No: C/2000/3901

Neutral Citation Number: [2001] EWCA Civ 884

IN THE SUPREME COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM ORDER OF THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice

Strand

London WC2

Thursday, 10th May 2001

LORD JUSTICE LATHAM

LORD JUSTICE JUDGE

MR JUSTICE LLOYD

- - - - - - - - - - - - -

HARAKEL

Appellant

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - - - - - - - - - - - - - -

(Computer Aided Transcript of the Palantype Notes of

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Official Shorthand Writers to the Court)

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MISS FRANCES WEBBER and MR PATRICK LEWIS (Instructed by Winstanley Burgess of London) appeared on behalf of the Appellant

MR K QURESHI (Instructed by Treasury Solicitor) appeared on behalf of the Respondent

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J U D G M E N T

1) LORD JUSTICE LATHAM: The appellant is a 50-year old citizen of the Czech Republic. He arrived in this country with his then partner and 10-year old son on 10th December 1998 and claimed asylum. The respondent refused him leave to enter, refused to grant him asylum on 19th May 1999 and gave directions for his removal. His partner made a separate application for asylum, the details of which are not available to us. The appellant appealed against the directions in this respect and his appeal was allowed by a special adjudicator. The respondent appealed in turn to the Immigration Appeal Tribunal which allowed the respondent's appeal. The appellant appeals to us with the permission of this court.

2) Before the special adjudicator the appellant gave evidence and was supported by an expert witness, Dr Chirico, a Fellow of the School of Slavonic and East European Studies at the University of London. His case was that he was a Romany and had, as a result, been subjected to discrimination over many years. In 1998 in particular there were threats to and theft of his property, threats to the safety of himself and his family and serious physical assaults carried out by skinheads. The authorities, according to him, were either unable or unwilling to provide him with any protection, in part, because some of the local police were themselves skinheads. His general account of the treatment of Romanies in the Czech Republic, and of the attitude of the police, was supported by the evidence of Dr Chirico.

3) The appellant described the general background of discrimination and abuse. In 1971 he was wrongfully arrested, detained and subjected to serious ill treatment by the authorities for coming to the defence of a female cousin who had been the subject of an unprovoked attack by policemen. He was sentenced to imprisonment for causing actual bodily harm to a policeman. In 1984 he was detained by a police officer, severely assaulted and, as he described it, "left for dead". Generally, he and his family had been subjected to abuse and discrimination. In his early years there had been difficulties over housing, education and in relation to employment. In the immediate past he would, in addition, be refused service in bars and restaurants. The position for him was particularly difficult as his partner was a non-Romany.

4) The incidents which prompted him to leave the Czech Republic occurred at the end of 1998. In the summer of 1998 a skinhead was sent by the job centre to apply for a vacancy at the appellant's business. The skinhead did not wish to work for the appellant and simply wished to be given a certificate stating that the appellant had refused to employ him. The appellant declined to provide him with such a certificate. The man became aggressive, damaging furniture, attacking the appellant and injuring his ribs which were found to have been damaged at the accident and emergency unit of the hospital. Although this incident was reported to the police the appellant heard nothing. He thereafter had real difficulties employing people. None but Romanies would work for him but Romanies were nervous because he appeared to have been targeted by the skinheads. He received two threatening letters, one directed to his partner. He received threatening and abusive anonymous telephone calls threatening to steal his car and set his house alight. His son was subjected to bullying and racist abuse at school.

5) In November 1998 he was attacked and beaten by two skinheads who punched and kicked him. He did not report this incident to the police because he believed some of the policemen were skinheads or skinhead supporters. Not long thereafter he received a further threatening letter, threatening to take his son or his car. He did not report this matter for the same reason he did not report the attack. Shortly thereafter his motor car went missing. He reported this matter to the police and was eventually provided with an appropriate form to fill in. He found the car himself in a cemetery the next day, completely destroyed. He again referred the matter to the police but he

heard nothing.

6) He became frightened for the safety of his son. At the beginning of December his house was broken into by skinheads, one of whom had taken part in the attack in November. He managed to frighten them off with a toy gun; but before they left one of them threatened to abduct his son. He reported the matter to the police. He said that some details were taken, but no report was provided to him nor was he advised what action was being taken. He became seriously concerned for the safety of himself and his family. He decided that he could not trust the authorities to protect them. Accordingly, he, his partner and his son left the Czech Republic and arrived in this country.

7) Dr Chirico gave evidence that the general account of the appellant fell into a recognised pattern. All the objective information suggests that there has been a steady rise in racist attacks on Romanies in the Czech Republic since 1989. Despite the formation of a Human Rights Commission in the Republic, the authorities had been slow to acknowledge the problem and thereafter to address it effectively. He confirmed the appellant's view that the police had connections with the skinheads, described by the Government itself as "the skinhead movement".

8) The special adjudicator on that evidence concluded that the appellant was a credible witness and accepted the account that he gave of the ill treatment which he suffered, and of his reasons for not reporting some of the incidents to the police or other authorities. She found that the level of ill treatment amounted to persecution and the authorities had made insufficient attempts to address the problems, particularly at local level, so as to provide protection for Romanies such as the appellant. She found that the appellant had taken reasonable steps to seek redress in the Czech Republic before fleeing to the United Kingdom. She was therefore satisfied that he had a well founded fear of persecution for a Convention reason, namely the fact that he was a Romany, were he to be returned to the Czech Republic.

9) The appeal to the Immigration Appeal Tribunal criticised the special adjudicator's conclusion that the appellant had taken all reasonable steps to seek redress at domestic level as perverse, and referred to paragraph 29 of the UNHCR Guidelines Relating to the Eligibility of Czech Roma Asylum Seekers of September 1998, and in particular the following passage:

> "Given that there is a legal and policy framework for the redress of racial-based grievances, unless all reasonable avenues of recourse to national protection have been exhausted, the applicant should not be considered to be in need of international protection."

10) The tribunal having considered all the material before it, including the evidence of Dr Chirico and the objective reports from external agencies, concluded that Romanies suffered disproportionately from poverty, unemployment, inter-ethnic violence, discrimination, illiteracy and disease and were subject to popular prejudice ranging from indifference to intolerance and occasional violence. It was noted however that in September 1998 a Human Rights Commission was appointed. In January 1999 a Commissioner for Human Rights was also appointed to advise the government on human rights issues and to propose legislation to improve the observation of human rights in the country. Further, Parliament had voted money to assist non-governmental organisations working on human rights matters. Steps had been taken to combat any anti-Romany feeling within the police force. It appeared to the Tribunal that from the evidence, the most anti-Romany feelings and actions within the police would emanate from the local police force but the national police were less likely to be prejudiced and were better trained and disciplined. It recorded Dr Chirico's

views that although there had been a number of positive developments in the Czech Republic in relation to the treatment of Romanies, he did not consider that that had necessarily yet produced any benefit to the individual Romany.

11) The Tribunal then considered the evidence as to the way in which the police had reacted to the appellant's problems. It noted certain discrepancies in the appellant's accounts as to the particular incidents about which he had given evidence to the special adjudicator. It noted what it described as "the glaring point" that apart from the incident of the fight with the skinhead at the appellant's office, all the incidents upon which the appellant initially relied when interviewed on his arrival would appear to have taken place in November 1998. It was concerned that the appellant did not appear to have followed up any of the incidents to determine whether or not the police had been able to make any progress, or alternatively to complain at the failure of the police to make any progress. He failed, again according to the Tribunal, to report matters to the police which he could be expected to have reported, such as the threatening letter to the wife. The picture, according to the Tribunal, was of incidents occurring over a relatively short period of time, not all of which had been reported to the police. Where the matters had been reported to the police, full information had not been provided by the appellant, and in relation to the latter events in November 1998 insufficient time had passed to justify the conclusion that the police were either unwilling or unable to take action. It concluded that steps had been taken in the Czech Republic to offer redress and protection to Romanies, that there was a system of domestic protection in place and a machinery for the detection, prosecution and punishment of actions contrary to the principles of the Convention. It concluded that it had not been shown that the appellant had exhausted all reasonable avenues of recourse to national protection and in coming to the contrary conclusion the special adjudicator had misdirected herself in law and in fact.

12) The law is not in dispute. The question which is raised by this appeal is in what circumstances serious violence or ill treatment by non-state agents - in this case the skinheads - can amount to persecution entitling the victim to the protection of the Convention. This issue has been the subject of consideration by the House of Lords recently in Horvath v Secretary of State for the Home Department [2000] 3 WLR 379. Lord Hope of Craighead said at page 387 F:

> " ..... I consider that the obligation to full refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals. I think that it follows that, in order to satisfy the fear test in a non-state agent case, the applicant for refugee status must show that the persecution which he fears consists of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection."

13) He identified what he described as the third issue at page 382: "What is the test for determining whether there is sufficient protection against a persecution in the person's country of origin - is it sufficient, to meet the standard required by the Convention that there is in that country a system of criminal law which makes violent attacks by the persecutors punishment and a reasonable willingness to enforce that law on the part of the law enforcement agencies? Or must the protection by the state be such as it cannot be said that the person has a well founded fear?"

14) At page 388 D Lord Hope continued:

> "As regards the third issue, the answer to it also is to be found in the principle of surrogacy. The primary duty to provide the protection lies with the home state. It is its duty to establish and to operate a system of protection against the

persecution of its own nationals. If that system is lacking, the protection of the international communities is available as a substitute. But the application of the surrogacy principle rests on the assumption, that just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected in the home state. The standard to be applied is therefore not that which would eliminate all risk, and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard which takes proper account of the duty which the state owes to all its own nationals. As Ward LJ said [2000] INLR 15, 44 G, under reference to Professor Hathaway's observation in his book at page 105, it is axiomatic that we live in an imperfect world certain levels of ill-treatment may still occur even if steps to prevent this are taken by the state to which we look for our protection."

15) That is the principle which underlines the test which was set out in paragraph 29 of the UNHCR Guidelines to which I have already referred. It reflects the fact that there is at least on its face in place in the Czech Republic the appropriate legislative, administrative and enforcement structure to provide for protection to Romanies. The question which has to be asked is whether or not that is in fact effective. The situation seems to me to be well described by Mr Justice Collins, as the President of the Immigration Appeal Tribunal, in Secretary of State for the Home Department v Havlicek, a decision dated 18th April 2000 of which we have been provided with a copy. At paragraph 10 it is said:

> "10. The existence of a system which is designed to punish such attacks and to protect such as the respondent will usually mean that a claim must fail unless it can be shown that the system is not effective. The real ground of appeal here is based on the alleged failure by the special adjudicator to take properly into account the objective evidence of effective protection afforded by the Czech authorities. The point made that the respondent had sought police protection does not help the appellant. It was precisely because he had sought but had failed to get protection from the police that the special adjudicator found in his favour. This showed, he said, that the protection on offer was not effective. Indeed, if the respondent had not sought the protection of the police, his claim would almost certainly have failed because he had not demonstrated any ground for his alleged inability or unwillingness to avail himself of the protection which was available.
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> 11. The special adjudicator himself in the passage we have already cited identified some of the steps which have been taken by the Czech authorities. The fact that the protection available has not proved effective in individual cases cannot of itself establish a claim for asylum. The fact that individual police officers are lazy or incompetent or unwilling to carry out their duty does not establish that the state is unable to provide the necessary protection. Furthermore, it must be recognised that a prosecution can only be based on evidence and it may in many cases be very difficulty to obtain sufficient evidence to launch prosecutions. However, the state can only provide the necessary protection through its agents, in this case the police. If the police are unwilling t act when they should and there is no means of making them do their duty, there may be shown an inability to provide the necessary protection."

16) That, essentially, is the issue raised by the appellant's case.

17) As far as this court is concerned, we have to determine whether or not it can properly be said that the Immigration Appeal Tribunal erred in law, that being the only basis upon which an appeal can succeed. It is accepted that the Immigration Appeal Tribunal properly directed itself as to the law. The question which is raised by Miss Webber, on the appellant's behalf, is whether or not the conclusion it reached was open to it on the evidence which was available. Putting it another way, was it a conclusion which no tribunal, properly directing itself, could have reached.

18) Mr Qureshi has underlined, as one would expect, forcefully the fact that the test we have to apply, as explained in Horvath, is essentially whether the material before us establishes that the state - in this case the Czech Republic - has failed in the sense of being unwilling or unable to give protection to this appellant in the circumstances of the case, because he accepts that if that has been established on the evidence then what has been suffered by this appellant amounts to persecution. Equally, on the material before this court, there does not appear to be any dispute but that if that were the conclusion to which we were driven, in other words that the contrary conclusion was not open to the Immigration Appeal Tribunal, then the appellant would have established that he had a well founded fear of persecution on Convention grounds as found by the special adjudicator and, accordingly, that the Immigration Appeal Tribunal decision should be quashed and that of the special adjudicator restored.

19) Having considered with some care the determination of the Immigration Appeal Tribunal, I have come to the clear conclusion that in two significant respects it is, in fact, flawed. The first respect in which it is flawed is that it fails, it seems to me, to put the situation of this appellant into its proper historical context. By historical context I do not simply mean historical in relation to the Czech Republic generally, but also in relation to the position of this appellant. As I have indicated, the Immigration Appeal Tribunal was greatly influenced by the fact, as it saw it, that the only matters about which this appellant complained occurred in the latter part of 1998. In my judgment, that is a simplistic approach to the specific complaints that he made of ill treatment. It fails adequately to take into account the objective material available to it in terms of the reports, of which we have been provided with details, also the evidence of Dr Chirico to which we have already referred and the further evidence of Miss Klara Vesela-Samkova, who was a former Member of Parliament in Czechoslovakia and is an expert in Czech law. The objective materials, as I have already generally indicated when dealing with the decision of special adjudicator, clearly supported the evidence of the appellant to the effect that he, as a Romany, would have been subjected to significant discrimination in all facets of his life throughout his life. They also supported his general assertions that he had been subjected to increased intimidation during the last few years. In those circumstances the events in 1998 have to be placed in that context.

20) It is particularly noteworthy that the Immigration Appeal Tribunal does not then seek properly to take into account the particular position of the appellant and of the evidence he gave in relation to his situation. It is clear from the evidence that we have that the appellant had in fact been a successful businessman in the sense of creating for himself a contracting business, as we understand it, in digging which presumably means in the construction industry. He employed men. He had been sufficiently successful to purchase the motor car to which we have already referred. He had a non-Romany wife and a child who was therefore of mixed race. What is significant also in relation to his personal situation was that by reason of the attitude of the authorities as described in the written statement that he made after he had originally been interviewed by the immigration authorities, he describes difficulties in being permitted to register his residence and, as a consequence, it proving impossible for him to marry because the authorities would not permit registration of any marriage. That therefore was the position in which he was in 1998 which meant

that he was liable to be exposed to the activities of those who, for envy or whatever other reasons, had feelings of antipathy towards the Romanies. It follows that the attacks on him and his reaction to them must be viewed in that rather particular light.

21) It seems that what does not receive any recognition in the decision of the Immigration Appeal Tribunal is that the attack on his car and the threats, as I have related, to his wife and, in particular, to his son are therefore of particular significance in relation to the feelings of fear that he would have. It also seems to me that the background facts were relevant to determining the extent to which it could properly be said that the reaction of the police was a reaction which was adequate in all the circumstances to justify the conclusion that the police were demonstrating a readiness or willingness to provide to this appellant the protection to which he was entitled. Having therefore expressed concern about the general attitude of the Immigration Appeal Tribunal in its failure, as I see it, adequately to put the events of 1998 into the context of the appellant's particular position and in the context of the general situation relating to Romanies in the Czech Republic, the Immigration Appeal Tribunal, in my judgment, then compounded the position by failing properly to analyse and consider the evidence which was before it. That evidence essentially was the material which had been accepted by the special adjudicator. The special adjudicator had expressly accepted the appellant's credibility. Although she did not seek to make findings in relation to every detail of the evidence put before her on behalf of the appellant, it must accordingly be the case that the whole of the statement which had been provided for the hearing was evidence subject to any criticisms she might have had.

22) There was no submission on behalf of the respondent at the appeal before the Immigration Appeal Tribunal that the conclusions of the special adjudicator as to the events about which the appellant provided evidence was to be in any way disputed. Nonetheless, when one comes to look at the way in which the Immigration Appeal Tribunal dealt with the facts relating to the events in 1998, which as I indicated were the events on which it concentrated, it seems to me that it fell into error in two separate respects. First, there is no doubt that it approached the matter on the basis that the appellant's evidence could be said to be subject to criticism. In paragraph 65 on page 16 of the decision it concluded that there were discrepancies between the accounts that the appellant had given in the first instance in his interview and in the statement that he ultimately provided which gave them some cause for concern. It criticised the appellant in relation to the material which he provided to police about the incident when the skinhead had been sent by the job centre. It said at paragraphs 69 and 70 as follows:

> “69 Thus, as we see it, if the fight at his office was one of the main incidents of persecution claimed by the respondent, and was one in which there would appear to be clear evidence of who `the skinhead' was, as he had been sent by the job centre, we are driven to ask ourselves why the respondent could not have given the police the fullest details and have pursued his complaint with the job centre, particularly as, according to his own statement, at paragraph 25, an explanation had been demanded of him, by the job centre, as to why he had been refusing to take any of the interviewees which they had sent to him.
>
> 70 In the circumstances as described by him, he could very well have explained that incident to the job centre, and assisted the police by giving evidence as to the identity of the skinhead. However, it is clear that he had failed to do so.”

23) Speaking for myself, I find that criticism somewhat curious. The Tribunal seems to me to have completely failed to appreciate that the relevance of what happened on that occasion was not so

much what the appellant himself had done or not done - he had made a report to the police - but the consequence, in other words, the inference one should draw from the fact the police themselves either did or appear to have done nothing. The argument that the person in question was readily identifiable seems to me a point which underlines the fact that the appellant having given the information that he did to the police could have expected the police to have identified that person themselves readily. The fact they did not do so, as far as the appellant knew, seems to me to be of significnce in determing the extent to which he thereafter acted reasonably. As far as the Tribunal was concerned, it appears to have taken the view that the police had been hampered by the inability or unwillingness of the appellant to provide them with adequate information. They said, for example at paragraph 75, that not all information which the respondent could have given to the police had been given and no acceptable reason had been given to the tribunal for not affording the police that information. It seems to me that seriously mis-states the true position.

24) As far as the Tribunal's attitude is concerned, it is perhaps exemplified most clearly at the end of paragraph 64 where it said as follows:

> “But, even on the respondent's own evidence, it would appear that, on the occasions when the respondent did make his complaints to the police, they either took action to investigate them or were hampered in commencing investigations by lack of evidence and the lack of provision of information which could be of assistance to them.”

25) I can see no justification for the Immigration Appeal Tribunal's conclusion in that respect. It may or may not be that the police had difficulties with their investigations but there is no evidence that they in fact did carry out investigations as apparently the Tribunal seems to have found.

26) I am therefore of the view that the Tribunal, in disagreeing as it did with the assessment of the special adjudicator, did so for reasons which were wholly inadequate in the sense that they have ultimately come to a conclusion which was not open to them on the facts before them. I am of the view that in this case the Tribunal was wrong. The decision of the special adjudicator appears to me to have been one which was fully open to the special adjudicator on the facts.

27) I would allow this appeal so as to restore the decision of the special adjudicator.

28) MR JUSTICE LLOYD: I agree.

29) LORD JUSTICE JUDGE: The current United Nations High Commission for Refugees Guidelines relating to Czech Roma asylum seekers includes the following paragraph:

> “27 In light of the above UNHCR's view is that while there is no official policy to discriminate against Roma on the basis of their ethnicity, discrimination at the popular level takes place and is fairly widespread. In some instances such discriminatory treatment may lead to consequences of a substantial prejudicial nature so as to amount to persecution. Asylum claims must therefore be assessed individually to establish if the discrimination experienced amounts to persecution.”

30) I agree with the observations, first in relation to the implied assertion that discrimination and persecution are not synonymous and that discrimination is not necessarily persecution, and also in the unequivocal statement that each claim for asylum must be considered as an individual case. Some claims therefore will be established, others will not. That means that it is not enough for an

asylum seeker to establish that he is a Czech Roma, nor for that matter that he is Czech Roma for whom the protective system created by the state has been unsuccessful.

31) I respectfully adopt the analysis by the President, Mr Justice Collins, in the passages from his judgment in Havlicek, recently quoted by my Lord. Paragraph 29 of the guidelines reads:

> "Where it is assessed that the discriminatory actions amount to persecution it would be necessary to evaluate whether the authorities have afforded or are able to afford the applicant protection. In this regard it is important to establish whether the applicant had approached the authorities to seek redress and if he/she had not done so the reasons. Obviously, where the local authorities had condoned or themselves engaged in the discriminatory treatment the applicant's access to redress measures would have been limited given that there is a legal and policy framework for redress of racial based grievances unless all reasonable avenues of recourse to national protection have been exhausted the applicant should not be considered to be in need of international protection."

32) Again, I agree. The question whether the asylum seeker has taken all reasonable steps to engage the assistance of those responsible for upholding the rule of law and protecting his basic human rights requires, as far as possible, in what I recognise may be an exceptionally complex situation, particularly difficult to ascertain from abroad and afar, a practical approach to the realities as they are found to be. The question whether all reasonable avenues of recourse have been exhausted is fact dependent and fact specific.

33) I agree with the judgment of Lord Justice Latham and for the reasons he has given that the decision of the Immigration Appeal Tribunal was flawed. I further agree that on the facts the decision of the special adjudicator should be restored.

Order: Appeal allowed