclusion on the objective evidence that there had been a switch from the targeting of high profile members of the respective communities and that the tendency was towards indiscriminate attacks, the adjudicator erred in effectively treating the objective evidence as definitive.

[11] Secondly, the adjudicator erred in relation to the question of sufficiency of state protection. In particular, he erred in appearing to take as his starting point the prospect of the petitioner being subjected to indiscriminate attacks, whereas, on the evidence, the petitioner's concern was that he would be subjected to targeted attacks. Even if that was wrong, no reasonable adjudicator could, having regard to the petitioner's own evidence as to what had happened to him in the past and the apparent continuing interest in him, have found that sufficient protection would be afforded. As to the tests to be applied, reference was made to *Horvath* v *Secretary of State for the Home Department* 2001 1 AC 489, (and, in the Court of Appeal, 2000 Imm. AR 205); *R* v *Secretary of State for the Home Department ex parte Bagdanavicius &c* 2005 2 WLR 1359; *Secretary of State for the Home Department* v *Kacaj* 2002 Imm. AR 213; *Dhima* v *Immigration Appeal Tribunal* 2002 EWHC 80 (Admin); *Brown* v *Secretary*

of State for the Home Department 2003 EWHC 2045 (Admin); and *Kinuthia* v *Secretary of State for the Home Department* 2002 INLR 133.

[12] Thirdly, the adjudicator erred in his decision that internal flight was available. Again, he appeared to proceed on the basis that the petitioner could be at risk of indiscriminate reprisal attacks, which was not his concern. In any event, no reasonable adjudicator could have reached the view which he did. There was nothing in the evidence to suggest that those interested in the petitioner would confine their interest in him to a particular area of Pakistan. Even within that area, it appeared that they had followed him after he had bought the poultry farm.

[13] Counsel for the respondent submitted that the petition should be dismissed. It could not be said that the Immigration Appeal Tribunal had erred in deciding that an appeal would have no real prospect of success (the test which they required to apply in terms of Rule 18(7)(a) of the Immigration and Asylum Appeals (Procedure) Rules 2000).

[14] In the first place, it could not be said that the adjudicator had failed to take account of the petitioner's evidence. Although a badge of credibility was given to the appellant as to his "personal history" (at paragraph 32), it was also clear from paragraph 11 that he had taken account of that part of the petitioner's statement which referred to apparent events since he had left Pakistan. It was not necessary for the adjudicator to deal specifically with every piece of evidence. Reference was made to *Singh* v *Secretary of State for the Home Department* 2000 SC 219. It was not possible to say that he erred in deciding that he did not consider that there was a real possibility that on return the petitioner would be targeted for attack. It could not, in particular, be said that this was a conclusion which no reasonable adjudicator could have reached on the evidence. Whatever may have been the position earlier, there was clear evidence,

which the adjudicator was entitled to accept, of a crackdown against members of extremist groups in 2001. Reference in particular was made to the US report, at page 33 of 68. It was not clear what could be made of the reference to telephone calls to the petitioner's wife.

[15] Secondly, it could not be said that the adjudicator erred in his assessment of the sufficiency of protection. It was plain from paragraph 33 that he well understood that the concern of the petitioner was that he would be a target for attacks. It could not be said that no reasonable adjudicator could have reached the conclusion he did. The test was not whether the state could afford a guarantee of protection but, on the principle of surrogacy, whether there existed criminal law making violent attacks of the type feared punishable, and a reasonable willingness by the law enforcement agencies to detect, prosecute and punish offenders. Reference was made in particular to *Horvath* v *Secretary of State for Home Department*. In reaching his conclusion, the adjudicator was entitled to take into account from the petitioner's own history that a first information report had been prepared by the police following the first attack in January 1997 and that the people responsible for the January 1999 attack were arrested and taken to court, with the petitioner being paid compensation. Further, he was entitled to take into account the evidence of a significant crackdown after the petitioner had left Pakistan.

[16] Thirdly, it could not be said that the adjudicator erred in relation to the question of internal flight. It was plain that he had proceeded on the basis that the petitioner's concern was that he would be targeted (as opposed to being a victim of indiscriminate attack). The onus was on the petitioner, and there was no evidence before the adjudicator to indicate that the petitioner would be pursued to other parts of

Pakistan. Instead, the Home Office report of October 2001, dealing with internal flight, indicated at paragraph 5.4.38:

> "Groups with a limited internal flight alternative are women and mixed (inter-religious and inter-caste) couples. Many flee from rural areas to the cities if their economic circumstances permit, but even there they may not be safe from their families or religious extremists. For Ahmadis and Christians (including converts) there is also a high likelihood that an internal flight alternative may also be ruled out. Political activists, however, usually do have the option of moving to another part of the country, unless they are of high prominence."

It could not be said that the petitioner was of high prominence.

[17] For the petitioner to succeed, I would require to be persuaded by all three broad arguments which were advanced on his behalf. Having carefully considered the matter, I have come to the view that, on the contrary, the submissions of the respondent are to be preferred, particularly in respect of the second and third arguments advanced.

[18] In relation to the petitioner's first argument, it cannot, in my view, be said that the adjudicator failed altogether to take account of the evidence particularly founded upon - namely the statement as to what had apparently happened after his departure from Pakistan. Although it would appear that no specific reference was made to this evidence at paragraph 32, it was specifically included in the adjudicator's summary at paragraph 11. I agree with counsel for the petitioner that there is nothing to suggest that insofar as he considered it, the adjudicator found it any less credible or reliable than the rest of the petitioner's evidence, and it was no doubt reasonably strongly arguable on his behalf that, taking specific account of it, it could be said that there was a real possibility that, on return, he would be targeted for attack. On the other hand, I

am not persuaded that it could be said that no reasonable adjudicator could have reached a different view. It has to be borne in mind that the adjudicator found (and it was not argued that he was not entitled to find) that there had been a crackdown by the military regime on religious extremists since August 2001, and that insofar as violence remained the tendency was away from targeted attacks. In addition, the petitioner's evidence about his wife receiving phone calls could be regarded as somewhat unspecific and equivocal.

[19] As regards the question of sufficiency of protection it is not, in my view, arguable that the adjudicator proceeded wrongly on an assumption that the petitioner's fear was of indiscriminate attack. On the contrary, the adjudicator said specifically (in paragraph 33):

> "Even accepting a failure of State protection in the past, I do not consider there is a real possibility that on return he would be targeted for attack, or if he were, that there would be a failure of State protection, given the current attitude of the authorities."

The question thus comes to be whether the adjudicator, applying the appropriate test, could not reasonably have reached the conclusion he did.

[20] As to the test, there was no dispute between counsel. In respect of asylum claims, the leading authority where the risk is said to arise from the actings of non-state agents remains *Horvath* v *Secretary of State for the Home Department*. In it, Lord Hope of Craighead emphasised that the underlying relevant purpose of the Convention was to be found in the principle of surrogacy; the general purpose of the Convention being to enable a person who no longer had the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community (page 495). He emphasised that the obligation to

afford refugee status arose only if the person's own state was unable or unwilling to discharge its own duty to protect its own nationals. As he said at page 499:

> "The applicant may have a well-founded fear of ... ill-treatment for a Convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well-founded, do not entitle him to the status of a refugee. The Convention has a more limited objective, the limits of which are identified by the list of Convention reasons and by the principle of surrogacy."

Later at page 500, he said:

> "The primary duty to provide the protection lies with the home state. It is its duty to establish and to operate a system of protection against the persecution of its own nationals. If that system is lacking the protection of the international community is available as a substitute. But the application of the surrogacy principle rests upon the assumption that, just as the subordinate cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard which takes proper account of the duty which the state owes to all its own nationals. As Ward LJ said ... it is axiomatic that we live in an imperfect world. Certain levels of ill-treatment may still occur even if steps to prevent this are taken by the State to which we look for our protection."

[21] In the same case Lord Clyde said, at page 510:

> "I do not believe that any complete or comprehensive exposition can be devised which would precisely and comprehensively define the relevant level of protection. Use of words like "sufficiency" or "effectiveness" both of which may be seen as relative, does not provide a precise solution. Certainly, no-one would be entitled to an absolutely guaranteed immunity. That would be beyond any realistic practical expectation. Moreover, it is relevant to note that in *Osman* v *The United Kingdom* 1998 29 EHRR 245, the European Court of Human Rights recognised that account should be taken of the operational responsibilities and the constraints on the provision of police protection and accordingly the obligation to protect must not be so interpreted as to impose an impossible or disproportionate burden upon the authorities. ... There must be in place a system of domestic protection machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected. More importantly, there must be an ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of circumstances of each particular case."

He went on to commend a formulation by Stuart-Smith LJ, in the Court of Appeal, as a useful description of what is intended, viz:

> "In my judgment there must be in force in the country in question a criminal law which makes the violent attacks by the persecutors punishable by sentences commensurate with the gravity of the crimes. Victims as a class must not be exempt from the protection of the law. There must be a reasonable

willingness by the law enforcement agencies, that is to say the police and courts, to detect, prosecute and punish offenders."

[22] The leading authority in respect of EHCR claims where the risk is said to come from non-state agents is *R* v *Secretary of State for the Home Department ex parte Bagdanavicius*. In the leading speech, Lord Brown of Eaton-under-Heywood said (at paragraph 11):

> "The issue may be formulated as follows: to avoid expulsion on Article 3 grounds must the applicant establish only that in the receiving country he would be at real risk of suffering serious harm from non-state agents or must he go further and establish too that the receiving country does not provide for those within its territory a reasonable level of protection against such harm? Mr Nicol, QC for the appellants, a Lithuanian couple with a young child, submits that they need establish only a real risk of harm on return. For the Secretary of State, Miss Carss-Frisk QC's principal submission is that the appellants must also establish that the receiving country would fail to discharge the positive obligation inherent in Article 3 to provide a reasonable level of protection."

In the following paragraph he said:

> "It is of course implicit in the formulation of the issue in this way that a real risk of injury may remain despite the state's provision of a reasonable level of protection against it and such, indeed, I understand to be the agreed position in the facts of this very case. The Secretary of State concedes (certainly for the purposes of this litigation) that on return to Lithuania the appellants would be at real risk of serious injury by non-state agents; Mr Nicol for his part concedes that Lithuania provides a reasonable level of protection against

> violence of the sort threatened here. That, indeed, is why the stated issue is properly described as critical: its outcome is determinative of this appeal."

The issue was answered in favour of the Secretary of State. What was said to engage the UK's obligation under Article 3 was not the risk merely of harm but the risk of proscribed treatment. As his Lordship said, at paragraph 24:

> "Non-state agents do not subject people to torture or other proscribed forms of ill-treatment, however violently they may treat them: what, however, would transform such violence into Article 3 ill-treatment would be the state's failure to provide reasonable protection against it."

After noticing the guidance provided for asylum cases by *Horvath* v *Secretary of State for the Home Department*, it was said that a broadly similar approach fell to be adopted under the EHCR. It was said *inter alia*: "Certainly your Lordships should state for the guidance of practitioners and tribunals generally, that in the great majority of cases an Article 3 claim to avoid expulsion will add little if anything to an asylum claim."

[23] In addition, it has been said that the relevant state system should carry with it a willingness to do as much as can reasonably be expected to provide protection in the circumstances (*Secretary of State for the Home Department* v *Kacha*, approved in *Dhima* v *Immigration Appeal Tribunal*). Much will, no doubt, depend upon the nature of the risk. This was recognised, for example, in *Brown* v *Secretary of State for the Home Department*, where the claimant under EHCR was a witness to a murder committed by a leading member of a powerful gang in Kingston, Jamaica, and who was, it was said, liable to targeted attack for that reason as an informer. It was accepted (at paragraph 21) that such attacks could give rise to different considerations from the kind of attacks considered in *Horvath* (being isolated random attacks on an

unpopular minority). Nevertheless it was also said (at paragraph 22): "However, plainly, a state cannot guarantee safety to informers, and in certain ways the difficulty of guaranteeing such safety to informers, or suspected informers, may be greater than in preventing random attacks on a unpopular minority." In the Court of Appeal in *Horvath* it was acknowledged that: "In some cases, where individuals are targeted by terrorists or dissidents it may be possible for the state to provide special police protection, for example by an armed guard or the provision of a new identity in a different part of the territory", (Stuart-Smith LJ at page 222). No doubt as Lord Clyde stressed in the House of Lords, the level of protection which would be expected to be afforded must be a matter of circumstances in each case.

[24] In the present case, the petitioner's own history indicated an apparent readiness of the authorities to intervene to try to help in relation to the incidents of 15 January 1997 and 7 January 1999. Much more significantly, however, the adjudicator found not merely a crackdown by the military regime on religious extremists in August 2001, but also a tendency apparently away from targeted attacks, and that the new regime in place since the petitioner left Pakistan did not tolerate religious violence and had taken steps to counter it. In these circumstances, I do not think it is arguable that, insofar as the adjudicator did not consider that there would be a failure of state protection, this was a conclusion which no reasonable adjudicator could have reached.

[25] Thirdly, in relation to the question of internal flight, it is, in my view, not arguable that the adjudicator proceeded wrongly on the view that the petitioner was concerned about potential indiscriminate attack. He records at paragraph 13 that the argument on behalf of the petitioner before him was that there was no internal flight alternative "under reference to the Canadian report". This, it appears, (from the adjudicator's first sentence in paragraph 34) referred to a sentence in the Canadian

report which read "Sectarian violence in one part of the country can lead to reprisals in another." In dismissing that argument (by saying that "the possibility of tit for tat violence elsewhere is not the same as saying that there is any real likelihood that this individual would be pursued to the furthest reaches of that vast and populous country"), the adjudicator made it perfectly plain that he understood that the petitioner's apparent concern was that he would be the subject of targeted violence. Further, it could not, in my view, be said that he was not entitled to find that, whatever might be the case in his own area, as a member of the majority Sunni population the petitioner could go virtually anywhere else. The onus was on the petitioner. I was not referred to any evidence before the adjudicator which would have suggested that those responsible for the petitioner's problems in his own area would pursue him to any other areas of Pakistan. On the contrary, there was evidence in the Home Office report which suggested that political activists usually did have the option of moving to another part of the country. It could not readily be said of the petitioner that he, a general secretary of a local branch, was of "high prominence".

[26] In these circumstances, the petition falls to be dismissed.