Case No: C1/2002/2183/QBACF

Neutral Citation No: [2003] EWCA Civ 666
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(QUEEN'S BENCH DIVISION - ADMINISTRATIVE COURT)
(Mr Justice Burton)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Tuesday 20th May 2003

Before:

LORD JUSTICE SIMON BROWN
(Vice-President of the Court of Appeal Civil Division)
LORD JUSTICE MANTELL
and
LORD JUSTICE LAWS

- -

Between:

EUROPEAN ROMA RIGHTS CENTRE & OTHERS	Appellants
- and -	
THE IMMIGRATION OFFICER AT PRAGUE AIRPORT	Respondents
&	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	
- and -	
THE UNITED NATIONS' HIGH COMMISSIONER FOR REFUGEES	Intervener

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Lord Lester QC & Ms Dinah Rose (instructed by Liberty) for the Appellants
John Howell Esq QC, Michael Fordham Esq & Ms Clare Weir
(instructed by The Treasury Solicitor) for the Respondents
Guy Goodwin-Gill Esq (instructed by Messrs S J Berwin) for the Intervener

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Judgment
As Approved by the Court

Lord Justice Simon Brown:

1. The increasing flow of asylum seekers to the United Kingdom over recent years is well known. It is well known too that it occasions great public concern. For the most part it is sought to control the problem (called in these proceedings "asylum overload") by imposing visa regimes upon those states from which most asylum seekers come. Linked to these visa regimes is carriers' liability without which, as the Divisional Court pointed out in *R -v- Secretary of State for the Home Department (ex parte Hoverspeed)* [1999] EuLR 595, the requirement for prior entry clearance would have little effect. The object of these controls, of course, so far as asylum seekers are concerned, is to prevent them reaching these shores. "Their very arrival here otherwise entitles them to apply for asylum and thus defeats the visa regime" - see my judgment in *Hoverspeed* at 599.

2. There are difficulties, however, of a political nature in imposing visa regimes on certain friendly states and so Parliament in 1999 authorised the Home Secretary to introduce in addition a scheme enabling the immigration rules to be operated extra-territorially rather than simply at UK ports of entry. Intending asylum seekers would in this way be refused leave to enter the UK by immigration officers operating abroad and so be unable to travel to the UK to claim asylum here.

3. Such a scheme was duly introduced and under it, by agreement with the Czech Republic, pre-entry clearance immigration control has been operated at Prague Airport since 18 July 2001. It is aimed principally at stemming the flow of asylum seekers from the Czech Republic, the vast majority of these being of Romani ethnic origin (Roma), and in this it has plainly had some considerable success; whereas in the three weeks before the operation began there were over 200 asylum claims (including dependants) at UK ports from the Czech Republic, only some 20 such claims were made in the first three weeks following its introduction, over 110 intending travellers from Prague being refused leave to enter the UK during that period. The pre-clearance procedure at Prague has been operated irregularly but sufficiently frequently and unpredictably that intending asylum seekers continue to be deterred.

4. These proceedings challenge the Prague operation on two central grounds. First it is said to violate the UK's international obligations both under the Geneva Convention (1951) and Protocol (1967) relating to the Status of Refugees ("the Convention") and under customary international law: the United Kingdom is not permitted to take such active steps to prevent those seeking refuge from persecution from leaving their own state. Secondly, and independently, it is said to contravene s 19(B) of the Race Relations Act 1976 and to constitute direct racial discrimination against those Czech Roma who are seeking to come to the UK not as asylum seekers but for some other purpose provided for under the immigration rules. A third and subsidiary ground of challenge is that the claiming of asylum itself is said to be a purpose covered by the rules so that the immigration officers were therefore breaching the rules in refusing leave to enter to Roma coming for that purpose. A fourth ground of challenge was advanced below, namely that the Secretary of State had fettered his discretion in refusing in the case of the individual appellants to consider exercising his extra-statutory discretion to grant them entry clearance to come to the UK as refugees.

5. In a reserved judgment given on 8 October 2002, following a three-day hearing in July 2002, Burton J rejected all four grounds of challenge and so dismissed the application. He gave permission to appeal, however, with regard to the Convention ground of challenge and also the alleged breach of the immigration rules. This court (Ward and Laws LJJ) on 24 January 2003 gave permission to appeal with regard to the race discrimination challenge. Permission to appeal on the fourth ground of challenge was refused; there was nothing in it: the appellants remain able to invite the Secretary of State's exercise of his extra-statutory discretion.

6. The appellants are respectively the European Roma Rights Centre ("ERRC"), an NGO based in Budapest devoted to the protection of the rights of Romani people in Europe (some nine million in all), and six Czech Roma who were refused leave to enter the UK by immigration officers at Prague airport. Five of the six were in fact intending to claim asylum in the UK, three having candidly stated that intention, the other two having initially sought to conceal it, falsely stating that they were intending only a short visit to the UK. The sixth (HM) asserts that she was genuinely intending only a short visit to her granddaughter and grandson-in-law although the immigration officer who interviewed her was not satisfied of this.

7. Before turning to the individual grounds of challenge I must first outline the main parts of the domestic legislation governing the Prague operation.

8. Apart from EEA nationals and British citizens, a person may not enter the UK "unless given leave to do so in accordance with the provisions of, or made under, [the Immigration Act 1971 ("the 1971 Act")]" (see s3(1)(a)). The power to give or refuse leave to enter is generally exercised by immigration officers (s4(1)), the Secretary of State only being able to do so in prescribed circumstances (s3A(7)). Section 3(2) permits the Secretary of State to make rules as to the practice to be followed in the administration of the 1971 Act and immigration officers are required to act in accordance with these rules and such instructions as may be given to them by the Secretary of State which are not inconsistent with such rules (paragraph 1(3) of schedule 2 to the 1971 Act).

9. The relevant immigration rules made under s3(2) are contained in HC 395 and set out at length the various grounds upon which entry clearance (advance leave to enter either by way of visa or entry certificate) or leave to enter (on arrival at the UK port) can be sought and obtained. Stringent conditions apply to each category of applicant and in each case the rules specify the matters of which the applicant must satisfy the immigration officer. Rule 320 provides that entry clearance or leave to enter "is to be refused" if, amongst other things, "entry is being sought for a purpose not covered by these Rules".

10. With regard to asylum the rules provide as follows:

> "327. Under these Rules an asylum applicant is a person who claims that it would be contrary to the United Kingdom's obligations under the United Nations Convention and Protocol Relating to the Status of Refugees [the Geneva Convention] for him to be removed from or required to leave the United Kingdom. All such cases are referred to in these Rules as asylum applications.

328. All asylum applications will be determined by the Secretary of State in accordance with the United Kingdom's obligations under the [Geneva Convention]. Every asylum application made by a person at a port or airport in the United Kingdom will be referred by the Immigration Officer for determination by the Secretary of State in accordance with these Rules.

329. Until an asylum application has been determined by the Secretary of State or the Secretary of State has issued a certificate … no action will be taken to require the departure of the asylum applicant or his dependants from the United Kingdom.

330. If the Secretary of State decides to grant asylum and the person has not yet been given leave to enter, the Immigration Officer will grant limited leave to enter.

334. An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:

(i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom; and

(ii) he is a refugee, as defined by the [Geneva Convention]; and

(iii) refusing his application would result in his being required to go (whether immediately or after the time limited by an existing leave to enter or remain) in breach of the [Geneva Convention], to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion, or membership of a particular social group.

336. An application which does not meet the criteria set out in paragraph 334 will be refused."

11. As those rules make plain, all claims for asylum, whether made at the point of entry or following the grant of leave to enter on some other basis, have to be referred to the Secretary of State. Many asylum seekers, of course, are subsequently found to have no proper claim but meanwhile will have remained in the UK, whether in detention or in the community, for months and often for years, and, according to published statistics, a substantial number of those eventually refused are never in fact removed. As Burton J observed below, "this is the administrative, financial and indeed social burden borne as a result of failed asylum seekers". Asylum overload, however, refers not only to asylum seekers who fail in their claims, but also to those who succeed.

12. Asylum overload has led both to an increase in visa control and also, as stated, to legislation to allow immigration officers to be stationed and to operate the rules abroad. Section 1 of the Immigration and Asylum Act 1993 introduced a new section 3A into the 1971 Act:

"3A(1) The Secretary of State may by order make further provision with respect to the giving, refusing or varying of leave to enter the United Kingdom.

(2) An order under s(1) may, in particular, provide for -

(a) leave to be given or refused before the person concerned arrives in the United Kingdom …"

13. This was given effect to by Article 7 of the Immigration (Leave to Enter and Remain) Order 2000, whereby:

"(1) An Immigration Officer, whether or not in the United Kingdom, may give or refuse a person leave to enter the United Kingdom at any time before his departure for, or in the course of his journey to, the United Kingdom.

(2) In order to determine whether or not to give leave to enter under this article (and, if so, for what period and subject to what conditions), an immigration officer may seek such information and the production of such documents or copy documents as an immigration officer would be entitled to obtain in any examination under … the Act."

14. By HC704 a new rule 17A was introduced into the rules whereby:

"Where a person is outside the United Kingdom but wishes to travel to the United Kingdom an Immigration Officer may give or refuse him leave to enter. …"

15. Following an agreement negotiated with the Czech government, this new power to operate the rules extra-territorially was implemented at Prague airport on 18 July 2001. As Mr James Munro, Assistant Director of the United Kingdom Immigration Service and the person responsible for operating the pre-clearance scheme, has stated in these proceedings, the Czech Republic had produced an unusually large proportion of failed asylum seekers:

"Asylum applications received in the United Kingdom from nationals of the Czech Republic, excluding dependants, had reached some 515 per annum in the year 1998. By 2000 it had reached 1200 per annum. Of the 1800 asylum decisions made in 2000 (which will have included applications made previously) there were 10 decisions by the Secretary of State granting asylum. A further 10 cases were granted exceptional leave to remain outside the asylum rules. The success rate of asylum appeals by Czech nationals was, at the beginning of 2001, only around 6%."

16. As already indicated, the vast majority of asylum applicants from the Czech Republic are Roma. The Home Office's own Country Assessment for August 2001 records:

> "[T]here are approximately 300,000 members of the Roma ethnic group, i.e. about 3% of the country's population … Roma may face discrimination from elements within Czech society in employment, education, housing and access to services … Sporadic acts of violence by 'skinheads' against members of the Roma minority have continued to occur … [D]iscrimination and harassment experienced by Roma will, in most cases, not amount to persecution within the terms of the Convention. The threshold may however be passed in individual cases."

17. The ERRC executive director paints an altogether bleaker picture:

> "… daily human rights abuse [of Roma] often motivated by, linked with or exacerbated by extreme levels of discrimination, notably in the fields of education, housing, employment and the provision of health and social services, as well as in the administration of justice, … high levels of racially-motivated violence including racially-motivated violent acts by neo-Nazi skinheads, members of the wider public and even members of law enforcement agencies"

18. It is no part of the court's task on this appeal to reach any view as between those differing positions, still less as to whether any of these appellants would have a valid claim for asylum. Rather our task on the first part of the case is to decide whether a scheme designed to prevent any such asylum claims (whether genuine or otherwise) being made in the UK is consistent with the UK's obligations in international law, in particular under the Convention.

19. With those few introductory paragraphs I turn now to this first issue, pausing only to observe that a substantially fuller account of the background to these proceedings is to be found in Burton J's admirably clear and comprehensive judgment below.

The Convention Challenge

20. Section 2 of the Asylum and Immigration Appeals Act 1993 provides that:

> "Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention."

21. The Convention, of course, is concerned with refugees. The term is defined in article 1A of the Convention:

> " For the purposes of the present Convention, the term 'refugee' shall apply to any person who … (2) … owing to 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 …, is unable, or owing to such fear, is unwilling, to return to it."

22. Article 33, entitled *Prohibition of expulsion or return ("refoulement")*, lies at the heart of this appeal:

> "(1) No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

23. It is convenient at this stage to set out two articles of the Vienna Convention on the Law of Treaties 1969 (which has been incorporated into domestic law) and two further provisions in international treaties (which have not been so incorporated).

24. Articles 26 and 31(1) of the Vienna Convention provide respectively:

> "26. Every treaty in force is binding upon the parties to it and must be performed by them in good faith.
>
> …
>
> 31(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and their context and in the light of its object and purpose."

25. Article 14(1) of the 1948 Universal Declaration of Human Rights provides that:

> "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

26. Article 12(2) of the International Covenant on Civil and Political Rights provides that:

> "Everyone shall be free to leave any country, including his own."

27. The appellants' central submission was recorded below as follows:

> "A good faith obligation, interpreted in the light of the object and purpose of the Convention, must include an obligation, not necessarily to facilitate an asylum seeker to leave his own country and/or to reach one's border, but not to take steps to prevent him from doing so (at least unless the refugee is already in a safe third country).

Thus, it is submitted, where, as here, such state is in practice extending its frontier out to Prague, it must not turn away an intending asylum seeker albeit that that person is not (yet) a refugee."

28. In support of their argument below the appellants prayed in aid the views expressed in a lengthy letter from the United Nations High Commissioner for Refugees ("UNHCR") dated 19 July 2002:

> "4. We acknowledge that the primary questions in this legal action do not turn on the text of the [Geneva] Convention. Rather, they turn on understanding the international protection regime as a complex of international practice and precepts drawn from refugee law, human rights law and general principles of international law. The [Geneva] Convention is the cornerstone of this complex. Where, as in the present case, issues arise that strictly do not fall within the Convention's textual scope, its objectives and purposes should act as a reliable guide. UNHCR's reservations to the pre-screening procedures are best understood in this light.
>
> 8. The [Geneva] Convention's objects and purposes are important in ensuring that States' approach to illegal migration is consistent with their Convention obligations. UNHCR acknowledges that States have a legitimate interest in controlling illegal migration. Such controls should not, however, be introduced in a manner which makes it difficult or impossible for refugees to access international protection. The pre-clearance procedures at Prague Airport have precisely the effect of preventing persons from boarding a flight to the UK when they express an intent to seek asylum. This means that persons at risk of persecution will be prevented from gaining access to international protection.
>
> 9. The international refugee protection regime would be significantly jeopardised if States which have agreed to provide protection for refugees were free to cut off all reasonable modalities of access to its territory for refugees [the letter should perhaps say 'potential refugees'] in the name of migration control.
>
> …
>
> 13. Although the decision to grant asylum to a particular refugee remains the prerogative of the State, there is an implicit responsibility on States to refrain from preventing asylum seekers from finding safety or from obtaining access to asylum procedures. Without such an implied responsibility the right to seek asylum might be rendered illusory.
>
> 14. It should be noted that denial of access to asylum procedures carries with it a significant amount of risk to the safety of the

> individual. Clearly the potential risks are heightened where – as is the case with the procedures at Prague Airport – access to procedures is denied in co-operation with the very country from which international protection is sought."

29. The Office of the UNHCR now intervenes in the appeal by permission of Laws LJ and we have been helpfully provided with a number of written arguments prepared on its behalf by Mr Guy Goodwin-Gill (nowadays disavowing professorial rank) extending in all to some 70 pages and supported by four volumes of texts and authorities in addition to the 50 or 60 authorities cited by the other parties. It will not, I fear, be possible to do justice to many of the arguments placed before us. Let me, however, record at this stage the essence of Mr Goodwin-Gill's final written submissions:

i) The pre-entry clearance practice as operated is contrary to international law and the international obligations accepted by the UK both under treaty and under customary international law.

ii) The practice frustrates the object and purpose of the 1951 Convention contrary to the international legal principle of good faith.

iii) It constitutes a revision of a multilateral treaty (increasing the burden on others), implemented without reference to the other parties.

iv) It is incompatible with the UK's other obligations under international law, including the obligation to exercise rights in good faith. It renders the 1951 Convention nugatory and prevents provisions such as article 31 or 33 ever being engaged.

v) Given that the practice of pre-clearance "extends" the UK's frontiers beyond the territory of the UK, the UK's international legal responsibilities go with it.

vi) A state lacks good faith in the application of a treaty, not only when it openly refuses to implement its undertakings, but equally when it seeks to avoid or to "divert" the obligation which it has accepted or to do indirectly that which it is not permitted to do directly.

30. The Convention challenge, it must be recognised, raises two quite distinct issues: one is the substantive question as to the UK's obligations under international law having regard to the terms of the Convention; the other, the justiciability of this question given the limited extent to which these obligations have been incorporated into domestic law. Although logically, no doubt, justiciability may be thought the prior issue, I have preferred to address first the substantive questions of international law arising as to the true nature of the UK's obligations under the Convention, in particular under the non-refoulement provision in article 33, construed in conformity with article 31(1) of the Vienna Convention.

31. That article 33 of the Convention has no direct application to the Prague operation is plain: as Mr Howell QC for the respondents points out, it applies in terms only to refugees, and a refugee is defined by article 1A(2) as someone necessarily "outside the country of his nationality" (or, in the case of a stateless person, "former habitual residence"). For good measure article 33 forbids "refoulement" to "frontiers" and, whatever precise meaning is given to the former term, it cannot comprehend action which causes someone to remain on the same side of the frontier as they began; nor indeed could such a person be said to have been returned to any frontier.

32. I have already indicated the broad outline of Mr Goodwin-Gill's argument on behalf of the UNHCR. Lord Lester QC for the appellants puts the argument a little differently. It is his submission that the Prague operation constitutes "a form of constructive refoulement", alternatively that, "in the absence of an express obligation on a state not to act so as deliberately to prevent those alleging that they are suffering Convention persecution from leaving their country of nationality so as to acquire refugee status under the Convention, such an obligation is to be implied into the Convention so as not to defeat or frustrate its purpose and as part of the obligation of good faith".

33. One of the respondents' contentions accepted below as a reason for rejecting Lord Lester's argument centred on the decision of the United States Supreme Court in *Sale, Acting Commissioner, Immigration and Naturalisation Service -v- Haitian Centers Council Inc.* 509 US 155 (1993). The court there was concerned with a boatload of refugees from Haiti intercepted by the American Immigration Service in international waters and returned under agreement with the Haitian government to Haiti. The court held by a majority of 8:1 that the action was lawful on the ground that article 33 was not intended to govern a state's conduct outside its national borders or territorial waters. Burton J below commented on the decision as follows:

> "It may be thought that the conclusion that the action of returning those already refugees to their country of origin was not in contravention of the Convention is *a fortiori* to the question as to whether any obligation is owed to those who are still in their country of origin and not yet refugees."

34. Before us the appellants were to my mind able to demolish that particular argument by reference to the report (No 51/96[1]) of the Inter-American Commission for Human Rights which was fiercely critical of the majority decision of the Supreme Court and preferred the dissenting judgment of Blackmun J, the approach which has subsequently been followed. For present purposes I propose to regard *Sale* as wrongly decided; it certainly offends one's sense of fairness.

35. Where, however, does that leave the present case? Lord Lester submits that there is only the narrowest distinction between the two cases: narrow in both the territorial and the jurisprudential sense. If it is impermissible to return refugees from the high seas to their country of origin, why should it be permissible to prevent their leaving in the first place? How can the legality of the putative receiving state's action be determined simply by reference to which side of the frontier (perhaps a land frontier) the prospective asylum seeker is standing?

36. Lord Lester further submits that a generous and purposive interpretation should be given to Convention provisions concerned, as clearly these are, to further human rights, and in this regard he prays in aid the decision of the ECtHR in what he contends is the closely analogous case of *Golder -v- United Kingdom* (1975) 1 EHRR 524. Golder was a prisoner refused permission by the Home Secretary to consult a solicitor with a view to bringing libel proceedings against a prison officer. The court construed article 6 of ECHR, which provides that "in the determination of his civil rights … everyone is entitled to a fair … hearing", as requiring a right of access to a solicitor. So too here, submits Lord Lester, the court should construe article 33 as implying a right of access to a prospective refugee so that his claim for asylum may be fairly determined.

37. Skilfully and powerfully though these arguments were advanced, they cannot to my mind prevail over the many and compelling arguments to the contrary. To start with *Golder*, it provides in my judgment no real analogy with the present case at all. The decision there turned on the true construction of article 6. The English text was ambiguous. The French text was ultimately found by the majority decisive. It cannot be suggested that on any construction of article 33, however generous, a right of access to this or any other country to claim asylum can be found within it. So far, indeed, from this being so, not merely article 33 itself but the Convention as a whole can be seen to be concerned not with permitting access to asylum seekers but rather with the non return of those who have managed to gain such access. Having defined as refugees solely those who have already left their own state, the Convention then imposes on member states a series of obligations with regard to them. Article 33 itself, as already explained, is concerned only with where a person must not be sent, not with where he is trying to escape from. The Convention could have, but chose not to, concern itself also with enabling people to escape from their own country by providing for a right of admission to another country to allow them to do so. The legal position is correctly stated in *Oppenheim's International Law*, Volume 1, 9th Edition at paragraph 402 as follows:

> "The so-called right of asylum is not a right possessed by the alien to demand that the state into whose territory he has entered should grant protection and asylum. For such state need not grant such demands. The constitutions of a number of countries expressly grant the right of asylum to persons persecuted for political reasons, but it cannot be said that such a right has become a 'general principle of law' recognised by civilised states and as such forming part of international law. Neither is any such right conferred by Art 14 of the Universal Declaration of Human Rights …. The Declaration, which in any case is not a legally binding instrument, does not confer a right to *receive* asylum …"

38. To the same essential effect are passages in *Hathaway's Law of Refugee Status* 1991 and the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, both quoted in the judgment below:

> "The first element of Convention refugee status is that the claimant must be outside his country of origin. There is nothing intuitively obvious about this requirement: many if not most of the persons forced to flee their homes in search of safety remain within the boundaries of their state. Their plight may be every bit as serious as

> that of individuals who cross borders, yet the Convention definition of refugee status excludes internal refugees from the scope of global protection." (*Hathaway*, p29)
>
> "It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country" (UNHCR Handbook, paragraph 88)

Such an approach is supported also by the authorities, domestic and foreign. I shall content myself with brief citations only.

39. Lord Mustill in *T -v- Home Secretary* 1996 AC 742 put it thus:

> "[A]lthough it is easy to assume that the appellant invokes a 'right of asylum', no such right exists. Neither under international nor English municipal law does a fugitive have any direct right to insist on being received by a country of refuge." (p754B)
>
> "The [domestic] legislation must be viewed against the background of a complete absence of any common law right, either national or international, for a refugee to insist on being admitted to a foreign country." (p758H)

40. To similar effect, Lord Goff and Lord Hoffmann in their joint dissenting opinion in the Privy Council in *Nguyen Tuan Cuong -v- Director of Immigration* [1997] 1 WLR 68, 78 - 79:

> "A person who satisfies [the Convention] definition is said to have refugee status. The rest of the Convention imposes on the contracting states certain obligations towards persons having refugee status. For the purposes of immigration control, the most important are contained in articles 31 and 33. … [Article 31 forbids the imposition of penalties on refugees arriving in another country without authorisation - unlike article 33, it is derogable under article 42]. Refugee status is thus far from being an international passport which entitles the bearer to demand entry without let or hindrance into the territory of any contracting state. It is always a status relative to a particular country or countries. And the only obligations of contracting states are, first, not to punish a refugee who has entered directly from the country in which his life or freedom was threatened for a Convention reason and secondly, not to return him across the frontier of that country. In all other questions of immigration control: for example, punishment for illegal entry from a third country, or expulsion to a third country from which there is no danger of refoulement to a country falling within article 33, the question of whether a person has refugee status is simply irrelevant."

41. Of the many foreign authorities I shall refer to only one, the judgment of the High Court of Australia in *Minister for Immigration and Multicultural Affairs -v- Ibrahim* [2000] HCA 55, and cite but a single passage from Gummow J's leading judgment on behalf of the majority:

> "The scope of the Convention
>
> 136. The remaining issues also turn on the meaning to be given to the Convention definition, but they involve more fundamental considerations respecting the scope and purpose of the Convention itself. The provisions of the Convention 'assume a situation in which refugees, possibly by irregular means, have somehow managed to arrive at or in the territory of the contracting state'. …
>
> 137. First, it has long been recognised that, according to customary international law, the right of asylum is a right of States, not of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a state in which that individual is not a national. …
>
> 138. Secondly, as Professor Sir Hersch Lauterpacht pointed out at the time, the Universal Declaration of Human Rights adopted in 1948, that is to say, shortly before the formation of the Convention, was accompanied by a general repudiation by member States of the idea that the Declaration imposed upon them a legal obligation to respect the human rights and fundamental freedoms which it proclaimed. Article 14 declared that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution'. But this right 'to seek' asylum was not accompanied by any assurance that the quest would be successful. A deliberate choice was made not to make a significant innovation in international law which would have amounted to a limitation upon the absolute right of member States to regulate immigration by conferring privileges upon individuals. Over the last 50 years, other provisions of the Declaration have, as Professor Brownlie puts it, come to 'constitute general principles of law or [to] represent elementary considerations of humanity' and have been invoked by the European Court of Human Rights and the International Court of Justice. But it is not suggested that Art 14 goes beyond its calculated limitation. Nor was the matter taken any further by the International Covenant on Civil and Political Rights ('the ICCPR'). This entered into force for Australia on 13 November 1980. Article 12 of the ICCPR stipulates freedom to leave any country and forbids arbitrary deprivation of the right to enter one's own country; but the ICCPR does not provide for any right of entry to seek asylum and the omission was deliberate."

42. As Mr Howell has pointed out, only two provisions in the Convention apply to admissions and they are of the most limited scope. Article 11 applies to refugee seaman and requires no more than that a state under whose flag they are serving "shall give sympathetic consideration to … their temporary admission in its territory". Article 28(1) requires states to issue "to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory" and by paragraph 13 of the Schedule to the Convention the state undertakes that the holder of such a document "shall be readmitted to its territory at any time during the period of its validity". The very limitations upon these obligations serve to illustrate the distinction between, on the one hand, the obligations owed to those already within a state's territory and, on the other, the lack of any obligation to admit those (perhaps simply across a land frontier) aspiring to become refugees.

43. It is, indeed, *accepted* by the appellants that a state is under no obligation to admit refugees. How then can there be an obligation not to impede but rather to admit someone so that he can *become* a refugee? For my part I remain of the view I expressed in *Hoverspeed*, namely that not merely is the Home Secretary under no obligation to facilitate the arrival of asylum seekers but rather he is entitled to take steps to prevent their arrival. I referred there to the "tension [which] undoubtedly arises from our obligation to asylum seekers under the 1951 Convention on the one hand and our entitlement to impede their arrival on the other". In the later case of *R -v- Uxbridge Magistrates' Court ex parte Adimi* [2001] QB 667, in the context of article 31, I noted that states strive increasingly to prevent the arrival of asylum seekers and observed that "the combined effect of visa requirements and carriers' liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents". None of this, I readily acknowledge, is entirely satisfactory. In an ideal world there would no doubt be provision for states to facilitate the escape of persecuted minorities by allowing entry to their own country. I am satisfied, however, that on no view of the Convention is this within its scope. The distinction between on the one hand a state preventing an aspiring asylum seeker from gaining access from his own country to its territory and on the other hand returning such a person to his own country (the distinction, in short, between this case and *Sale*) can be made to seem a narrow and unsatisfactory one. In my judgment, however, it is a crucial distinction to make and it is supported both by the text of the Convention and by the authorities dictating its scope.

44. It is supported too, as Mr Howell points out, by reference to the 1977 Draft UN Convention on Territorial Asylum which ultimately failed to achieve approval but which would otherwise have provided by article 3 that no person eligible for the benefits of asylum "who is at the frontier seeking asylum … shall be subjected [by a contracting state] to measures such as rejection at the frontier … which would compel him to remain in … a territory with respect to which he has a well-founded fear of persecution". What need for such further Convention if the law is already as the appellants submit?

45. It seems to me important to recognise that in entering into international treaties states are undertaking limited obligations only and that the courts must recognise and respect such limitations. The good faith allegation upon which Mr Goodwin-Gill lays such stress should be approached with this in mind. As the International Court of Justice stated in *Cameroon -v- Nigeria* (1998) General List No 94, at paragraph 39:

> "[A]lthough the principle of good faith is 'one of the basic principles governing the creation and performance of legal obligations … it is

not in itself a source of obligation where none would otherwise exist' …"

46. It is pertinent in this connection to refer also to the judgments of the High Court of Australia in *A -v- Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225. Dawson J there, having graphically described the limits on the extent to which the Convention attempts to translate into practical reality the concern expressed in its Preamble that persons enjoy the "widest possible exercise of … fundamental rights and freedoms", continued:

> "In that respect, the Convention, like many international and municipal instruments, does not necessarily pursue its primary purpose at all costs. The purpose of an instrument may instead by pursued in a limited way, reflecting the accommodation of the differing viewpoints, the desire for limited achievement of objectives, or the constraints imposed by limited resources. … It would therefore be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them."

47. Included within Mr Goodwin-Gill's final submissions is the suggestion that the Prague scheme "renders the 1951 Convention nugatory and prevents provisions such as article 31 or 33 ever being engaged" (see paragraph 29.iv) above). This surely overstates the argument. Of course, if those intending refugees who are affected by the Prague scheme are unable on that account ever to leave the Czech Republic, they can never benefit from articles 31 or 33. But many others benefit and will continue to do so. In the end, as it seems to me, all Mr Goodwin-Gill's submissions rest on this: that no individual state can impede the flow of prospective asylum seekers to its shores. To do so, it is said, either precludes their becoming refugees and thereby benefiting from articles 31 and 33 in the first place (if they have to remain in their country of origin), or at least "avoids" or "diverts" onto other states the burden of processing their claims and providing them with sanctuary where appropriate. For the reasons already given these are not arguments I feel able to accept.

48. Let me at this stage address the distinctions which the appellants seek to draw between visa regimes and the Prague scheme, distinctions which they suggest make the latter the more objectionable of the two types of control. Lord Lester criticises in particular the fact that the decision to refuse leave is made at the airport, after the intending asylum seeker has already committed himself to purchasing a ticket and to effecting an escape, and in such a way as to increase the risk of persecution. He contrasts this with the more discreet process involved in making an advance visa application in writing. He complains too that the pre-clearance scheme operates only on a sporadic basis which is accordingly arbitrary and unfair as between asylum seekers. Mr Goodwin-Gill too submits that there is a distinction to be made between "the active interdiction or interception of persons seeking refuge from persecution" on the one hand and "passive regimes, such as visa and carrier sanctions" on the other.

49. In my judgment there is nothing in these criticisms and indeed the Prague scheme seems to me to constitute if anything a less, rather than more, serious problem for would-be asylum seekers than visa control. The fact that it operates only sporadically means that sometimes

the intending asylum seeker will be free to travel. In any event it applies only to travel to the UK: the intending asylum seeker can travel anywhere else he pleases and, indeed, if he does so, there is nothing in the scheme which precludes his then travelling on to the UK. There is no stamping of his travel document or any permanent record of his having been refused leave. Rather the immigration officer when refusing leave merely issues a document recording such refusal which he faxes to the airline. Although in practice the airline will be unwilling to carry the passenger and will immediately refund the ticket price, it is not in fact prohibited from carrying the passenger to the United Kingdom. Nor indeed would it incur carrier's liability (as it would if a visa regime were imposed) although it might be liable to some lesser financial sanction pursuant to paragraphs 8 or 20 of Schedule 2 to the 1971 Act. Whilst in certain countries the operation of the scheme might perhaps expose a refused asylum seeker to the risk of further persecution for having sought to escape, that certainly cannot be said of the Prague operation: persecuted Czech Roma ordinarily suffer at the hands of non-state agents; they are not subject to persecution by the state itself.

50. In short, it seems to me impossible to draw any principled distinction in international law between the legality of the Prague operation and visa controls. Both Lord Lester and Mr Goodwin-Gill, I should note at this point, take exception also to visa controls, at any rate insofar as they are designed to impede the escape of prospective asylum seekers. In this regard Mr Goodwin-Gill puts before us a letter from UNHCR to the Home Secretary dated 13 December 2002 objecting to the then proposed visa restrictions on Zimbabwean nationals. In my judgment, however, these objections do not sound in international law. Rather one must hope that when in truth acute humanitarian concerns arise states will respond beyond the strict call of their international obligations. This, I believe, is the only answer the court is entitled to give when Lord Lester conjures up the spectre of a fresh Holocaust. Visa controls are, in short, clearly not outlawed under the Convention or under international law generally. EU law, indeed, not merely sanctions them but requires for certain countries both visa controls and carriers' liability with stipulated minimum penalties attaching - as to which see *International Transport Roth GmbH -v- Home Secretary* [2002] 3 WLR 344, 366.

Justiciability

51. Had I reached a different conclusion on the substantive issue of international law here arising it would have been necessary to consider at length the question whether that issue is strictly justiciable under domestic law. As it is, however, I propose to leave this question, difficult and complex as it is, for another day. For present purposes I wish to say no more than that, in the light of the extensive arguments developed before us both orally and in writing, I now recognise that the views I expressed in the Divisional Court in *Adimi* (at pp685-686, in particular in reliance on *R -v- Secretary of State for the Home Department ex parte Ahmed* [1998] INLR 570), are to be regarded as at best superficial, and that the conclusion I reached there, with regard to the legitimate expectations of asylum seekers to the benefits of article 31, is suspect. Mr Howell has mounted a formidable argument against that conclusion, based not least on this court's decisions in *Chundawadra -v- Immigration Appeal Tribunal* [1988] IAR 161 and *Behluli -v- Secretary of State* [1998] IAR 407, neither of which was referred to in *Ahmed* (a rather special case under the prerogative) nor cited to us in *Adimi*. Whether in the light of s2 of the Asylum and Immigration Appeals Act 1993 (see paragraph 20 above) or by reference to the principle of legality in the context of customary international law Lord Lester would have persuaded us that we have the right to

quash the Prague scheme had we in the event thought it incompatible with the UK's obligations under the Convention, I cannot say. I prefer to leave this important issue undecided.

The alleged breach of the Rules

52. This complaint is advanced on behalf of those appellants who were expressly seeking to come to the UK as asylum seekers. I can deal with it quite briefly. Rule 320 (see paragraph 9 above) provides that "leave to enter the United Kingdom is to be refused [if] entry is being sought for a purpose not covered by these Rules". The appellants argue that asylum - either the making of the application or the gaining of refugee status - *is* a purpose covered by the rules so that the immigration officer in Prague, faced with these applications, should not have refused leave to enter but rather should have allowed the applicants to travel, neither granting nor refusing leave to enter and thus enabling them to make their application for asylum on arrival at Heathrow, applications which would then have been referred to the Secretary of State under rule 328 (see paragraph 10 above). When an asylum application is made to the immigration officer on arrival in the UK and then referred to the Secretary of State, leave to enter is initially neither given nor refused. If the Secretary of State later grants asylum, limited leave to enter will then be given - see rule 330. Meantime the applicant is either detained or granted temporary admission.

53. In my judgment the argument fails. Of course the rules make provision for what is to happen if an asylum application is made in the UK. (That the rules apply only to applications made in the UK is apparent both from rule 327, which defines an asylum applicant as someone complaining that it would be contrary to the Convention to remove him *from* the UK, and indeed from rule 328 which refers only to applications made "at a port or airport in the UK".) That is not to say, however, that asylum seeking is "a purpose covered by [the] Rules". In my judgment it is not. Those purposes are rather confined to the particular categories of entrant provided for by the rules, for example, visitors, students, spouses, ministers of religion and so forth. For each category the rules specify the matters of which the applicant must satisfy the immigration officer. Neither the seeking of asylum nor the enjoyment of refugee status constitutes such a category and, of course, it is the Secretary of State, not an immigration officer, who must be satisfied of the matters stipulated by rule 334 before asylum will be granted.

54. On this part of the case I add only this: were the challenge to succeed on this basis and no other the victory would be pyrrhic and short-lived - the Secretary of State could immediately counter it by a simple change in the rules.

Race discrimination

55. The statutory framework within which this issue arises is as follows. Section 1(1) of the Race Relations Act 1976 ("the 1976 Act") provides that a person discriminates against another if in any relevant circumstances:

> "(a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or

(b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but -

(i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and

(ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and

(iii) which is to the detriment of that other because he cannot comply with it."

56. Section 3(4) provides that:

> "A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

57. Pursuant to a recommendation in the Macpherson Report, the 1976 Act was amended so that its provisions applied (as previously they had not) to public authorities, albeit subject to certain exceptions. Section 1 of the Race Relations (Amendment) Act 2000 introduced into the 1976 Act further provisions as follows:

"19B(1) It is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination."

"19D(1) S19(B) does not make it unlawful for a relevant person to discriminate against another person on grounds of nationality or ethnic or national origins in carrying out immigration and nationality functions.

(2) For the purposes of subsection (1), 'relevant person' means –

(a) a Minister of the Crown acting personally; or

(b) any other person acting in accordance with a relevant authorisation."

"27(1A) In its application in relation to granting entry clearance (within the meaning of the Immigration Act 1971) section 19B applies in relation to acts done outside the United Kingdom, as well as those done within Great Britain."

58. A relevant authorisation under s19D(2)(b) was in fact given by the Minister on 23 April 2001. By paragraph 2, under the heading *Examination of passengers*, it provided:

> "2 Where a person falls within a category listed in the Schedule and is liable to be examined by an immigration officer under paragraph 2 of Schedule 2 to the Immigration Act 1971 the immigration officer may, by reason of that person's ethnic or national origin-
>
> (a) subject the person to a more rigorous examination than other persons in the same circumstances; …"

59. Paragraph 3 of the authorisation, under the heading *Persons wishing to travel to the United Kingdom*, provided:

> "Where a person falls within a category listed in the Schedule and is outside the United Kingdom but wishes to travel to the United Kingdom, an immigration officer or, as the case may be, the Secretary of State may, by reason of that person's ethnic or national origin –
>
> (a) decline to give or refuse the person leave to enter before he arrives in the United Kingdom …"

The Schedule there referred to contains a list of persons of seven ethnic or national origins including "(b) Roma".

60. It is Mr Munro's evidence that the authorisation, which in any event was revoked on 11 June 2002, was never adopted or made use of with regard to the pre-clearance scheme at Prague Airport. The respondents accept rather that the Prague operation had to be operated consistently with the 1976 Act and it is their assertion that it was. The appellants submit to the contrary that the scheme operated in a systematically discriminatory fashion. As noted at the outset, the allegation here is not of discrimination against Roma asylum seekers but rather against those Roma who were applying to come to the UK for reasons *other than* to claim asylum.

61. What was alleged below was direct discrimination contrary to s1(1)(a) of the 1976 Act in the following two respects:

> "a) Longer and more intrusive questioning in the case of Roma than non-Roma, and the treatment of the former with greater suspicion and a requirement for a higher standard of proof.
>
> b) In the event the decision-making was such that Roma were refused while comparable non-Roma were not."

In those respects it was said that the defendants in operating the pre-clearance scheme have treated Roma less favourably than non-Roma. The appellants relied not least on some

striking figures compiled between late January and late April 2002 based on observations made by a Czech Roma citizen working as a consultant for ERRC which were accepted for the purposes of the argument below. These showed that, during that three month period, out of 6,170 passengers recorded as Czech nationals but not Roma, only 14 (0.2%) were refused entry while, of 78 who were apparently Roma (Roma being for the most part visually identifiable) 68 (87%) were refused. The case below rested in part on those statistics, in part on the very existence of the authorisation even though the respondents asserted that it had in no way influenced the approach to the Prague operation, and in part on evidence as to what had in fact occurred in relation to the six claimants and to five other people who were not claimants. Two of the non-claimants (one Czech Roma, Mr Samko; one Czech non-Roma, Ms Novakova) were journalists whose applications were the subject matter of a Czech TV programme. Three (two Czech Roma, Ms Grundzova and Ms Polakova; one Czech non-Roma, Ms Dedicova) were the subject of the ERRC's own test. All five (whose expenses had been paid respectively by the TV station and by ERRC) were ostensibly seeking leave to enter as visitors. Leave to enter was, in the event, given to Ms Novakova, Ms Polakova and Ms Dedicova, but not to Mr Samko or to Ms Grundzova. In other words, of the five whose applications were staged, both the non-Roma applicants were granted leave but only one of the three Roma. Even in the case of that one, moreover, Ms Polakova who had a well-paid job, it was contended that she was subjected to longer and more intrusive questioning than would have been the case had she been a non-Roma.

62. The argument below turned entirely on the facts. The parties were in full agreement on the applicable principles of law which were stated by the judge as follows:

> "i) A complainant must prove his or her case on the balance of probabilities (*King -v- Great Britain-China Centre* [1992] ICR 516 at 528-9 approved in *Zafar -v- Glasgow City Council* [1997] 1 WLR 1659 at 1664f).
>
> ii) Claims brought under the race and sex discrimination legislation present special problems of proof for complainants, since those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them (*Zafar* at 1664d).
>
> iii) It is unusual to find direct evidence of racial discrimination. The outcome of the case will therefore usually depend on what inferences it is proper to draw from the facts (*King* at 528-529 approved in *Zafar* at 1664f-g).
>
> iv) If a claimant can show that he has been less favourably treated than comparable individuals from a different racial group, the court will look to the alleged discriminator for an explanation. If no explanation is put forward or if such explanation is inadequate or unsatisfactory it will be legitimate to infer that the discrimination was on racial grounds (*King* at 528-9 approved in *Zafar* at 1664h)."

63. It is convenient to cite also the next two paragraphs from Burton J's judgment which similarly set out undisputed matters of law:

"51. The Claimants draw attention to the danger of stereotyping, which does not need to be deliberate, and to guidance to be obtained from Lord Nicholls in *Nagarajan* at 511H-512D:

> 'All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover we do not always recognise our own prejudices … Members of racial groups need protection from conduct driven by unrecognised prejudices as much as from conscious and deliberate discrimination.'

52. Balcombe LJ in *West Midlands Passenger Transport Executive -v- Jaquand Singh* [1988] 1 WLR 730 at 736 referred to 'a conscious or unconscious racial attitude which involves stereotyped assumptions', and there was helpful reference to the Court of Appeal decision in *Skyrail Oceanic Ltd -v- Coleman* [1981] ICR 864 (itself cited in a recent Hong Kong case in which Lord Lester QC was involved)."

64. The judge then dealt in very considerable detail with the many arguments based on the facts of the case before finally stating his conclusion as follows:

"74. The conclusion that is sought to be drawn is that the Prague operation was discriminatory against Roma. I am wholly unpersuaded that such a proposition is supported or furthered by the refusal of leave of entry to HM or by the TV programme. Is the apparently differential treatment of the Roma in the ERRC test enough, coupled with the statistics, to draw a conclusion that the operation was targeted against Roma and was discriminatory? I am satisfied that this is not established:

(i) The ERRC test is in my judgment insufficient to draw any conclusion as to the nature of the whole operation, not least given the fact that all three were acting out a part.

(ii) The evidence as to the individual Claimants cannot be ignored. I have already concluded that I do not draw support for a case for discrimination from the case of HM, and obviously the same goes for the three Claimants who simply claimed asylum and do not allege discrimination. But the evidence in respect of the other two Claimants must plainly be taken into account. RG and AKu both now admit that they lied by concealing their intentions to claim asylum, and no longer claim discrimination. The contemporaneous notes in respect of RG show his interrogation, and the carefully developing thought processes of the officer, whereby, notwithstanding the then assertion by RG of

an intention of a short term visit, by reference to questioning as to the wife's cousin whom he alleged that he was to visit, and his own financial circumstances, the officer concluded that the expenditure of a trip 'was wholly out of proportion to the likely resultant benefits for someone of modest economic background' and that he 'could not be satisfied that the passenger and his family were genuinely seeking entry as visitors for the period stated'. When Ms Rose talks of a 'bulls eye' in relation to the ERRC test, it is in the context that none of the evidence in relation to the Claimants, or the other non-claimant, supports the case of discrimination.

(iii) Mr Munro makes clear in his evidence that different officers have different techniques and different methods. Not always are the same questions asked, and certainly interrogations will vary in length, depending upon whether early answers are satisfactory or not. I am not persuaded that the evidence of Mr Munro is displaced; namely that the authorisation was neither in place nor in mind, and that the operation in Prague was to be and was carried out non-discriminatorily. Whatever might be the position if Ms Grundzova or indeed Ms Polakova were a claimant in respect of their own individual circumstances (whether in s57 proceedings, if permitted, or otherwise), I am wholly unpersuaded that, even taken with anything that could be made of the statistics, this limited evidence shows that the operation in Prague was carried out discriminatorily, or *a fortiori* that the six Claimants are entitled to relief in respect of discrimination, or in particular that any of the Claimants can establish, as asserted in Lord Lester's skeleton argument, that the practice of pre-clearance is being operated in a way that discriminates against Roma on racial grounds. In those circumstances I express no view either way as to the desirability of the introduction, either in the United Kingdom or in Prague, of any system of recording by immigration officials of ethnicity."

65. Ms Rose (who argued this part of the case on behalf of the appellants) seeks to attack those conclusions by reference to a number of detailed criticisms of the judge's many findings of fact which underlay them. By way of example only, she criticises the judge's earlier finding that there was nothing surprising in 68 out of 78 Roma being refused leave to enter since this was "a not dissimilar ratio" to the five out of six claimants whom it was conceded were in fact asylum seekers and thus properly refused. Ms Rose submits that the judge should have taken, for the purposes of the comparison, not the five out of six who failed to get leave, but rather the four out of nine (the nine being the six claimants together with the three Roma

who were involved in the TV and ERRC trials) who she says should have been granted leave (HM, Mr Samko, Ms Grundzova and Ms Polakova) whereas only one, Ms Polakova, was. I would reject this criticism which seems to me founded on the false premise that the Roma applicants involved in the TV and ERRC trials were properly to be regarded as typical of the ordinary run of Roma applicants seeking leave to enter the UK. To examine within this judgment all Ms Rose's many criticisms of the judge's factual conclusions would be a lengthy process indeed. I decline to embark on it and would say only that I reject almost all of them and conclude that even those few which are made good do not in my judgment seriously undermine the judge's final conclusions.

66. That, however, is not the end of the case on discrimination. Rather the court itself raised in the course of argument, and later sought additional written submissions upon, what seems to me the all-important question arising on the race discrimination challenge. The question is this: what is the position in law if, as seems to the court wholly inevitable, immigration officers, aware of the fact that the overwhelming majority of those seeking asylum from the Czech Republic are Roma (it may be doubted, indeed, whether any such are non-Roma), bring a greater degree of scepticism to bear on a Roma's application for leave to enter for some permitted purpose than upon an apparently comparable application by a Czech non-Roma? Mr Howell for the respondents, I should at once record, does not accept the premise of the question. Nonetheless, at our invitation, he addressed the court's concern in this regard.

67. Let me state the problem as clearly as I can. What we are postulating is this:

i) The immigration officers at Prague have treated all passengers in the same way irrespective of race in the sense that they have genuinely tried their utmost not to discriminate against Roma but rather to give Roma and non-Roma alike a fair and equal opportunity to satisfy them on the balance of probabilities that they are coming for a permitted purpose and will not apply for asylum on arrival. So the judge below has found and so to my mind he was entitled to find.

ii) Being aware, however, that Roma alone as a group suffer discrimination (whether or not amounting to persecution) in the Czech Republic and so in general have a much greater incentive than others to seek asylum and therefore, when being questioned at Prague airport, to lie about their intentions in visiting the United Kingdom, immigration officers on that account are inevitably more sceptical of a Roma applicant's true intentions than those of a non-Roma, and are less easily persuaded that the Roma is genuinely intending to come only for a permitted purpose.

iii) Generally, therefore, Roma are questioned for longer and more intensively than non-Roma and are more likely to be refused leave to enter than non-Roma.

68. Are Roma in these circumstances properly to be regarded as subject to unlawful direct discrimination? Are they in short to be regarded as being less favourably treated on racial grounds than a relevant comparator? Lord Lester submits so; Mr Howell submits not.

69. When I first raised with Ms Rose what seemed to me the obvious point that immigration officers at Prague could not fail to be more sceptical of Roma than non-Roma applicants in processing their applications for leave to enter for non-asylum purposes - they would surely not otherwise be doing their duty which is to refuse leave unless satisfied that applicants are genuinely coming for a permitted purpose - I had thought the point fatal to her argument. Once one predicates, as for this purpose one must, the lawfulness of the policy of excluding prospective asylum seekers from the UK, immigration officers are surely entitled to act logically in its implementation. Her response was that on the contrary it makes good her argument. Having initially found this perplexing I very soon came to regard it as the most troubling part of the case. Indeed, I confess to having changed my mind upon it more than once.

70. The first point made by the appellants is that an assumption that the effective implementation of the Prague scheme requires a racially discriminatory approach on the part of the immigration officers involved underlies the very authorisation granted by the minister just ten weeks before the operation began - see paragraphs 58 and 59 above. The authorisation expressly provided for such discrimination. True, the Home Office for whatever reason chose not to make use of it. Its grant, however, is not without significance; rather it emphasises the need for such an exception to justify the practice.

71. As for why the operation is to be regarded as directly discriminatory, all the appellants' arguments seem to me to depend ultimately on two central principles of discrimination law: the irrelevance of motive and the impermissibility of stereotyping. First it is said that the immigration officers' *motive* in treating Roma applicants differently is irrelevant: it matters not that they perceive Roma as being in a materially different position from non-Roma applicants on the basis that they have a greater incentive to lie. The fact, therefore, that the immigration officers are honestly concerned simply to enforce the immigration rules cannot avail them. Secondly the appellants submit that the Prague operation involves stereotyping - treating Roma less favourably because of the group's assumed characteristics: those of a race subject to discrimination who therefore have an incentive to seek asylum and a propensity to lie to achieve it. Let me briefly refer to the main authorities relied on in support of each argument.

I Motive

72. The authorities principally relied upon by the appellants under this head are *R -v- CRE (ex parte Westminster City Council)* [1985] ICR 827, *Bain -v- Bowles* [1991] IRLR 357 and *James -v- Eastleigh Borough Council* [1992] AC 751.

73. In the CRE case the council had dismissed a black road sweeper to whose appointment the trade union objected on racial grounds. That the council's motive for doing so was to avert industrial action could not avail them.

74. Similarly in *Bain -v- Bowles*, *The Lady* magazine had no defence to a complaint by a man whose advertisement for a housekeeper in Tuscany they had refused to accept. Following past complaints of sexual harassment, the magazine's policy was to accept such advertisements only where the employer was a woman. As Beldam LJ said at paragraph 25:

> "In my judgment the perception of the risk of harm to those who answer the advertisement was not a relevant circumstance for the purpose of the Act. Essentially, it comes within the category, as my Lord [Dillon LJ] has said, of motive for the discrimination and for the policy adopted by the defendants."

75. In *James -v- Eastleigh Borough Council* the council allowed free entry to its swimming pools to those of pensionable age (ie women of 60 and men of 65). A 61 year old man successfully complained of sexual discrimination. The House of Lords by a majority of 3:2 overturned the Court of Appeal's decision that the policy was not discriminatory "on the ground of his sex". As Lord Bridge said at p763-764:

> "The fallacy, with all respect, which underlies and vitiates [the Court of Appeal's reasoning] was a failure to recognise that the statutory pensionable age, being fixed at 60 for women and 65 for men, is itself a criterion which directly discriminates against men and women in that it treats women more favourably than men 'on the ground of their sex'. … The expression 'pensionable age' is no more than a convenient shorthand expression which refers to the age of 60 in a woman and the age of 65 in a man. In considering whether there has been discrimination against a man 'on the ground of his sex' it cannot possibly make any difference whether the alleged discriminator uses the shorthand expression or spells out its full meaning."

II Stereotyping

76. The appellants' two main authorities under this head are *Hurley -v- Mustoe* [1981] ICR 490 and *EOC -v- Director of Education* in the High Court of Hong Kong on 22 June 2001 (in which Hartmann J's very full judgment considers a number of the earlier cases).

77. In *Hurley -v- Mustoe* the EAT was concerned with an employer's refusal to employ women with small children because he regarded them as unreliable employees and needed to have reliable staff for his small business. As Browne-Wilkinson J put it at p496:

> "[W]e are not deciding whether or not women with children as a class are less reliable employees. Parliament has legislated that they are not be treated as a class but as individuals. No employer is bound to employ unreliable employees, whether men or women. But he must investigate each case, and not simply apply what some would call a rule of convenience and others prejudice to exclude a whole class of women or married persons because some members of that class are not suitable employees."

78. The Hong Kong case resulted in the striking down of the Director of Education's policy of weighting children's exam results so as to neutralise a perceived advantage enjoyed by girls over boys at that stage of their development. As Hartmann J explained at paragraph 86:

> "It is not disputed that the right to equal treatment free of sex discrimination is in our society a fundamental right; as Lord Lester expressed it, a right of high constitutional importance. As an individual right it cannot be undermined or negatived by broad assumptions or generalisations. What may be true of a group may not be true of a significant number of individuals within that group."

79. Amongst the earlier authorities considered in that case was Hutton J's judgment in *In re the Equal Opportunities Commission and Others (No 1)* [1998] NI 223 in which the court struck down a policy under which non-fee paying school places were awarded to an equal percentage of boys and girls (in each case the top 27%) notwithstanding that some of the girls not thereby qualifying obtained higher marks than some of the boys who did.

80. Under this head of argument the appellants submit further that the treatment of Roma at Prague airport is directly analogous to other such obviously objectionable discriminatory practices as police officers stopping and searching black youths more frequently than white youths on the assumption that they are more likely to have been engaged in criminal activity, or tax inspectors more frequently or more rigorously investigating Jews than non-Jews on the assumption that Jews are more prone to financial crime. They argue that it is not open to the discriminators to say that the appropriate comparators in these cases are respectively other recognisable groups of asylum seekers (this being one of Mr Howell's arguments) or drivers of white vans (like black youths, frequently stopped and searched by the police) or self-employed plumbers (whose tax returns, we are told, are often found unreliable).

81. Both arguments, I readily acknowledge, appear to have considerable force. Clearly it is unacceptable for someone to be treated less favourably because of his race whatever the motives underlying such treatment and whether or not it results from the discriminator making stereotyped assumptions. My difficulty, however, is in recognising in the practice followed at Prague airport anything that can realistically be regarded as less favourable treatment of Roma *qua* Roma. True, as we ourselves have postulated, Roma are questioned more intensively and with a greater degree of scepticism that non-Roma (although I reject the appellants' contention - see paragraph 61(a) - that they are subjected to a higher standard of proof). True too, paragraph 2 of the s19D(2)(b) authorisation provided in terms for "a more rigorous examination [for, amongst others, Roma] than other persons in the same circumstances". I reject, however, the contended-for implication that such an examination must necessarily otherwise be unlawful. How, I ask rhetorically, is an objection to the more rigorous questioning of some than others reconcilable with the exhortation repeatedly to be found throughout the case law that applications must be investigated individually, each applicant being given the opportunity to establish that he or she can satisfy whatever may be the legitimate requirements of the questioner? How can it be said that the Prague operation falls foul, for example, of the principle established in *Hurley -v- Mustoe*? On the contrary, what Browne-Wilkinson J surely was advocating there, in place of the wholesale rejection of women with children as an unreliable class of employees, was the questioning individually of women in that position, questioning logically likely to be more intensive in their case than in the case of other applicants for the same job. Consider similarly an employer interviewing for a job involving heavy lifting. He may not be entitled to refuse to interview women at all, but is he not permitted to question a female applicant for the job more sceptically and rigorously than her male counterpart?

82. Nor do I see the operation of the Prague scheme as being in any way inconsistent with the majority decision of the House of Lords in *James -v- Eastleigh Borough Council*. Once it was recognised that the council there might just as well have said that entry was free to women, but not men, in the 60-65 age group, the direct discrimination involved against men became indisputable. The condition of pensionability was itself patently gender-based. The position would in my judgment have been very different had the policy been instead to admit free, say, those who were in fact retired, or who could otherwise establish that they were of limited means; that would not have involved direct discrimination and, if challenged as indirect discrimination, would surely have been capable of justification.

83. The gender-based discrimination so plainly evident in *James -v- Eastleigh Borough Council* was, of course, itself unlawful. The appellants appear to suggest that that is mirrored here by the discrimination against Roma in the Czech Republic which, of course, is what underlies the inevitable scepticism surrounding Roma applications for leave. I readily accept that the race discrimination against Roma in the Czech Republic is no less objectionable than sex discrimination in the UK. But it does not follow that the fact that Roma are discriminated against must be ignored and so cannot properly found the basis of otherwise legitimate concerns felt by immigration officers at Prague about Roma applicants seeking to enter the UK. On the contrary, once it is recognised as lawful to operate in Prague a policy designed to keep asylum seekers away from the UK, that policy must inevitably focus on those suffering discrimination abroad and for this purpose it cannot sensibly matter whether such discrimination is by reason of race, sex, politics, or whatever else may found a claim of persecution on Convention grounds.

84. The policy at Prague airport is manifestly not to refuse Roma as Roma; rather it is to refuse prospective asylum seekers, or rather those who cannot satisfy the immigration officer to the requisite standard that they will not claim asylum on arrival. (That the policy is designed also to prevent travel to the UK even for one of the permitted purposes if the applicant cannot satisfy the immigration officer of a relevant condition for entering, seems to me for present purposes immaterial.) It is, it must be noted, a very different policy from that which could properly have been adopted pursuant to paragraph 3 of the s19D(2)(b) authorisation, namely a refusal of leave to any and all Roma *qua* Roma, irrespective of their purpose in travelling. That, of course, would have involved direct discrimination and been unlawful save under an express statutory authorisation.

85. Nor to my mind can the Prague operation be said to fall foul of the principle established in the Hong Kong case (see paragraph 76 above) or the Northern Ireland case (see paragraph 79 above). In both those cases a general policy was being adopted which necessarily depended for its validity upon assumed characteristics as between the respective sexes and which inevitably, therefore, disadvantaged a number of girls without their being given an opportunity to qualify for the relevant benefit on individual merit.

86. I have already recognised that, because of the greater degree of scepticism with which Roma applicants will inevitably be treated, they are more likely to be refused leave to enter than non-Roma applicants. But this is because they are less well placed to persuade the immigration officer that they are not lying in order to seek asylum. That is not to say, however, that they are being stereotyped. Rather it is to acknowledge the undoubtedly disadvantaged position of many Roma in the Czech Republic. Of course it would be wrong

in any individual case to assume that the Roma applicant is lying, but I decline to hold that the immigration officer cannot properly be warier of that possibility in a Roma's case than in the case of a non-Roma applicant. If a terrorist outrage were committed on our streets today, would the police not be entitled to question more suspiciously those in the vicinity appearing to come from an Islamic background? Similarly in the case of sectarian violence in Northern Ireland. These seem to me the relevant analogies here, not the now defunct practice of repeatedly stopping and searching black youths, clearly an unjustifiable interference with their liberty unless reasonable grounds exist for suspecting those actually stopped.

87. There are, it seems to me, various jurisprudential paths by which to reach what I conceive to be the common sense result in this case. I would hold either that the Roma applicants are not being treated less favourably than others in the respects alleged, alternatively, if they are, that this is not "on racial grounds". If necessary I would hold that there are no relevant comparators against whom to judge the treatment of Roma applicants. I believe that the true analysis of this case is that, so far from Roma applicants being treated less favourably than others in a comparable position, in reality there is being applied to them a requirement or condition which is applied equally to others - the requirement that they satisfy the immigration officer that they are not travelling to the UK with a view to claiming asylum. True, a considerably smaller proportion of Roma applicants than others are able to satisfy that requirement, but it is nonetheless justifiable. In other words, this appears to me to be a case of justifiable indirect discrimination. No case of indirect discrimination, however, has ever been advanced here, or is now sought to be advanced. The appellants' claim stands or falls as one of direct discrimination. For the reasons already given, I take the view that it falls.

88. It follows from all this that in my judgment none of the appellants' arguments is sustainable and in the result the appeal fails and should be dismissed.

Lord Justice Mantell:

89. I entirely agree with Simon Brown LJ that this appeal should be dismissed and for the reasons he gives. It is only because I am aware that Laws LJ does not that I add a few thoughts of my own and then, simply, on the area of disagreement.

90. Applying Lord Steyn's test in *Nagarajan* [2000] 1 AC 501 at 521 the question becomes, "why did the Immigration Officer treat the Roma less favourably than the non-Roma?" Surely the answer must be, "because the Roma is more likely than the non-Roma to wish to claim asylum." It may be and almost certainly is the case that the wish to claim asylum comes about because the Roma has suffered discrimination from being Roma but that is not to answer the question posed. To turn the facts on their heads, suppose the object was to allow genuine asylum seekers to travel and to prevent those without genuine reasons from doing so: could it be said that the more intensive questioning of non-Roma amounted to discrimination against them? Another analogy might be where it is known that a dangerous virus is epidemic in, say, China and stringent medical examinations are imposed on all incoming travellers from that country. They are all Chinese. The same is not required of incomers from elsewhere. It cannot be disputed that the Chinese in such a case suffer

different and discriminatory treatment, but not on racial grounds. The reason for the different treatment is that they are coming from a place where they might have been exposed to the virus: it just so happens that they are all Chinese. In that case a true comparator might be a non-Chinese travelling from China on the same plane, as in the present it would be a non-Roma believed likely to have been a victim of discrimination or persecution.

91. The difference between the present case, the chosen analogues and the example put forward in argument is that, in the latter, generalised assumptions are being made about the character or proclivities of black youths by reason of their colour or race, whereas in the former the only assumption is about the possible effect on an individual of influences from outside.

92. If, as I believe, that analysis is correct, it would follow that the practice at Prague Airport does not amount to direct racial discrimination which is all the Secretary of State has to meet, a satisfactory outcome since any other would be an affront to common sense. If it were to amount to indirect discrimination I would hold it to be justifiable for the reasons given by Simon Brown LJ

Lord Justice Laws:

93. I adopt with gratitude the description of the facts, the account of the material legislation and treaty provisions, and the learning given in the judgment of my Lord Simon Brown LJ whose judgment I have had the opportunity to read in draft. I agree entirely with his conclusions on what he has called the Convention challenge, and the challenge based on the alleged breach of the Immigration Rules; and with his reasons for concluding on these points as he does. In light of the importance of the Convention challenge and the depth of the arguments about it which were presented to us, I will add some observations of my own relating to what has been called the 'justiciability' aspect of this part of the case.

94. However before doing so I have to say that as regards the appellants' claim of direct race discrimination I am unable to agree with the conclusions arrived at by my Lord Simon Brown LJ, and shared by my Lord Mantell LJ; and I will of course explain why not.

The Convention challenge: justiciability

95. The genesis of an international treaty is quite different from the genesis of an Act of the United Kingdom Parliament. An international treaty is forged by debate, compromise and negotiation between the governments of sovereign nation States. My Lord has referred (paragraph 46) to the observation of Dawson J in *A -v- Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 that "[t]he purpose of an instrument may… be pursued in a limited way, *reflecting the accommodation of the differing viewpoints…*" (my emphasis). And there is generally no legal tribunal or political assembly before whom the outcome of this process may overall be called to account. Treaties are, to adopt a phrase from an altogether different discipline, free radicals.

96. By contrast an Act of the United Kingdom Parliament is, as everyone knows, made by a national assembly answerable to the citizens at elections. There may be negotiations between parties; between factions within parties; between the two Houses of the Parliament. But every party to any such negotiation is subject only to our law and constitution, and the outcome of the process may very firmly be called to account: for the legality of what is done in its name, to the courts of law; for its wisdom, to the people at the ballot-box.

97. There is no analogue to these procedures in the case of an international treaty. Treaties are, under our constitution, made by the executive and not by the legislature. Saving certain arcane exceptions, the executive is not a source of law in England. Hence the rule that no treaty comes within the body of the law of the land unless it is specifically incorporated by Act of Parliament. The rule is a benign one: no one is to be subjected to any burden or requirement imposed by the State, unless it is given by the common law or by or under statute. The rule applies no less where the treaty under consideration confers advantages; advantages here are burdens there. I think it salutary to repeat the well known words of Lord Oliver in *J H Rayner Ltd -v- DTI* [1990] 2 AC 418, 500B – D:

> "… as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights an obligations, it is irrelevant."

98. For these reasons it is important to be precise as to the extent to which any given international treaty has by municipal legislation become part of our law. It is commonplace to suppose that the 1951 Convention has been "incorporated" in domestic law. But this is in context a loose expression. The exact position is given, first, by s.2 of the Asylum and Immigration Appeals Act 1993 which provides:

> "Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention."

Secondly, the 1951 Convention is engaged in our domestic law by the statutory provisions which confer rights of appeal to the immigration appellate authorities on individuals who claim that their removal or deportation from the United Kingdom would contravene their Convention rights. These provisions have been revised from time to time. It is unnecessary to enter into the detail. It is true that in *Sivakumaran* [1988] AC 958 Lord Keith of Kinkel observed (at 990G – H) that the Convention had "for all practical purposes been incorporated into United Kingdom". But with respect it is clear in context that he was

referring, and only referring, to the obligations which the Secretary of State had undertaken by force of the immigration rules then in force. I would of course accept without cavil that in a case where and to the extent that the Convention *is* engaged, the Secretary of State's duty is to be loyal to it with all that that entails, and the court will insist that the duty is observed. So much is given, but in the context of the present case with respect no *more* is given, by the judgment of this court presided over by the Master of the Rolls in *Saad & ors* [2001] EWCA Civ 2008.

99. In my judgment the Convention challenge is concluded against the appellants on these following short grounds. There is nothing in the immigration rules which lays down any practice which would be contrary to the Convention. There is thus no contravention of s.2 of the 1993 Act. I do not understand this proposition to be seriously contested. No submission has been made to us that anything in the rules is *ultra vires* s.2. Nor has any argument been advanced to the effect that any statutory right of appeal has been frustrated or undermined by the pre-clearance scheme at Prague airport. Indeed (as I understand is accepted) no question as to the statutory appeal rights arises, since on the facts there is no person facing removal or deportation from the United Kingdom who is thereby in a position to assert that his Convention rights would or might be violated. The appellants are therefore, as I see the matter, driven to assert that the 1951 Convention has distinct and enforceable effects in the domestic law of England which transcend the reach of its incorporation by Parliament. But that is a constitutional solecism.

100. In my judgment it is important that the Convention point should be dismissed on this short ground. Nothing, surely, is more elementary than the certainty required for the identification of what is and is not law in our modern constitution; and we must not be seduced by humanitarian claims to a spurious acceptance of a false source of law. I should say that these considerations have led me to feel, with great respect, some unease in relation to a particular line of authority relied on by Lord Lester QC for the appellants, which is to be found in *Ahmed & Patel* [1998] INLR 570 and *Ex p. Adimi* [2001] QB 667. In the former case Lord Woolf MR as he then was (at 583G – 584F) and Hobhouse LJ as he then was (591G – 592E) indicated, *obiter*, that the Crown's ratification of, or entry into, a treaty might be capable of giving rise to a legitimate expectation upon which the public in general would be entitled to rely. Reference was made to the decision of the High Court of Australia in *Minister for Immigration and Ethnic Affairs -v- Teoh* (1995) 183 CLR 273, 291 (*per* Mason CJ and Deane J). In *Adimi* the Divisional Court had to consider Article 31 of the 1951 Convention. My Lord Simon Brown LJ referred to *Ahmed & Patel*, and accepted what the Master of the Rolls had said *obiter*; he continued (686d):

> "By the time of these applicants' prosecutions, at latest, it seems to me that refugees generally had become entitled to the benefit of article 31 in accordance with the developing doctrine of legitimate expectations…"

101. The proposition that the act of ratifying a treaty could *without more* give rise to enforceable legitimate expectations seems to me to amount, pragmatically, to a means of incorporating the substance of obligations undertaken on the international plane into our domestic law without the authority of Parliament. In *Chundawadra* [1988] IAR 161 this court held that ratification of the European Convention on Human Rights created no justiciable legitimate expectation that the Convention's provisions would be complied with. In *Behluli* [1998]

IAR 407 a like conclusion was arrived at in this court in relation to the Dublin Convention Beldam LJ said at 415:

> "In… *Minister for Immigration and Ethnic Affairs -v- Teoh*… it was said that in that jurisdiction ratification of a Convention was to be regarded as a positive statement by the executive government and its agencies that they would act in accordance with the Convention and that that positive statement was an adequate foundation for a legitimate expectation in the absence of statutory or executive indication to the contrary. But as is clear from… *ex p. Brind*… that is not the law in this country.

We are of course bound by *Chundawadra* and *Behluli*, which were not referred to in the judgments in *Ahmed & Patel* and *Adimi*; and the report shows that they were not cited to the Divisional Court in the latter case.

Race discrimination

102. At paragraph 67 Simon Brown LJ states the premises of this part of the appeal in three propositions. The last of them, which with respect is plainly true on the facts of the case, is put thus: "… Roma are questioned for longer and more intensively than non-Roma and are more likely to be refused leave to enter than non-Roma". It seems to me inescapable that this fact constitutes less favourable treatment to the Roma in comparison with the treatment of non-Roma, within the meaning of s.1(1)(a) of the Race Relations Act 1976. I have heard no sensible argument to the contrary. The question is whether such treatment is on racial grounds; if it is, direct discrimination is established.

103. Clearly, whether A's less favourable treatment of B is on racial grounds or not is a question of fact, though it is constrained by certain matters of law which the tribunal deciding the question has to get right. Of these one of the most important is that it does not have to be shown that the putative discriminator was actuated by a conscious or unconscious racial motivation. My Lord Simon Brown LJ has referred to the principal authorities at paragraph 72 ff. In any given case the motivation may have nothing whatever to do with race. As my Lord has said (paragraph 67(ii)) it is inevitable on the facts here that an immigration officer, involved in the scheme at Prague airport, will be more sceptical of the true intentions of a Roma who asserts a desire to travel to the UK for a non-asylum reason than in the case of a non-Roma who asserts the same. Indeed it is in particular the *conscientious* immigration officer who will thus be more sceptical. And like my Lord I would accept without cavil that the immigration officers operating the scheme are not in the least motivated by any desire to discriminate against Roma as Roma.

104. The factual enquiry which the tribunal, faced with a complaint of direct discrimination, has to make was shortly expressed by Lord Steyn in *Nagarajan* [2000] 1 AC 501 as follows (521H – 522A):

> "… in section 1(1)(a) cases the tribunal simply has to pose the question: Why did the defendant treat the employee less favourably? It does not have to consider whether a defendant was consciously

> motivated in his unequal treatment of an employee. That is a straightforward way of carrying out its task in a section 1(1)(a) case."

105. My Lord has also cited (paragraphs 76 ff) authority which demonstrates the imperative of avoiding what has been called "stereotyping". I think it convenient to repeat two judicial observations which were cited by the learned judge below at paragraphs 51 and 52 of his judgment, though they have already been recalled by my Lord Simon Brown LJ at paragraph 63. First there is what was said by Lord Nicholls in *Nagarajan* at 511H – 512D:

> "All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover we do not always recognise our own prejudices… Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination."

Secondly, there is Balcombe LJ's reference in *West Midlands Passenger Transport Executive -v- Singh* [1988] 1 WLR 730, 736, to "a conscious or unconscious racial attitude which involves stereotyped assumptions."

106. In my judgment the irrelevance of motive, and the impermissibility of stereotyping, have to be considered with some care. Each involves a risk of confusion. As for the first, what is irrelevant is the discriminator's *motive*, or *reason*, for acting on racial grounds. He may discriminate against a person or persons of a particular race even though he possesses no *animus* whatever, conscious or unconscious, against persons of that race. The *CRE* case, cited by my Lord at paragraphs 72 and 73, is a good example. The irrelevance of motive does not prohibit the tribunal from investigating the discriminator's state of mind; indeed, very obviously, that is where his grounds for acting as he did are to be ascertained. The risk of confusion here is that motive's being out of bounds might lead one to suppose that the exercise of adjudication in a direct discrimination case is merely one of ascertaining an *objective cause* of the actor's conduct, as distinct from his thought processes; but that would in truth be a meaningless exercise. Lord Browne-Wilkinson's reasoning in *Nagarajan* at 508C – 509G, which with respect I need not set out, bears on this part of the case.

107. The law, then is clear: once it is shown that the discriminator's act was taken on racial grounds, the *reason why* he acted on such grounds is neither here nor there. I would wish respectfully to repeat these observations of Lord Nicholls in *Nagarajan* at 511B – C:

> "… a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred. For the purposes of direct discrimination… the reason why the alleged discriminator acted on racial grounds is irrelevant. Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds."

108. The mistake that might arise in relation to stereotyping would be a supposition that the stereotype is only vicious if it is *untrue*. But that cannot be right. If it were, it would imply that direct discrimination can be justified; whereas it is entirely plain that the legislature has advisedly chosen to allow justification of indirect, but not direct, discrimination.

109. A consideration of all these factors provides, in my judgment, the answer to this part of the case. As Ms Rose submitted at paragraph 2 of her written reply, when a Roma and non-Roma both present themselves at the desk at Prague airport and state they wish to visit London for the weekend, the immigration officer at that stage knows nothing of their personal circumstances. He has not seen what evidence they have to support their applications for leave to enter as visitors. All he knows, from their appearance, is that one is Roma and the other is not. He treats the Roma less favourably, by subjecting him or her to a more intrusive enquiry with a lesser prospect of leave to enter being granted. One asks Lord Steyn's question: why did he treat the Roma less favourably? It may be said there are two possible answers: (1) because he is Roma: (2) because he is more likely to be advancing a false application for leave to enter as a visitor. But it seems to me inescapable that the reality is that the officer treated the Roma less favourably *because* Roma are (for very well understood reasons) more likely to wish to seek asylum and thus more likely to put forward a false claim to enter as a visitor. The officer has applied a stereotype; though one which may very likely be true. That is not permissible. More pointedly, he has an entirely proper reason (or motive) for treating the Roma less favourably on racial grounds: his duty to refuse those without a claim under the Rules, manifestly including covert asylum-seekers, and his knowledge that the Roma is more likely to be a covert asylum-seeker. But that is irrelevant to the claim under s.1(1)(a) of the 1976 Act.

110. For these reasons I am driven to disagree with my Lords Simon Brown LJ and Mantell LJ on this part of the case. I do so with no satisfaction. The Prague scheme is entirely unobjectionable *vis-à-vis* the United Kingdom's international obligations. The government is perfectly entitled to form the political judgment that it is a desirable initiative in the public interest. And my view on the discrimination issue, had it prevailed, might have had surprising ramifications well beyond the four corners of this case. But elementarily, we are not concerned with such things.

111. I would allow the appeal.

ORDER: Appeal dismissed with costs. Permission to appeal to the House of Lords granted.

(Order not part of approved judgment)