



Neutral Citation No: [2004] EWCA Civ

Case No: C4/2003/2520

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

Date: 28 July 2004

Before :

LORD JUSTICE TUCKEY
LORD JUSTICE CLARKE
and
LORD JUSTICE LAWS

Between :

'K' & anr
- and -
Secretary of State for the Home Department

Appellant

Respondent

Ms M Plimmer (instructed by **Browell Smith & Co**) for the Appellants
Mr T Eicke (instructed by **The Treasury Solicitors**) for the Home Department

Hearing date: 29 April 2004

**JUDGMENT : APPROVED BY THE COURT FOR
HANDING DOWN (SUBJECT TO EDITORIAL
CORRECTIONS)**

Lord Justice Laws:

INTRODUCTORY

1. This is an appeal against the determination of the Immigration Appeal Tribunal ("IAT") of 29 November 2003, by which the IAT allowed the Secretary of State's appeal against the decision of the Adjudicator given on 16 October 2002. The Adjudicator in turn had allowed the appellant's appeal, on asylum grounds and grounds based on Article 3 of the European Convention on Human Rights ("ECHR"), against removal directions set by the Secretary of State following his dismissal of the appellant's asylum claim and consequent refusal of leave to enter the United Kingdom. The Adjudicator rejected a further ground of appeal based on ECHR Article 8. On 5 December 2003, on consideration of the papers, permission to appeal to this court was granted by myself on one ground only, which I will explain in due course.
2. In light of the nature of the issue in the case, it is convenient at the outset to cite the well known definition of refugee in Article 1A(2) of the 1951 Convention Relating to the Status of Refugees. It refers to a 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..."

THE FACTS AND THE CONCLUSION OF THE IAT

3. The appellant is a national of Iran. She left that country on 26 September 2001 and found her way to Istanbul. She travelled to the United Kingdom by air, arriving on 4 October 2001. She claimed asylum on 5 October 2001.
4. Findings of fact made by the Adjudicator were not disputed in the IAT, which gave this crisp account of the primary events:

"3. The basis of the respondent's [sc. the appellant's] claim is that her family in Iran are royalists and were associated with the regime of the late Shah. Her father had been arrested and imprisoned for a year; and one of her brothers executed in 1981. She married in 1991. In April 2001 her husband failed to return home after work. This was at a time when the Iranian authorities arrested a number of known dissidents in Tehran. The respondent was unable to find out what had happened to her husband. Two to three weeks after his disappearance revolutionary guards came to her house and searched it. They took away some books and papers that they found in a desk.

4. A week later they came again. Although she did not say so until late in the proceedings, she asserts that she was raped by the revolutionary guards on that occasion. By this time she had concluded that her husband was in serious trouble and in prison. She went to stay with friends. She was able to find out which prison her husband was in and went to visit him on 24 June 2001. She noticed that his face was swollen and he was guarded in his responses to her questions. She did not believe him when he said that everything was fine and he was being well-treated.

5. She continued living with her friends until the school year started on 25 September 2001. The day after term started she was warned by the headmaster of the school that the revolutionary guards had been asking about her son. The headmaster had told them he was enrolled at the school but not present. The respondent concluded that pressure was going to be put on her husband by pressure being exerted on members of his family and especially his son. It was at that stage she decided to leave Iran."

The Adjudicator found, and the IAT did not dispute, that if returned to Iran there was a serious possibility that the appellant would be detained and ill-treated by reason of her association with her husband, that is "as the wife of a man who was still a prisoner and 'as a person in respect of whom adverse attention had been applied by the revolutionary guards until she disappeared'" (IAT, paragraph 9).

5. There remained the question whether this prospective persecution would be for a Convention reason. The IAT noted (paragraph 10) that the Adjudicator had rejected the submission for the appellant that she would be persecuted by reason of an "imputed political opinion". However he had proceeded to hold that the persecution would be by virtue of her membership of a particular social group: namely her husband's family. Then the IAT said this (paragraph 12):

"In the grounds of appeal the appellant made one point only and in doing so relied on *Quijano* [1997] IAR 227. The first point made by the appellant seems to be that the family is not a particular social group. This is clearly wrong, the family is the quintessential social group. However, the point made in *Quijano* can simply be stated as being that where the primary member of a family is not persecuted for a Convention reason, then the secondary members cannot be said to be persecuted for being members of the primary person's family. "

The IAT then referred to the Adjudicator's finding as follows (paragraph 42 of the Adjudicator's decision):

“... I cannot find even on the lower standard of proof that her husband has been detained for political reasons”.

6. The conclusions of the IAT were as follows:

“14. Given that [the Adjudicator] found there was no evidence to establish, even to the appropriate standard of proof, that the appellant’s husband had been arrested and mistreated for political reasons, it then followed as in *Quijano* that the appellant could not establish that whatever she feared on return was as a result of a Convention reason.

15. That being the case, the Secretary of State’s appeal on the grounds of asylum is allowed.”

THE GROUND OF APPEAL

7. The only ground on which I granted permission to appeal is ground 2:

“The Tribunal erred in law in concluding that it was bound by *Quijano* [1997] IAR 227 without distinguishing the facts or considering *Shah and Islam* [1999] 2 AC 629”.

Shah is of course a decision of their Lordships’ House. This ground of appeal would perhaps suggest that we have only been concerned with the austere legalisms of our rules of precedent. That is by no means the case. As the argument unfolded it became clear that the court was being required to revisit the substance of a vexed area of refugee law. At this stage I put it very broadly. Where a family member has been persecuted but for a non-Convention reason, and his persecutors seek to multiply his woes by going after other family members, may the latter enjoy a good asylum claim on the basis of their “membership of a particular social group”?

8. I think it convenient to introduce the relevant learning before embarking upon any analysis of the question or questions to be decided.

THE AUTHORITIES

9. The identification, on many different sets of facts, of those persons who ought to be treated as refugees as members of a “particular social group” has proved to be markedly elusive, and has generated much learning in the courts of a number of States Parties to the 1951 Convention. In this jurisdiction it is convenient to embark on the trail of relevant authority with a decision of mine given at first instance in *de Mello* [1997] IAR 43. In that case the applicants, two sisters from Brazil, feared serious ill treatment (if they were returned to that country) at the hands of a certain drug trafficker who had approached their father to get him to grow drugs on his farm and been flatly refused. I said:

“... is the alleged or actual persecution ‘for reasons of... membership of a particular social group’? Mr Kovats submits as follows. Where an individual is persecuted for a non-Convention reason, concurrent or subsequent threats (or presumably, acts) against his family likewise cannot be regarded as persecution for a Convention reason. If it were otherwise the person initially ill treated – here, the father – would have no claim to asylum under the 1951 Convention and so it would be anomalous were the members of his family, persecuted or ill treated simply because of their association with him, to be accorded Convention rights.

I do not consider that this argument is correct. Let it be assumed that an individual has been ill treated or terrorised for a reason having nothing to do with the Convention. He has no Convention rights. But on the view I have taken, his family may form a particular social group within the meaning of the Convention. If then they are persecuted because of their connection with him, it is, as a matter of ordinary language and logic for reasons of their membership of the family – the group – that they are persecuted. I see nothing anomalous in this. The original evil which gives rise to persecution against an individual is one thing; if it is then transferred so that a family is persecuted, on the face of it that will come within the Convention. The definition of ‘refugee’ in Article 1 of the Convention treats membership of a particular social group as being *in pari materia* with the other Convention reasons for persecution: race, religion and so forth. Mr Kovats’ argument implies, however, that membership of a particular social group is (at least on some sets of facts) to be regarded as merely adjectival to or parasitic upon the other reasons. With deference to him, that in my judgment amounts to a misconstruction of Article 1 with the consequence that his submission proceeds on a false premise. Moreover, I am inclined to think that the argument accords the persecutor’s motive a status not warranted by the Convention’s words. The motive may be to terrorise the person against whom the persecutor entertains ill will (for a ‘non-Convention’ reason) by getting at his family: but when it comes to the question whether the family are persecuted by reason of their membership of a particular social group – the family – I do not see that the persecutor’s motive has any relevance.”

10. In *Quijano* the facts were not dissimilar to those of *de Mello*. The applicant feared persecution by members of a drugs cartel in Columbia because his stepfather had refused to cooperate with them. The IAT had issued their decision in the case shortly before my judgment was given in *de Mello*. They said:

“However in this case the Martinez family is not being persecuted because of being the Martinez family. The

persecution is directly linked to the actions of the stepfather and his refusal to join the Mafia. The only interest in any of the Martinez family is because of that act. That being so we agree with Mrs Sargent that it would be absurd that a member of a family of a person threatened would be within the ambit of the Convention when the person threatened would fall outside the Convention. Where a claim is made therefore as a member of the family it is critical to identify the root of the threat and to decide whether that root is the family itself or a particular member of the family. In the latter case any Convention foundation for the claim must be ancillary to and dependant on that of the person threatened.”

Leave was given to appeal to this court in light of the *de Mello* judgment. The Court of Appeal (Thorpe, Morritt and Roch LJJ) dismissed the appeal. Thorpe LJ said:

“... 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 for 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:

“However the fear of persecution must be ‘for reasons of... membership of a particular social group...’ It is plain that the fear of the applicant, which is to be assumed, is the consequence of the refusal of his stepfather to comply with the illegal demands of the drugs cartel in Columbia and the determination of the drugs cartel to take revenge on those they considered to be related to him. It is true that each member of the social group apart from the stepfather is likely to have the same fear and for the same reasons. But 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 applicant. The stepfather was not persecuted for any Convention reason so that the individual relationship with him cannot cause a fear for a Convention reason either. In short the assumed fear of the applicant is not caused by his membership of a particular social group.”

Roch LJ said:

“Where, as in this case, 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 a 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. In that situation membership of that family will entitle a claimant for refugee status to political asylum. The use of the word ‘particular’ before the phrase ‘social group’ is of great importance, in my opinion.

A good example of such a family in times past would have been the Bourbon family in France during the time of the French Revolution.”

11. This decision, then, plainly differed from and overruled my judgment in *de Mello*. The next case is the well known decision of their Lordships’ House in *Shah & Islam*. It concerned the plight of women in Pakistan who had been falsely accused of adultery by their husbands. The appellants were two such women who feared physical and emotional abuse, and possibly even death by stoning, if they were returned to Pakistan. Their Lordships’ reasoning is largely directed to the criteria to be adopted or the approach to be taken to the ascertainment of a “particular social group” for the purposes of the Convention. The House accepted that a particular social group could not be constituted solely by the fact or apprehension of persecution of its putative members. Their Lordships were concerned to deal with a particular argument which had been accepted by Staughton LJ in the Court of Appeal ([1998] 1 WLR 74, 93D), to the effect that to constitute a particular social group its members must be “joined together with some degree of cohesiveness, co-operation and interdependence”. That argument was rejected. In fact it had not been relied on by the Secretary of State before the House in what might be called its full-blown form; it was submitted only that “particular social group” normally requires cohesiveness. That, with respect, did not appear to illuminate the subject. The majority of their Lordships (Lord Millett dissented) attached importance to the decision of the Board of Immigration Appeals in *Re Acosta* (1985) I & N 211, whose reasoning Lord Steyn described as seminal (644 D). In that case it was concluded that for refugee status to arise on the footing of membership of a particular social group, there has to be demonstrated a well-founded fear of persecution by reason of an immutable characteristic which the claimant shares with others, that is, “a characteristic that is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed”. This reasoning exemplified, as the Board said in *Re Acosta*, the *ejusdem generis* doctrine of construction: all the other categories of refugee in Article 1A(2) of the Convention involved such “immutable characteristics”. Adopting such an approach, there was no requirement for the interposition of a further limiting factor such as “cohesiveness”.
12. I should notice that there is much reference in their Lordships’ speeches to the fact that women in Pakistan were the subject of discrimination in matters of fundamental

rights, and were unprotected by the State. The notion of discrimination is discussed at a more general level by Lord Hoffmann (651 A-D):

“In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect. The obvious examples, based on the experience of the persecutions in Europe which would have been in the minds of the delegates in 1951, were race, religion, nationality and political opinion. But the inclusion of ‘particular social group’ recognised that there might be different criteria for discrimination, in pari materia with discrimination on the other grounds, which would be equally offensive to principles of human rights. It is plausibly suggested that the delegates may have had in mind persecutions in Communist countries of people who were stigmatised as members of the bourgeoisie. But the concept of a social group is a general one and its meaning cannot be confined to those social groups which the framers of the Convention may have had in mind. In choosing to use the general term ‘particular social group’ rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.”

I refer to this lest it be thought that Lord Hoffmann was holding that discrimination as such is a defining characteristic of “particular social group”. I think it is clear, if I may say so, that that is not the case. The passage I have cited is immediately followed by a reference to *Re Acosta*. Lord Hoffmann adopts the *ejusdem generis* approach. The discussion of discrimination goes to the kind of persecution outlawed by the Convention. There is no doubt a relationship between the nature of the persecution outlawed and the chosen categories of potential refugee. The drafters included, as Lord Hoffmann said, the categories of persons who might most obviously be vulnerable to persecution. The inclusion of “particular social group” recognised that there might arise other criteria for discrimination and thus persecution.

13. I should cite these passages from Lord Hope’s discussion of “particular social group” (657 G-E, 658 A-G):

“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, *The Refugee in International Law*, 2nd ed. (1996). At pages 47-48 he observes that the importance, and therefore the identity, of a social group may well be in direct proportion to the notice taken of it by others. Thus the notion of 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."

14. In the result their Lordships in *Shah* held that women in Pakistan were a social group for the purpose of the Convention. Now I must consider whether *Quijano* must be revisited in light of the open-ended approach taken in *Shah*, as suggested in the ground of appeal for which I granted permission. It is important to remember that the debate in *Quijano* was not about the *ascertainment* of a particular social group. The case went off on what Thorpe LJ described as the second question:

"The second question is whether in order to qualify for Convention protection by virtue of membership of a family the applicant must show that other members of the family are persecuted for a Convention reason."

I apprehend that if in *Quijano* the stepfather faced persecution for a Convention reason, and the applicant faced persecution because of his association with him, the claim to asylum might have succeeded – but not on grounds of particular social group: rather, because the applicant would then be associated with the basis of persecution of the stepfather. A scenario of that kind is untouched by *Shah*.

15. The extent to which *Quijano* may be said to be modified by their Lordships' reasoning in *Shah* has been passed upon by Auld LJ in *Skenderaj* [2002] EWCA Civ 567, dealing with the question whether the facts in that case disclosed a fear of persecution for reasons of membership of a particular social group. There the asylum-seeker claimed to fear persecution in the context of an Albanian blood-feud, his uncle having killed a member of another family in a dispute over entitlement to a plot of land. Auld LJ said (paragraph 36):

"*Quijano* 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."

16. I should also refer to *Sarrazola* [2000] FCA 919 (Federal Court of Australia: Madgwick J), [2001] FCA 263 (Federal Court of Australia on appeal from Madgwick J: Heerey, Sundberg and Merkel JJ). Miss Plimmer for the appellant submits that the reasoning in this case touches more closely the question I posed at the outset: where a family member has been persecuted but for a non-Convention reason, and his persecutors seek to multiply his woes by going after other family members, may the latter enjoy a good asylum claim on the basis of their "membership of a particular social group"? I need not however take time with the facts in *Sarrazola*. Its relevance lies in this reasoning of Madgwick J at first instance, which was impliedly blessed by the court on appeal (paragraph 31 of the first instance judgment):

"The sorts of irrational, discriminatory prejudices that result in persecution of social groups (including ethnic, religious and racial groups) not infrequently begin with antipathy towards one member of the group for non-group reasons. It then becomes transmuted into antipathy towards group members for their group affiliation or identification. An example will I hope make this clear. A is deeply humiliated by B, A then being unaware that B is, say, Jewish or homosexual; A thereupon threatens B; for that or some other reason B leaves the scene; A soon after discovers B's group identity and, rankling, come to hate and persecute other members of the group for reasons of such membership."

CONCLUSION

17. The question whether, in any particular case, a claimant is a member of a "particular social group" for the purpose of the Convention is with great respect illuminated by the decision of their Lordships' House in *Shah*, not least by virtue of the "immutable characteristic" approach commended in *Re Acosta*. There will remain difficulties: I apprehend that the last word has not yet been spoken as to the extent to which the putative group must be recognised or treated as such by society. That was the point on

which this court held in *Skenderaj* that the appellant was *not* a member of a particular social group.

18. But let it be assumed, as I will assume in this case, that the claimant is to be treated as a member of a particular social group – here, the family. I am clear that where a family member has been persecuted for a non-Convention reason, and his persecutors seek to get at him by going after other family members including the claimant, the claimant is not, by reason of those facts, a refugee within the meaning of Article 1A(2) of the Convention. To hold otherwise would be to depart from the *ejusdem generis* principle of construction commended in *Re Acosta* and adopted by the House of Lords in *Shah*. That principle requires that the claimant's membership of the family be the *primary* and not a *secondary* reason for his being targeted. The persecutor must be shown to take objection to the family as such. As Auld LJ said in *Skenderaj*, in the passage I have cited:
- “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.”
19. In short the feared persecution of family members must be the persecutor's end, and not a means to another end. This is so for all the other categories of refugee mentioned in Article 1A(2). Respectively they are persecuted by reason of their race, politics, religion. If the family member faces persecution because the primary victim is persecuted for a non-Convention reason, then he, too, faces persecution for *that* reason; and he is not, accordingly, protected by the Convention. *Sarrazola* is nothing to the contrary. Madgwick J's reasoning merely demonstrates the melancholy fact that a secondary reason for ill-treatment may, over time allowing nasty resentments to take root and grow, be supplanted by a primary one.
20. The short answer to the case is that on the question whether a person may claim asylum fearing persecution by persons whose primary target is victimised for a non-Convention reason, *Quijano* gave a negative answer which has not been overturned or cast into doubt by their Lordships' decision in *Shah*; and in the ordinary way we are bound by *Quijano*. I have ventured to offer somewhat more extended reasoning only because this is an area of the law where it seems to have proved difficult to find the rocks among the sand.
21. I would dismiss the appeal.

Lord Justice Clarke:

22. I have found the issues in this appeal somewhat intractable. I agree with Laws LJ that the last word has not yet been spoken as to the extent to which a putative group must be recognised or treated as a “particular social group” for the purposes of the Convention. The appellant's case is that a family group naturally falls within the definition on the basis that it is just that; it is a social group and thus a particular social

group. It is not to my mind easy to see why it is not a particular social group for the purposes of the Convention, unless a particular family is not a sufficiently large group within society to be regarded as a particular social group.

23. It is not, however, necessary to form a final conclusion on that question in this appeal because, as I read the decisions in both *de Mello* and *Quijano*, to which Laws LJ has referred in detail, they both proceed on the basis that the family concerned was a social group. The difference between them was one of causation. It was, not that the family was not a social group, but that the fear of persecution was not “for reasons of ... membership of a particular social group”. That can be seen from the extracts from the judgments of this court in *Quijano* quoted by Laws LJ.
24. In both *de Mello* and *Quijano* a member of a family, A, was persecuted for a non-Convention reason. The question was whether another member of A’s family, B, feared persecution for reasons of his or her membership of the family in circumstances in which the only relationship between A and B was a family connection. In *de Mello* Laws J said that, where B fears persecution for reasons of his or her family connection with A, as a matter of ordinary language and logic, such a fear is a fear of persecution for reasons of his or her membership of a particular social group, namely the particular family.
25. I initially thought that there was much to be said for that approach on the basis that the question for decision is why B fears persecution. The only reason that B fears persecution is because of his or her membership of the particular family, which is a Convention reason, whereas A fears persecution for a non-Convention reason. However, I agree that that conclusion is not open to the court because of the decision in *Quijano*, which is not distinguishable from the present case on the facts.
26. In *Quijano* this court held that the persecution of B was not for reasons of his membership of his family but in order, as Laws LJ put it, to get at A for a non-Convention reason. I at first thought that the question was a simple question of causation and that there were two effective causes of B’s fear of persecution, namely the cause of the persecution of A and the cause of the persecution of B and that the cause of the persecution of B was, and perhaps was only his or her family relationship with A. However, all questions of causation must be analysed in their context and I do not now think that is quite the question.
27. The relevant words of Article 1A(2) of the Convention refer to a person who has:

“... a well-founded fear of persecution for reasons of ... membership of a particular social group ...”

The reference to “*for* reasons of membership” of such a group, say a family, suggests that the focus should be on the persecutor’s purpose (my emphasis). As Laws LJ put it, the feared persecution must be the persecutor’s end and not a means to another end. That is essentially what was decided in *Quijano*. It is not therefore sufficient to ask simply why B was being persecuted. The answer to that question could be that it was for two reasons, namely the persecutor’s wish to persecute A and the family relationship between B and A. If, as *Quijano* shows, the purpose or end of the persecutor is the key factor in the context of the Convention, the answer becomes clear. It is that B does not have a well founded fear of persecution for reasons of membership of his or her family because the persecution feared is not for those reasons but for whatever reasons prompted the authorities to persecute A.

28. In all the circumstances, I agree that the appeal should be dismissed for the reasons given by Laws LJ.

Lord Justice Tuckey:

29. I agree that this appeal should be dismissed for the reasons given in both judgments.