Case No: C/2000/3674

Neutral Citation Number: [2001] EWCA Civ 807
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM A DETERMINATION OF
THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday 25th May 2001

B e f o r e :

LORD JUSTICE THORPE
LORD JUSTICE CLARKE
and
MR JUSTICE BUTTERFIELD

- -

SONA BANOMOVA — Appellant

- and -

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT — Respondent

- -

(Transcript of the Handed Down Judgment of
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Mr Peter Jorro (instructed by Gill & Co for the Appellant)
Mr Robin Tam (instructed by the Treasury Solicitor for the Respondent)

- -

Judgment

LORD JUSTICE CLARKE:

Introduction

1. This is an appeal from a decision of the Immigration Appeal Tribunal ("IAT") dated 31st July 2000 dismissing the appellant's appeal from a determination of a special adjudicator dated 6th June 2000 in which he dismissed the appellant's appeal against the decision of an immigration officer made on 15th March 1999 in which he refused her leave to enter the United Kingdom.

2. The appeal against the decision of the immigration officer was lodged on asylum grounds under section 8(1) of the Asylum and Immigration Appeals Act 1993. The appellant had arrived in the United Kingdom from Slovakia on 22nd July 1998 and immediately claimed asylum. She was subsequently refused asylum by a letter written on behalf of the respondent dated 4th February 1999. She appeals to this court pursuant to permission given by Simon Brown LJ having been refused permission by the IAT.

The Facts

3. The facts may be stated shortly as follows. The appellant was born in Michalovice on 4th October 1979 in the then Czechoslovakia to a Roma father and a non-Roma Slovak mother. While she was at school and aged between about 12 and 14 she was bullied, hit and racially discriminated against by both teachers and non-Roma classmates, which made her cry and feel miserable. Thereafter between 1993 and 1996 while she was at upper school she was discriminated against by a chemistry teacher and ostracised by class mates once they discovered that she was Roma. When she was 16 she wanted to start going to discos but had problems in getting in because of anti-Roma racial discrimination. The same happened at restaurants.

4. The appellant's mother died on 24th December 1996. She had often been criticised over the years by her neighbours for marrying a "gypsy man". After she died the appellant and her remaining family were subjected to a hate campaign by neighbours who wanted them out of their village. The appellant was pointed at and verbally abused in the street and other young people with whom the appellant wanted to make friends, were discouraged from talking to her by their parents. In the summer of 1997 the family dog was shot and killed. The family suspected that one of their neighbours was responsible, although none of the other neighbours was prepared to provide any information so that there was no point in reporting it to the police. Also in the summer of 1997 the appellant's family chickens were killed. A further example of the problems faced by the appellant and her family was that they were refused service in a local restaurant in April 1998 on the pretext of there being no room when in fact there clearly was room.

5. Those facts are no more than background to the crucial events, which occurred in July 1998. At about 1.00 am on 3rd July 1998 the family home was subjected to what can fairly be described as a terrifying invasion. While they were sleeping masked men came to their house and rang the bell. When the appellant's father opened the door they burst in, the appellant and her family were all tied up and her father was taken away and severely beaten. They were told that if they did not leave there would be further trouble. They stole everything of value and

smashed furniture, cupboards and wall units and ripped out the telephone. The appellant's father was taken to the cellar and again severely beaten. The men finally left warning the family not to call the police, locking them in and warning them that they would be watching from outside. They said that if they went to the police they would know all about it.

6. Later in the morning the appellant managed to free herself and the others and her father climbed out of the window, went to a telephone box and called his brother who persuaded him to call the police. Four or five police officers arrived during the afternoon to take down details of the incident. They looked round the house and took photographs. They then took the appellant's father to hospital. However, the next night the appellant's family received a telephone call in which the caller told them to withdraw their complaint to the police or they would be attacked again as before. On 4th July the family discovered that their animals, namely a pig and some chickens, had been killed. Later that day they received another threatening telephone call. On 5th July following those threats the appellant's father went to the police and withdrew his complaint. He told them that he was taking it all back because of the threats. The police allowed him to withdraw his complaint but said that he could reinstate it if he wanted to. On 7th, 8th or 9th July a note was stuck to the gate of the appellant's home saying among other things "we will kill you".

7. Because of those events the appellant and her family left Slovakia by air on 22nd July, that being the earliest date on which her father could obtain tickets. They arrived in the United Kingdom and immediately claimed asylum. The appellant was interviewed by an immigration officer and I have already described the proceedings which followed.

8. Those facts are taken from the evidence of the applicant which, so far as I can see was accepted by the special adjudicator, before whom she gave evidence, and by the IAT.

9. I am not sure what happened to the remaining members of the family, although we were told that the appellant's father had his claim for asylum refused and that his subsequent appeals have failed. I do not know whether it is common for cases involving members of the same family and essentially the same facts to be considered separately. However, if it is, I would like to say in passing that it seems to me to be unfortunate. It is surely preferable for the claims for asylum of members of the same family to be considered and determined at the same time on the same evidence and for any appeals from relevant decisions to be heard and determined at the same time.

The Issues

10. The issues identified by Mr Jorro on behalf of the applicant as arising on this appeal are these:

(1) whether the IAT erred in finding, on the facts on the appellant's particular case, that there is sufficient protection for her in the Slovak Republic as measured by the appropriate minimum international standard for such, so that what she fears does not amount to being persecuted for the purposes of Article 1A(2) of the Refugee Convention;

(2) whether the IAT erred in failing to find that the appellant, in the particular circumstances of her case, is unwilling owing to her well-founded fear of being persecuted by reason of her race, to avail herself of the protection of her country; and

(3) whether the IAT erred in failing to find that the applicant as a half-Roma is at a greater risk of mistreatment, amounting to her being persecuted by reason of her (mixed) race, than full-Roma are in the Slovak Republic.

I shall consider those issues in turn.

Issue 1

11. Mr Tam, who represented the respondent, reformulated this issue in this way: whether the IAT should have found that Slovakia does not provide an adequate level of protection against ill-treatment by non-state agents because members of the police investigating a criminal incident permitted the appellant's father to withdraw his complaint after he had to their knowledge been threatened. I do not think that there is any significant difference between the formulations of this issue adopted by each of the parties.

12. As I see it, the resolution of the issue depends to a large extent upon the application to the facts of this case of the principles set out by the House of Lords in *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 379. The leading speech was given by Lord Hope, who set out a brief summary of the facts on page 381, but they can perhaps best be seen from paragraphs 6 and 7 of the judgment of Stuart-Smith LJ in this court. He said at [2000] INLR 15 at pp 19-20:

> "The facts can be succinctly stated. The appellant is 26. He comes from a village called Palin from the county of Mikhalovice, where the Roma community, to which he belongs, are a small minority. On 15 October 1997 he arrived in the UK with his wife and child and claimed asylum. He stated he feared persecution in Slovakia by skinheads, against whom the Slovak police failed to provide protection for Roma. Among the episodes to which he referred was the beating to death of his father (which did not even lead the police to come to his house: 'They pretended it hadn't happened'), this was in 1985 under the communist regime; an attack on his brother by skinheads armed with vicious weapons; persistent attacks on his home, leading the appellant and his brothers to dig a hole in the ground in their back garden and regularly take shelter in it at night; the destruction by skinheads of every item in the appellant's home, leaving an empty shell; attacks on all the Roma in the appellant's village ('the police didn't want to get involved'); serious violent attacks on two Roma neighbours; and the murder of two others. He said that if they were returned to Slovakia he was afraid that he would again be persecuted by the skinheads because he was a gypsy. He will not get protection from the police who don't care at all about their problems. His written statement reported that 'skinheads would come to our village and throw bombs into the homes of gypsies'; that 'approximately 3 to 4 times a week neo-Nazis would

> … hurl abuse outside my windows that all gypsies must die', that the situation 'caused me to fear for my life' and that he came to the UK because he wanted his child to grow up in a country in which she is not persecuted. He also stated that along with other Roma, he was unable to find work and the Slovak authorities failed to afford him normal public facilities including marriage and schooling for his child."

13. In that case the IAT (reversing the special adjudicator) accepted the appellant's account as credible but concluded that, while he had a well-founded fear of violence by skinheads, that did not amount to persecution within the meaning of Article 1A(2) of the 1951 Geneva Convention Relating to the Status of Refugees as amended by the New York Protocol of 1967 (which I shall together call "the Convention") because he had not shown that he was unable or, through fear of persecution, unwilling to avail himself of the protection of the state. Both this court and the House of Lords upheld the decision of the IAT.

14. Article 1A(2) of the Convention provides that the term "refugee" shall apply to any person who:

> "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The decision of the House of Lords in *Horvath* is authority for the proposition that a person does not have a "well-founded fear of being persecuted" for a Convention reason, say race, simply by showing a well-founded fear of being persecuted (in the ordinary meaning of the word) by a particular group or groups of individuals who are not agents of the State.

15. Lord Hope explained in *Horvath* (at p 383) that the reason was to be found in what he described as the principle of surrogacy. As he put it at (p 383 C):

> "It seems to me that the Convention purpose which is of paramount importance for a solution of the problems raised by the present case is that which is to be found in the principle of surrogacy. The general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community."

That principle plays a crucial role in determining the meaning of the expression "fear of being persecuted" in the Convention.

16. Lord Hope then referred to the view expressed by Lord Keith in *R v Secretary of State for the Home Department ex parte Sivakumaran* [1988] AC 958, 992 H to 993A that the general purpose of the Convention was to afford protection and fair treatment for those for whom neither is available in their own country. He thereafter referred to *Canada (Attorney General) v Ward* (1993) 103 DLR (4^{th}) 1 per La Forest J at p 12 and added (at p 383 E to H):

> "This purpose has a direct bearing on the meaning that is to be given to the word "persecution" for the purposes of the Convention. As

> Professor James C Hathaway in *The Law of Refugee Status* (1991), p 112 has explained, "persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community." At p 135, he refers to the protection which the Convention provides as "surrogate or substitute protection," which is activated only upon the failure of protection by the home state. On this view the failure of state protection is central to the whole system. It also has a direct bearing on the test that is to be applied in order to answer the question whether the protection against persecution which is available in the country of his nationality is sufficiently lacking to enable the person to obtain protection internationally as a refugee. If the principle of surrogacy is applied, the criterion must be whether the alleged lack of protection is such as to indicate that the home state is unable or unwilling to discharge *its* duty to establish and operate a system for the protection against persecution of its own nationals."

Lord Hope then discussed the relationship between what have been called the fear test and the protection test, by reference to the speech of Lord Lloyd in *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 at 304, and said (at p 385 E) that a person may satisfy the fear test because he has a well-founded fear of being persecuted but yet may not be a "refugee" within the meaning of the article because he is unable to satisfy the protection test. He expressed the view that the two tests are linked as being founded on the same principle, namely that of surrogacy.

17. The key conclusions reached by Lord Hope which are of particular significance in the instant appeal are those to be found at pages 385 G to H and 387 F to G. At page 385 G to H he said:

> "I would hold therefore that, in the context of an allegation of persecution by non-state agents, the word "persecution" implies a failure by the state to make protection available against the ill-treatment or violence which the person suffers at the hands of his persecutors. … in the case of an allegation of persecution by non-state agents the failure of the state to provide the protection is nevertheless an essential element. It provides the bridge between persecution by the state and persecution by non-state agents which is necessary in the interests of the consistency of the whole scheme."

Lord Hope then referred to a dictum of Hale LJ at [2000] INLR 15 at 59 and to some of the academic writings on the topic. For example in *The Law of Refugee Status* Professor Hathaway makes it plain that the intention of the makers of the Convention was to restrict refugee status to situations where there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by the state to its own population.

18. Lord Hope expressed his final conclusion in this way at p 387 F-G:

> "To sum up therefore on this issue, I consider that the obligation to afford refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals. I think that it follows that, in order to satisfy the fear test, in a non-state agent case, the applicant for refugee status must show that the persecution

> which he fears consists of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection. The applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or 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."

19. In that part of his speech Lord Hope did not attempt to define the precise level or standard of protection which a state must provide against which the facts of a particular case can be tested. If it were possible to set such a standard it would no doubt be easier to decide on the facts of a particular case whether the state had failed to provide sufficient protection to its nationals such that an asylum seeker could properly say that he or she was deprived of that protection against persecution (in the ordinary meaning of the word) by non-state agents for a Convention reason such as race. Lord Hope merely said in his summary at page 387 that the applicant must show that the persecution which he fears consists of acts against which the state is unable or unwilling to provide protection.

20. It is, however, apparent from the decision in *Horvath* on the facts that he cannot have meant those words to be taken literally. It is plain that it is not sufficient for an applicant to show that the state is unable to provide protection because on the facts of *Horvath* as summarised above the state had in fact been unable to provide protection for the applicant. It is perhaps obvious that there are many types of persecution against which a state will not be able to provide complete protection. What then is the appropriate standard?

21. This question was the subject of the third issue in *Horvath*, which Lord Hope defined (at p 382 G) as asking what is the test for determining whether there is sufficient protection against persecution in the applicant's country of origin – is it sufficient, to meet the standard required by the Convention, that there is in that country a system of criminal law which makes violent attacks by the persecutors punishable and a reasonable willingness to enforce the law on the part of the law enforcement agencies? Or must the protection by the state be such that it cannot be said that the person has a well-founded fear?

22. On the facts found as to the position in Slovakia Lord Hope said (at p 384 D to F):

> "Fortunately the situation in Slovakia is not such as to give rise to the problems which may arise in other jurisdictions where there is no effective state authority or the state authority is unable to provide protection. The present case is relatively straightforward. The institutions of government are effective and operating in the Republic of Slovakia. The state provides protection to its nationals by respecting the rule of law and it enforces its authority through the provision of a police force. But, as the Immigration Appeal Tribunal said in its judgment, there is racial violence against Roma perpetrated by skinheads. The police do not conduct proper investigation in all cases and there have been cases where their investigation is very slow. But there was also evidence that the police have intervened to provide protection when they have been asked to do so and that stiff sentences

> are imposed at times for crimes that are racially motivated. The tribunal's conclusion was that the violent attacks on Roma are isolated and random attacks by thugs."

23. Lord Hope later observed (at p 387 H):

> "The Immigration Appeal Tribunal said in its judgment that in its view it was the failure of the state to provide protection that converts the discriminatory acts into persecution. On that approach, having considered the evidence, it decided that the applicant fell below the threshold which it believed was required for international protection in a case where the fear was of discriminatory acts and where it was alleged that there was not a sufficiency of protection from non-state agents. The tribunal stated: "It is our view that his fear is not that of persecution." For the reasons which I have given I consider that the tribunal approached the matter in the right way, by examining the question as to the sufficiency of state protection at the first stage when they were considering whether the applicant's fear was of "persecution" within the meaning of the Convention."

Lord Hope concluded that the IAT was entitled to hold on the evidence that the protection afforded by the state was sufficient.

24. In dealing with the third issue Lord Hope said this (at p 388 D to F):

> "As regards the third issue, the answer to it also is to be found in the principle of surrogacy. The primary duty to provide the protection lies with the home state. It is its duty to establish and 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 substitute 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 not therefore 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 its own nationals. As Ward LJ said [2000] INLR 15, 44G, under reference to Professor Hathaway's observation in his book, at p 105, it is axiomatic that we live in an imperfect world. Certain levels of ill-treatment may still occur if steps are taken by the state to which we look for our protection. I consider that the Immigration Appeal Tribunal in this case applied the right test when they were considering the evidence."

25. Although he does not say so in terms, it seems to me that Lord Hope's answer to the questions raised by issue three set out above was that in order to meet the standard required by the Convention it is sufficient for the home state to have a system of criminal law which makes violent attempts by the non-state persecutors punishable and a reasonable willingness to enforce that law on the part of the law enforcement agencies.

26. Lord Lloyd's approach was in some respects different from that of Lord Hope, although not on the standard required of the home state. Thus he said (at p 394 G to H) that on the findings of the IAT it was to be inferred that the authorities in Slovakia were able and willing to provide protection to the required standard and that gypsies, as a class, were not exempt from that protection. Lord Browne-Wilkinson and Lord Hobhouse agreed with Lord Hope, although Lord Browne-Wilkinson also agreed with Lord Clyde, who delivered a reasoned speech of his own.

27. Lord Clyde specifically addressed the third issue. He referred (at p 396 F to G) to a statement by Professor Hathaway at pp 103-104 of his book to the effect that the purpose of the Convention was to restrict refugee recognition to situations in which there was a risk of a type of injury that would be "inconsistent with the basic duty of protection owed by a state to its own population". With particular regard to the third issue, he said (at pp 397 H to 398 E):

> "I do not believe that any complete or comprehensive exposition can be devised which would precisely or comprehensively define the relevant level of protection. The 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 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. At the least … the person must be able to show that that if he is not granted asylum he would be required to go to a country where his life and freedom would be threatened. There must be in place a system of domestic protection and 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 that line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case.
>
> It seems to me that the formulation presented by Stuart-Smith LJ in the Court of Appeal may well serve as a useful description of what is intended, where he said [2000] INLR 15, 26, para 22:
>
> > "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. The 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 the courts, to detect, prosecute and punish offenders."
>
> And in relation to unwillingness he pointed out that inefficiency and incompetence is not the same as unwillingness, that there may be various sound reasons why criminals may not be brought to justice, and

> that the corruption, sympathy or weakness of some individuals in the system of justice does not mean that the state is unwilling to afford protection. "It will require cogent evidence that the state which is able to afford protection is unwilling to do so, especially in the case of a democracy." The formulation does not claim to be exhaustive or comprehensive, but it seems to me to give helpful guidance."

28. There does not seem to me to be any difference in substance between the approach of Lord Hope, Lord Lloyd and Lord Clyde as to the correct approach to the level of protection which a state must afford its nationals or citizens for the purposes of the Convention. They all stressed that it is the duty of a state to establish and operate a sufficient system of protection against persecution by non-state agents. In this regard I accept the submission of Mr Tam that it is the system operated by the home state which is to be considered, or (as he put it) the adequacy or otherwise of protection is to be judged on a systemic basis. This can be seen from two particular passages in Professor Hathaway's book at pp 108 and 112:

> "The dominant view … is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard (Page 108)
>
> …
>
> In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community. (Page 112)"

That approach is entirely consistent with the principles outlined in *Horvath.*

29. The system must provide for a criminal law which makes it a criminal offence to persecute individuals for a Convention reason and there must be appropriate penalties imposed upon those who commit such crimes. The system must also be operated in such a way that victims of a particular class are not exempted from the protection of the law and there must be a reasonable willingness on the part of the police and law enforcement agencies to investigate, detect and prosecute. To my mind, in order to resolve the issues in this appeal it is not necessary to identify the relevant criteria beyond those discussed by Lord Hope, Lord Lloyd and Lord Clyde, approving the approach to this problem by Stuart-Smith LJ, in the passages to which I have referred.

30. Although Lord Hope referred to the tribunal's conclusion in *Horvath* that the violent attacks on Roma people were isolated and random attacks by thugs, he cannot have meant that the particular facts evidenced only one attack. It is plain from the facts which I set out in paragraph 12 above from the judgment of Stuart-Smith LJ that there was there a persistent course of violent attacks including persistent attacks on the applicant's home, destruction of every item in his home, attacks on all the Roma in the village, serious violent attacks on two Roma neighbours and the murder of two others.

31. If those events are compared with the facts of this case as identified in paragraphs 3 to 7 above, subject to one possible exception, namely the effect of the withdrawal of the applicant's father's complaint, they bear a strong similarity. Unless that one consideration makes the crucial difference, for my part I do not see that there is any sensible distinction between the

facts of this case and the facts of *Horvath,* either as to the type of persecution alleged or as to the system in place in Slovakia.

32. In this case the special adjudicator, Mr Alex Alagappa JP, correctly directed himself by reference to the approach adopted by Stuart-Smith LJ in the passage quoted by Lord Clyde and set out above. He then stated the facts including the violence and concluded that the applicant faced discrimination and harassment from elements of Slovak society, namely skinheads and others. He concluded as follows:

> "I am not however satisfied that the appellant has demonstrated that she would be denied a sufficiency of protection within Slovakia were she to be returned to her own country. It is generally accepted that Roma do face discrimination from certain elements of Slovak society. However the documentary evidence satisfied me to the required standard that there is in place a sufficiency of protection. The Slovak Government at its very highest level has made it clear in Prime Ministerial statements that it is committed to offering protection to ethnic minorities who face discrimination. There are procedures in place which could offer the appellant effective protection. The appellant has failed to discharge the burden of proof which is a lesser standard than the balance of probabilities."

The special adjudicator accordingly said that he was satisfied that the appellant could return to her own country and find effective internal protection.

33. The IAT reached the same conclusion and, in doing so, paid particular regard to the one point of possible distinction between this case and *Horvath* upon which Mr Jorro relied before us. He submitted that the crucial distinction is that here the applicant's father reported the matter to the police but that when he subsequently withdrew the complaint because of threats to himself and his family (including the applicant) the police stopped investigating the complaint even though they knew that he had withdrawn it because of threats. It was submitted that that was a failure of the system or that it showed that the system was inadequate and that it was a reasonable inference that the same would or might happen again in the future with the result that the applicant would or might not receive the protection of the state from persecution to which she was entitled.

34. In this regard the IAT (comprising Mr John Freeman as chairman and Mr C Thursby) said:

> "We shall assume in the appellant's favour that something of the kind suggested would be reasonably likely to happen on any occasion when a complainant of full age and sound mind sought to withdraw an allegation of crime, even if that person mentioned threats. The short point which arises in this case is whether that sort of reaction on the part of the police amounts to so serious a failure of protection as to engage the Convention."

The IAT directed itself by reference to the decision of the House of Lords in *Horvath* and held that the standard of protection afforded by the home state must be an international one. It expressed its conclusion thus:

> "We have no doubt in this case that, if the Slovak police had refused to investigate the case at all, then that would have been such a failure. That is not of course what happened; they simply accepted that the expressed wish of the appellant's father, who was of full age and apparently sound mind, not to go on with it. While we are prepared to accept that the further threats would have been criminal in Slovakia, as in England, there is nothing to suggest that, if the appellant's father's attitude had been different, the police would not have been willing to investigate these, as they had been with the original complaint. As it was, they made it quite clear that they were prepared to re-open on demand. While these are not our ways now, they might well have been in the past. Different countries, and their criminal justice systems, develop at different speeds, and from different bases. In trying to set an international standard, we prefer to be guided by our idea of the basic minimum on which all reasonably civilised countries could agree, rather than by imposing "the best practice" from one on what may be the very different history and conditions on others. We do not consider that the willingness of the Slovak police to allow a person of full age and sound mind to withdraw a serious criminal complaint, even after threats have been mentioned, can amount to a breach of that basic standard equivalent to denying protection, and engaging the international duty of surrogate protection under the Convention."

35. By referring to a basic standard, I do not understand the IAT to be departing from the approach in *Horvath*. Just as under the European Convention on Human Rights there must be a margin of appreciation afforded to different states as to how to discharge their obligations of protection, so the question here is whether a system which enables a police force to stop investigating a reported criminal offence when the request is withdrawn by the alleged victim falls short of providing the level of protection contemplated by the Refugee Convention. The system in place in Slovakia was such that the police were quite willing to investigate the alleged persecution in the first place and indeed were willing to continue doing so if asked. As the IAT said, the same would presumably be true in the future, although that conclusion must I think assume that the factual position was the same. In my judgment, applying the approach suggested by the speeches in *Horvath*, those differences do not sufficiently distinguish this case from *Horvath* on the facts.

36. The facts here, as there, show that Slovakia had a system of laws and of law enforcement of the kind which satisfies the tests or approach set out in *Horvath*. The police were willing to investigate these very complaints and continued to be willing to do so if asked. Moreover, the precise circumstances of their compliance with the applicant's father's request are far from clear. As Mr Tam observed in argument, there may be many reasons which contributed to the decision not to take the matter further. The police in Slovakia (as elsewhere) no doubt have limited time and resources. The continuation of the investigation might have involved a waste of time and resources if (as seems very likely) the assistance of the applicant's father and his family were necessary to enable them to take the investigation much further. It is perhaps ironical that the reason the police were asked to stop the investigation was that the family feared persecution, whereas it is now said that the police should have continued to investigate and that its failure to do so deprived the family of the protection to which it was entitled. However that may be, I am not persuaded that the system in Slovakia was such that the police would never continue to investigate a complaint in these circumstances, whatever evidence

they had before the complaint was withdrawn because of threats. Nor do I think that the IAT so held or assumed.

37. In all the circumstances I have reached the conclusion there that there is no sufficient distinction between the facts here and the facts in *Horvath* to enable this court to hold that, whereas there the applicant was properly protected by the system, here the applicant was not. There is, moreover, no support for the proposition that whenever a request by a Roma is made to investigate allegations of this kind and subsequently withdrawn by reason of threats the police will always stop the investigation, whatever evidence is available to them. In short the evidence does not show (to the required standard) that persons in the position of the applicant and her family are exposed to the risk of persecution as a result of the system of law enforcement in place in Slovakia.

38. I have reached those conclusions by focusing on the decision and reasoning in *Horvath* which is in many ways close to this case on the facts. Mr Jorro sought to introduce some of the jurisprudence of the European Court of Human Rights on different questions, namely whether member states were in breach of various articles of the European Convention on Human Rights. I observe that, with the exception of the reference to *Osman* by Lord Clyde referred to above, the House of Lords did not approach the matter by reference to principles developed in the context of the European Convention. Given that fact and given the closeness of this case to *Horvath*, I do not think that it is necessary or helpful to consider cases decided in that different context in order to determine this appeal. I will only say that none of them seemed to me to lead to any different conclusion from that outlined above.

39. For these reasons I would answer the question raised by issue 1 in this way. The IAT was not in error in failing to find that Slovakia does not provide an adequate level of protection against ill-treatment by non-state agents because members of the police investigating a serious crime permitted the father to withdraw his complaint after (to their knowledge) he had been threatened. Put another way (as it was formulated by Mr Jorro) the IAT was not in error in finding, on the facts of the applicant's particular case, that there is sufficient protection for her in the Slovak Republic as measured by the appropriate international standard.

Issue 2

40. This issue is whether the IAT erred in finding that the appellant, in the particular circumstances of her case, is unwilling owing to her well-founded fear of being persecuted by reason of her race, to avail herself of the protection of her country. Mr Tam observed that this point was not taken before the IAT. However that may be, if my conclusion on issue 1 is correct, I do not see how this point can assist the appellant. The effect of that conclusion together with the reasoning of the House of Lords in *Horvath* leads inevitably to the conclusion that the appellant does not have a "well-founded fear of persecution" within the meaning of the Convention because the protection afforded by the state of Slovakia does not fall below what may be called the Convention standard.

41. In these circumstances I accept Mr Tam's submission that the precise meaning of the phrase "owing to such fear, is unwilling" is irrelevant and it is not necessary for us to consider the interesting difference of views in this regard in *Horvath.*

Issue 3

42. It was submitted by Mr Jorro under this head that the IAT erred in failing to find that the applicant as a half-Roma is at a greater risk of mistreatment, amounting to her being persecuted by reason of her mixed race, than full-Roma in the Slovak Republic. Mr Tam again observes that this point was not taken before the IAT. However that might be, as in the case of issue 2, I do not see how it can assist the appellant if my conclusion on issue 1 is correct. There is no reason to think that the IAT was not aware that the appellant a half-Roma, but, as Mr Tam correctly points out, the issue was not whether she is or would be at risk of persecution by non-state agents. That is and was not in dispute. The issue is and was whether the state will afford her adequate protection. The resolution of that question does not depend upon whether she is a full-Roma or a half-Roma.

Conclusion

43. Although I have considerable sympathy for the appellant personally, for the reasons which I have given, I would dismiss the appeal.

LORD JUSTICE THORPE:

44. In my opinion the outcome of this appeal is determined by the decision of the House of Lords in *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 379. Both cases are remarkably similar on their facts. In contending for the opposite outcome Mr Jorro relies upon the single distinction that in the present appeal the Slovak police took no further action after the appellant's father withdrew his complaint despite the fact that they knew that he only withdrew in the face of threats of further serious harm. Mr Jorro submits that this amounts to a failure to protect, not isolated but systemic, because continuing.

45. The duty of a state to protect its citizens was analysed by Stuart-Smith LJ in the course of his judgment in *Horvath* in this court. He said at [2000] INLR 15:

> "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. The 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 the courts, to detect, prosecute and punish offenders."

46. That analysis was approved by the House of Lords. In the course of his speech Lord Clyde said at 398:

> "There must be in place a system of domestic protection and 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 that line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case."

47. So where does this appeal fall on its facts? Between a criminal justice system effective in concept and operation at one extreme and a supine or corrupt system at the other extreme there is obviously a continuum. So where on that line does this case fall? On the scanty evidence available in this case it would, in my opinion, be impossible to hold that the system in operation in Slovakia in July 1998 was so flawed as to fail its duty to protect the appellant against the persecutory attack of the racist gang. After all the police reaction to the initial complaint seems to have been efficient and effective and when the complaint was withdrawn the police made it perfectly plain that it could be reinstated at any time.

48. This is essentially the reasoning of the tribunal. I only add that I have had the advantage of reading in draft the judgment of my lord, Clarke LJ, and I am in full agreement with his more profound reasoning. I too would dismiss this appeal.

MR JUSTICE BUTTERFIELD:

I agree

ORDER: Appeal dismissed, public funded costs assessment for the appellant

(Order does not form part of approved Judgment)