IMMIGRATION APPEAL TRIBUNAL

Appeal No: 17338
CC/59978/97

Date heard: 28/09/1998
Date notified: 04/12/1998
Before:
His Honour Judge D S Pearl (Chair)
Mrs J Chatwani
Mr J A O'Brien Quinn, QC

MILAN HORVATH
Appellant

The Secretary of State for the Home Department,(UNHCR intervening)
Respondents

Determination and Reasons

INTRODUCTION
1. The appellant in this appeal is a citizen of Slovakia, and a member of the Roma community. He appeals to the Tribunal with leave (Mr M W Rapinet, Vice President) notified on 5th June from the decision of a Special Adjudicator, Mr Richard Chalkley who dismissed his appeal against the refusal of the Secretary of State to grant him asylum under paragraph 336 of HC 395. The Secretary of State certified the appeal pursuant to section 5(4)(b) of Schedule 2 of the Asylum and Immigration Act 1993 as amended by section 1 of the Asylum and Immigration Act 1996. The Special Adjudicator found the Secretary of State wrong to have certified the appeal and he "dismissed" the certificate. Accordingly there is a right to seek leave to appeal to the Tribunal, which, as we have said, was granted on 5th June 1998.

2. The Tribunal sat as a legally constituted Tribunal and considered the submissions over two days on 28th September and 29th September 1998. The appellant was represented by Mr P Jorro of the RLC and the Secretary of State was represented by Mr R Tam of Counsel instructed by the Treasury Solicitor. The Tribunal had held a preliminary hearing on 13th August 1998 and issued a number of directions, especially in relation to skeleton arguments. In compliance with these directions, the appellant submitted a skeleton argument of some 13 pages together with a supplementary submission of a further 5 pages. The Secretary of State submitted a skeleton argument of 30 pages. We are grateful to both Mr Jorro and Mr Tam for the care they have given to this case.

3. The UNHCR by letter dated 25th September 1998 submitted written submissions, although it did not attend to provide any oral submissions.

THE ISSUES

4. The issues in this case extend beyond the actual factual basis before us. Adapting, although not following, the list from Mr. Tam's skeleton argument they are as follows:

- The approach which should be taken by the Immigration Appeal Tribunal when a Special Adjudicator has made an adverse finding in respect of the credibility of the appellant;

- The decision which we take in this case on the adverse findings of credibility by Mr. Chalkley; which as will be seen, means that we must consider the issue of Slovak Roma;

- The standard of proof to be applied in asylum status determination when making findings relating to the evidence of past events;

- The definition of persecution;

- Non-State Agents of Persecution;

• The application of these principles to the issue of Roma from Slovak, and in particular, this appellant.

THE APPELLANT'S CASE

5. Before we consider these matters, we set out the appellant's case. The appellant is a Roma from Slovakia who was born in February 1973. He arrived in UK on 15th October 1997 and claimed asylum on arrival. Asylum was refused on 26th November 1997, he was refused leave to enter and given removal directions. He then appealed against the refusal of leave to enter and Mr. Chalkley dismissed the appeal on 30th April 1998.

6. He was interviewed in connection with the asylum claim, although as Mr Chalkley states in his determination the record of the interview is undated. When asked what particular event caused him to leave he replied "Because the skinheads would not leave us in peace. They harassed us. We could not go down to the town for a walk or take our son to school. We had to hide." He said in his interview that he had not personally been beaten, but his next door neighbour had been. The appellant submitted a further statement prepared by his then solicitors and forwarded to the Secretary of State on 3rd November 1997. The appellant's case is outlined in detail in a further statement prepared for the appeal hearing before the special adjudicator and appearing at pp 224-221 of the Tribunal bundle. We set this out here:

"1. My name is Michael Horvath. I am a Gypsy from the county of Michalovce in Eastern Slovakia. I come from a small village called Palin which is close to Michalovce town itself. I am married. My wife's name is Verona Horvathova and we have a son, Mihal, who is now five years old.

2. The village in which we lived was mostly made up of whites but there were a few Gypsy families living on the outskirts. There were two other Gypsy households in our area. The house itself was built by my mother after my father's death. The house had all the necessary amenities such as water, electricity and a telephone. The house is owned by my mother but she has to pay ground rent. At the back of the house is a large garden.

3. Along with myself, my wife and my child, my mother, four brothers, two sister a brother-in-law and two disabled children of my sister and brother-in-law lived in the house.

4. My father died when I was twelve. This was in the period of Communism. He was coming back from work one day. He enjoyed a drink and had stopped at a pub. When he left the pub some whites started on him. A Romany family that witnessed him being beaten ran to tell us what was happening. When we ran to find him he was lying on the ground. He seemed to be conscious but didn't recognise us. We lifted him up and called an ambulance. He was taken to the hospital in Michalovce where he died after a week. The doctors reported the death to the police as he had died from the beating. The police didn't even come to our home. They pretended it hadn't happened. My mother is a timid person and was too afraid to pursue the matter with the police. My father had been a building worker when he was alive.

5. I went to primary/secondary school in the village (Palin) up until age 14 or 15. I then started at apprentiship school in Michalovce where I was learning the skills of a builder. However I didn't finish the course due to one teacher in particular. This teacher was very strict about time-keeping and I was late one day. He took me into his office and beat me badly with a thick ruler on my legs and back then he let me go. I returned to the classroom, took my bag and returned home. I didn't want to tell my mother about this incident. She is unwell and I didn't want to upset her. After a while she realised I wasn't going into the college and she asked me about it. I told her and she became angry with me. It caused a big row and I left home and went to stay with my sister in Czech Republic for a couple of months. This was before Slovakia and the Czech Republic split up and around the time that democracy started and communism fell.

6. Since my return and since the beginning of democracy I have been unable to find work in Slovakia. Not only me but all of my family couldn't get work. This is because the whites won't

generally employ Gypsies especially if there are whites to take the jobs. One of my sisters worked as an agricultural worker until she had an accident and lost a foot.

7. The skinheads also started after democracy came in. I first became really aware of them when my brother, Slovomir, went to a local football match in Palin. He was caught by skinheads and attacked with a "Nunchky" (a kind of "Ninja" weapon) and a "Lancer" - a wooden stick with a spiked ball at the end of a chain. When he returned home he was bleeding all over. We dressed his wounds at home as we were too scared to take him into Michalovce to the hospital.

8. I must state that since the skinhead attacks began we have been like prisoners. We are mostly too scared to go to Michalovce - certainly we would never use public transport as the skinheads hand around the bus and train stations and pick on Gypsies. Even in the village we have to be careful. White neighbours would call the skinheads onto us if we were not careful. We even had to go by a complicated route to get to the shops. Our neighbours used to laugh at the precautions we used to take. Things got so bad that me and my brothers dug a shelter - a large hole really - in the back garden where we would often sleep at night. We put mattresses and blankets down there so we could hide until the skinheads went.

9. Approximately four nights a week, skinheads would come to the village. You could hear their motorbikes and when we heard these noises we would pack up the children and go and hide in the shelter. The other Romany families had similar provision for when the skinheads came. The shelters were dug in secret so that our white neighbours didn't get to know about them.

10. This almost nightly routine demoralised us. Sometimes the skinheads would attack the outside of the property. Originally we had glass windows. When these got broken we replaced them with plastic sheeting. Then these were destroyed as well and eventually we had to give up replacing them. On at least seven or eight occasions the skinheads came into our house while we were hiding in the shelter in the garden. They took or destroyed every bit of furniture we had. In the end we were left with an empty shell of a house. This happened to our Romany neighbours as well.

11. There was no police station in Palin. The nearest one was in Pavlovce, a village about two kilometres away. We used to report all the attacks on our house to the police station there they always said they would come and see the next day but often it would be as long as a week and sometimes they wouldn't bother at all. They once took a photograph of some of the damage. All the Romanies in our village reported the attacks but the police would never post officers there at the right time to catch the skinheads. You could tell the police didn't want to get involved between the Gypsies and the skinheads.

12. We also reported the problems we were having to the police in Michalovce. They asked us where we belonged to. When I told them that we lived in Palin, they told us to go to the police station in Pavlovce. I told them that the police there had not helped us. They said "too bad" and "if the same things happens in Micholovce come and see us".

13. The whites in the village were mostly hostile to us. There was a nursery class that my son could have attended but the teacher made it very clear to me that there were others who didn't wish me to come bothering her about my son going there. For a long time me and my wife could not get married at the Registry Office in Palin as the authorities kept cancelling or postponing the date or not turning up to perform the ceremony and record the marriage. Only wen the chairman changed did we manage to marry.

14. With the exception of my brother, we avoided being directly attacked by the skinheads ourselves. However this was a result of the careful precautions we took as described above. Two Romany neighbours Miroslav Tokar and Anna Tokarova were beaten when returning from the shops in Palin. Anna's face was very swollen and Miroslav was cut on his abdomen by a knife. He had also been beaten with baseball bats.

15. The final straw for me came when a young man that I knew, Juraj Gujda, was killed in Micholovce a few days before we set out. By then we were already planning to leave. Things

had been getting worse and a Gypsy man and his son had been killed in Prievidza about a month before that. My mother had been saving money. These deaths were on television.

16. Our passports were obtained shortly before coming. I have already said that I avoided using public transport because of the skinheads so when I needed to obtain the passports a friend drove me in his car to Micholovce very early in the morning. He dropped me off and left having arranged a time to pick me up. I handed in the photographs and birth certificates and was told to return two or three days later. I didn't do this as my friend was too busy to give me a lift. I collected them the day before we left for Bratislava.

17. We were very nervous going to Bratislava on the bus. There were about eight skinheads at the bus station in Bratislava but because there were about seven or eight Gypsy families going on the bus to England we outnumbered them. Nevertheless we took precautions by going on the bus one by one so as to make ourselves less visible.

18. When I got to England I claimed asylum and was interviewed about why I had come. When it came to the end of the interview I didn't want to sign it as it was in English. I didn't know that I could have it read back to me. I told the interpreter that I was reluctant to sign something when I wasn't sure what had been recorded. I was told that I had to sign it or I would be put on a boat back to Belgium. I don't know whether it was the interpreter or the Immigration Officer who said this.

19. If we are returned to Slovakia, I am afraid that I will be again persecuted by the skinheads because I am a Gypsy. I can not get protection from the police who don't care at all about our problems. I want to stay in the UK where I live a peaceful life without fear."

7. Mr Jorro summarises this evidence in his Skeleton argument in this way (at para 2.1)

"2.1 In brief the appellant's case - as outlined most particularly in his statement at pages 224-221 of the Tribunal main bundle - is that at least since the inception of the Slovak Republic he has (a) been seriously discriminated against in terms of denial of employment opportunities by reason of his being Roma and (b) has been directly and/or indirectly (via family and friends) the victim of intimidation, harassment and physical assault against both person and property at the hands of 'skinheads' by reason of his being Roma and that the Slovak state authorities have been unable and/or unwilling to provide him with a sufficiency of protection against these 'skinheads' who are accordingly to be properly considered as 'agents of persecution'."

THE APPROACH WHICH SHOULD BE TAKEN BY THE IAT WHEN A SPECIAL ADJUDICATOR HAS MADE AN ADVERSE FINDING IN RESPECT OF THE CREDIBILITY OF AN APPELLANT.

8. Mr Chalkley makes what Mr Jorro refers to as "an all-embracing negative credibility finding". Mr Chalkley states:

"I did not find the Appellant to be a credible witness. I believe that his coming to the UK has nothing at all to do with him being in fear of persecution in Slovakia but rather a desire to improve his economic circumstances and those of his family."

9. Mr Tam at 4.2 of his skeleton submits that any appellate Court or Tribunal should be very slow to interfere with findings of fact made by lower Courts or Tribunals, given that witnesses have given oral evidence. In support of the appropriate approach to take we were referred to Borissov [1996] Imm AR 524 at p 535. Hurst LJ said this:

"Thus the jurisdiction of the Immigration Appeal Tribunal is not limited to questions of law, and it is within the scope of their jurisdiction for them to review, if they see fit to do so, the Special Adjudicator's conclusions of fact, though no doubt this power will be sparingly exercised, and in any event, in accordance with general principles, the Immigration Appeal Tribunal will naturally be most reluctant to interfere with a finding of primary fact by the Special Adjudicator which is dependent on his assessment of the reliability or credibility of a witness who has appeared before him."

10. We of course follow this approach. However, as Hurst LJ acknowledges, the Tribunal does have a power to review conclusions of fact. In Ikhlaq [1997] Imm AR 404, Staughton LJ criticised the language used by the Tribunal in that case; namely that the finding was "perverse". Staughton LJ suggested that a finding did not need to be perverse before the Tribunal had the right to alter it stating that:

"They were entitled to do that if the decision was in their opinion merely wrong, but not necessarily perverse."

Mr Tam pointed out that Borrisov was not cited before the Court of Appeal in Ikhlaq, and that in any event Staughton LJ was really only dealing with the point that the Tribunal was not limited to correcting errors of law (that is perverse findings), and he did not by using the word "wrong" imply that the ordinary principles of appellate jurisdiction as laid down in Borrisov should be widened.

11. We should mention also that Jowitt J remarked in Balendran [1998] Imm AR 162 at 168:

"The Tribunal's approach should be the same as that of any appellate tribunal able to set aside a finding of fact, and not restricted to doing so only on the basis that it discloses an error of law dealing with the particular kinds of error which are encapsulated in the Wednesbury principles."

Jowitt J reminded the Tribunal in that case:

"...whether the appellant has given oral evidence or simply in statement form, the Tribunal will remind itself that the assessment of the evidence of an asylum seeker has its own particular problems. To the resolution of those problems the special adjudicator brings his own expertise."

12. This approach would appear to us to reflect the practice of the Tribunal in recent years. Indeed, the Tribunal has considered its powers recently in the case of Ibrahim (17270) (The President, The Countess of Mar, Mr M L James). In that case, the Tribunal said:

"It is still the case...that the Tribunal will not engage in a re-examination of the evidence simply because an appellant disagrees with an adjudicator's finding on the factual basis of his claim. There must be something more than this; something which goes to the heart of the matter in the sense that there is an allegation that his assessment of the evidence is flawed in that it discloses a fundamental error of approach."

13. Mr Tam was content to adopt the approach taken in Ibrahim. Mr Jorro too accepted that Ibrahim applied the correct test. There sadly all agreement vanished. Mr Tam said that the adjudicator's findings were unimpeachable and that there was no basis for interfering with his findings. In contrast, Mr Jorro submitted that his findings were fundamentally flawed and accordingly the Tribunal can and should reverse these findings.

MR CHALKLEY'S FINDINGS WITH RESPECT TO CREDIBILITY

14. A concern in this case, identified by Mr Jorro, and with which we agree, is the apparently cursory approach which appears to have been taken by the Asylum Directorate in the initial decision making exercise. The refusal letter is undated, is signed pp E.V.Thomas in signature with Mr M Dalgety Asylum Directorate in typescript. It is not clear who is responsible for the refusal letter. Almost all of the 20 paragraphs are general in nature, referring to the situation in Slovakia. Paragraph 19 is more specific. It reads as follows:

'You have submitted no evidence in support of your claim. Whilst the Secretary of State accepts that an individual fleeing persecution may not be able to gather evidence with which to support his claim, and that occasions where an individual can produce such evidence will be the exception rather than the rule, this does not oblige the Secretary of State to accept unsupported statements as necessarily being true, especially where there are inconsistencies in the account or reasons for doubting its credibility. The Secretary of State considers this to be so in your case, particularly so when you claim to have experienced 30 to 40 incidents stretching back to 1990.'

15. The problem with this paragraph, as Mr Jorro submitted to us and with which we agree, is that the appellant never stated in his interview anything about 30 to 40 incidents. The questions and answers of the interview read as follows:

"1. Q. What particular event caused you to leave the country?

A. Because the skinheads would not leave us in peace. They harassed us. We could not go down to the town for a walk or take our son to school. We had to hide.

2. Q. How did they harass you?

A. Whenever they saw a black face they started to beat us with whatever they had. They were racist.

3. Q. How often did they beat you?

A. They did not beat me but I had to hide for two years.

4. Q. Did they beat your wife or child?

A. No, but they beat our next door neighbour.

5. Q. Did they beat your parents or brothers and sisters?

A. No. But they too have to hide."

16. Neither answers to these questions nor his statement seem to bear any relationship to the refusal letter. Indeed Mr Jorro pondered on whether the wrong refusal letter had been prepared for this case. We simply wish to state that the lack of skilled and professional care in reaching the initial decision necessarily places extra burdens on adjudicators. In this case, and for the reasons we have stated, Mr Chalkley was in effect having to reach a decision on the claim almost as if he were the original decision maker. Some jurisdictions operate such a system, as in Canada for example. But the UK has a different system, with the initial decision being taken by officials on behalf of the Secretary of State. It is incumbent on these officials to give each and every case anxious scrutiny. This, sadly in our view, did not occur in this case.

17. Mr Chalkley starts his determination by quoting both the record of interview and the appellant's additional statement sent on 3rd November 1997. He also quotes in full the statement prepared on behalf of the appellant for the hearing. The statement represents the most detailed account by the appellant why he wishes to seek international protection under the terms of the Geneva Convention.

18. On the basis of the evidence which he read and heard, Mr Chalkley made a number of findings of fact. The second finding is an adverse finding relating to the death of the appellant's father as a result of his having been beaten by "some whites." Mr Chalkley states that if the appellant's father had been a victim of a racist attack from which he had died, the appellant would have mentioned this at the interview, or even if he had not mentioned it at the interview it would have been in the statement sent on 3rd November 1997. Mr Chalkley said also that even if it had been a racially motivated attack he did not believe that it was materially relevant to the appellant's claim, as this had happened when he was 12 during the Communist period. We agree with Mr Chalkley in his last remark, although we see no justification for his rejecting as implausible the belief by the appellant that his father's death was racially motivated. We accept that the appellant believes subjectively that it was so motivated.

19. The third finding concerns events at school. We agree with the approach taken by Mr Chalkley that the violence of the school teacher as objectively viewed was "intended to chastise the appellant for having been late at College", although again we see no reason to reject the conclusion that the appellant subjectively believes that this chastisement was also racially motivated.

20. The fourth finding relates to the statement about his brother being attacked, about digging holes in the garden to hide, about the skinheads coming to the village four nights a week, and about furniture being destroyed by the skinheads. Mr Chalkley does not believe the appellant, finds that he has quite deliberately exaggerated his claims, and that his coming to the UK has nothing to do with a fear of persecution but rather a desire to improve his economic circumstances.

21. We have to say that we do feel that Mr Chalkley has applied the wrong approach in this case. Most importantly, he seems to have failed to relate the story which he was told at the hearing, and which in our view does not materially differ from the earlier less complete accounts, to the background evidence which was before him. It is our view that credibility findings can only really be made on the basis of a complete understanding of the entire picture. It is our view that one cannot assess a claim without placing that claim into the context of the background information of the country of origin. In other words, the probative value of the evidence must be evaluated in light of what is known about the conditions in the claimant's country of origin.

22. Mr Chalkley failed to adopt this approach, and thus we are entitled, in accordance with the principles we have enunciated above, to reconsider his findings.

23. We have read a considerable volume of material presented to us about the situation of Roma in Slovakia and their treatment. It is to this material that we now turn. The European Roma Rights report of 1997 was before Mr Chalkley. The Report was written by Claude Cahn and Nidhi Trehan as part of an international initiative for monitoring the human rights situation of Roma. The Report refers to attacks by skinheads which are common all over Slovakia, that in particular there are attacks by skinheads on children, that many Roma hide in their homes after nightfall, afraid to go outside. The ERR report concludes that the real heat of Slovak national populism is felt by Roma. These incidents are not in dispute by the Secretary of State and it is only right and proper that we set the appellant's story into the context of what we know about Slovakia and the problems experienced there by Roma.

24. There is another matter which we feel to be relevant in this case and it is this. The appellant said that he often hid from the skinheads. He and his friends feared what would happen to them. We believe that it is appropriate to place this statement of a subjective fear in its historical context. During the Nazi period many hundreds of thousands of Roma were victims of genocide. Estimates vary from 200,000 to 1.5 million. Eisenberg in his book "Witness to the Holocaust" states, in relation to the Roma: "When the bloodbath was over, only pitiful remnants were left alive. Except for the few survivors, a whole people, unique in its life-style, language, culture and art, was wiped off the face of the earth." With that historical perspective, it is only natural that the rise of nationalist populism of the Meciar period was met by the Roma with a genuine subjective fear of what may possibly await them. What is described by the appellant before Mr Chalkley is totally consistent with the literature we have read about the position of Roma in Slovakia. We accept that what the appellant has said with regard to the general situation in respect of Roma in Slovakia is correct. We believe that his subjective fear of what may await him if he is to return to Slovakia could well be genuine and, subject to any changes in Slovakia subsequent to the recent elections, we believe that they are well founded.

25. Whether they are fears of persecution or of something less than persecution is of course a fundamental question to which we shall return later in this determination. Simply because a person has a genuine fear of return does not by itself give rise to the requirement for international and surrogate protection. Before we turn to this question however we need to consider the question of the standard of proof which should be applied in asylum status determination.

THE STANDARD OF PROOF

26. In this case, and so far as we are aware for the first time since the promulgation of the Tribunal determinations in Kaja [1995] Imm AR 1, the Respondent reserved the right to argue that the "standard of reasonable likelihood" does not apply to any issue other than the

quantification of the risk of future persecution (or the well-foundedness of the fear of persecution). It is in some respects unfortunate that the issue has been so much the matter of debate in the UK, because it is our view that status determination should concentrate on protection from prospective risk of persecution. This should be forward looking. It is most unfortunate that all of us involved in this process in the United Kingdom have had what Professor Hathaway refers to as "an unhealthy fixation with past mistreatment." If we had concentrated on a forward looking assessment of risk, much of the debate would have been irrelevant.

27. Indeed, the Respondent accepts that when assessing whether a fear of persecution is well-founded, the test to be applied is whether the evidence of the situation in the country in which the asylum seeker fears persecution demonstrates that there is a "reasonable degree of likelihood that he will be persecuted." This test, laid down by the House of Lords in Sivakumaran is applied every day by adjudicators and Home Office officials. Mr Tam submits, however, that the House of Lords said nothing:

• about the approach to be adopted in relation to historical facts;

• to suggest that the standard applied to anything other than the assessment of the probability of future persecution;

• to indicate any disapproval of what it had earlier said in Fernandez [1971] 1 WLR 987, which was then adopted by Nolan J in Jonah [1985] Imm AR 7.

28. Mr Tam then submits that the decision of the majority in Kaja [1995] Imm AR 1 has been commonly understood to mean that an historical event or fact is proved by the asylum seeker when he demonstrates that there is a "reasonable likelihood" that the event or fact occurred. Mr Tam draws our attention to the dictum of Jowitt J in the unreported case of Iyadurai (19.3.98) where the decision in Kaja has been expressly doubted. The point was not taken up when it reached the Court of Appeal, and Jowitt J's comment remains no more than that. However, Mr Tam acknowledges that such higher court concern has prompted the Secretary of State to reopen the issue before us.

29. In effect, Mr Tam submits that:

(a) the decision of the majority in Kaja did not go as far as is commonly understood;

(b) in any event, it was:-

(i) per incuriam (particularly in the light of the binding decision of Nolan J in Jonah); and/or

(ii) wrong;

and the view of the minority should be preferred.

30. Mr Tam produces an analysis of what Kaja decides as argument 1 in his skeleton argument.

"6.6 Argument 1 - what Kaja decided

The majority decision in Kaja does not require a decision maker to accept a fact as proven as soon as the asylum seeker demonstrates that there is a reasonable likelihood that it occurred. Kaja decided only that the decision maker should not adopt an approach of first deciding what historical facts have been proved, and then quantifying from the proven facts the risk of future persecution, but that the decision maker should adopt a one-stage (or composite) approach to historical fact and future risk.

6.7 Any such composite approach should ignore different probabilities of different asserted historical facts having actually occurred. A decision maker should, even if following Kaja, assess how likely it is that each individual asserted fact actually occurred. The quantification of future risk can then be carried out from the picture thus revealed."

Although ingenious, we do not think that this analysis is correct. Suffice it to say that in Asuming (11530) where both Professor Jackson and Mr. Farmer (the majority in Kaja) sat together with a non legal member, and in Muamba (11716) (Mr Farmer, Professor Jackson, and Mrs Chatwani who is of course a member of this panel), the Tribunal set out very clearly indeed its understanding of the appropriate standard of proof as laid down in the majority determination in Kaja. The adjudicators in Asuming and Muamba had criticised and in effect refused to follow the majority approach in Kaja. In Muamba, the Tribunal said:

"In our view the adjudicator erred in law in applying the standard of balance of probability to his assessment of the facts."

31. Thus, it is our view that Mr Tam is not able to argue that Kaja decides something other than that which everyone since that case thinks it decides. He turns therefore to the argument that the majority were simply wrong. He says in his skeleton at 6.8 - 6.13:

"6.8 Argument 2 - Kaja was wrongly decided

In Fernandez, the House of Lords had rejected the use of "balance of probabilities" when quantifying future risk, holding that a lesser degree of likelihood than a 50% risk was sufficient to meet the test in the statute then under consideration. Lord Diplock expressly referred to the difference between "the degree of certitude which the evidence must have induced ... as to the existence of facts, so as to entitle the court to treat them as data capable of giving rise to legal consequences", and "prophesying what, if it happens at all, can only happen in the future" (993H-994A); he drew analogies with personal injuries claims involving risk of future change and with risk of future behaviour in the context of quia timet injunction claims.

6.9 In Jonah, Nolan J referred to the requirement that the court must make an "inference" or an "informed guess" as to what may happen in the future; in respect of that he accepted (in the asylum context) that something different from proof on the balance of probabilities was contemplated (p11). However, he also expressly said that the court "can only [make such an "inference" or an "informed guess"] on the basis of the facts proved on the balance of probabilities" (p11).

6.10 The minority in Kaja referred to this dictum and to Nolan J's quotation and acceptance of Fernandez. It is submitted that:-

(a) Jonah was binding on the Immigration Appeal Tribunal in Kaja and should have been followed;

(b) alternatively, Jonah represents the true state of the law and should be followed in preference to the majority decision in Kaja.

The remaining arguments expressed by the minority in Kaja are respectfully adopted.

6.11 The "balance of probabilities" standard does not mean that a "more than 50%" test should always be applied; the "balance of probabilities" test has always been more flexible than this when necessary - see Khawaja (HL) [1984] AC74.

6.12 The concern expressed by the majority in Kaja, arising out of the difficulty which asylum seekers notoriously have about "proving" aspects of their claims, are misplaced. It is true that most decision makers will have some uncertainty about some aspects of the evidence in any case, including an asylum case. However, it is not true that application of the "balance of probabilities" standard means "removing from consideration of any 'factor' about which there is uncertainty as to its existence".

6.13 Even on the "balance of probabilities" standard, the existence of a "proved" fact can be uncertain. This standard is clearly lower than the criminal standard. In Fernandez, Lord Diplock described the "balance of probabilities" as being "the degree of certitude which the evidence must have induced .. as to the existence of facts, so as to entitle the court to treat them as data capable of giving rise to legal consequences". Contrary to the view of the majority in Kaja,

application of the "balance of probabilities" standard includes consideration of some factors about which there is uncertainty as to their existence; it includes consideration of those factors which are sufficiently certain (judged by the demands of the subject matter of the case) to merit consideration."

32. In reply, Mr Jorro has submitted a supplementary submission in defence of Kaja. The main points are as follows:

"3.1 It is a feature of normal civil proceedings in English law that there are two parties each with their own version of events that they put before the judge. The judge must then decide which is telling the truth before he can then decide what to do about the matter in hand. However asylum appeals before special adjudicators are obviously very different from other civil proceedings - for a start they are appeals. Two parties do not go on relatively equal terms before a judge and ask him to rule on the matter. The special adjudicator's job is, starting with the assumption that the respondent is right (hence the burden of proof on the appellant), to determine whether in fact and law the decision was right (section 19 of the Immigration Act 1971 as applied by paragraph 4(2)(b) of the second schedule of the Asylum and Immigration Appeals Act 1993). In the vast majority of cases there is only one version of events - that of the appellant - for the special adjudicator to consider. The respondent does not call witnesses with an alternative version, rather he merely tries to pick holes in the appellant's story. As is acknowledged by UNHCR (paragraphs 196, 197, 203 and 204 in the Handbook) it is generally very difficult for an asylum seeker to prove that his or her story is true. In very many cases an appellant will not be able to prove that what he says has happened to him probably did happen. If the special adjudicator is to ignore all that evidence coming from the appellant that he (the special adjudicator) accepts may possibly be true but which has not been proved, on the balance of probabilities, to be true, in making his assessment of the likelihood of risk of future persecution, then the incidents of refoulement can only increase. This would be contrary to the United Kingdom's obligations under the Refugee Convention (cf. Section 8 of the Asylum and Immigration Appeals Act 1993).

3.2 Against this argument the point could be made that a wrong decision in, for example, a Children Act case can also lead to very undesirable results (see Lord Browne-Wilkinson's view on this very point in In re H and Others (Minors) (Sexual Abuse: Standard of Proof) [1996] 2 WLR 8 at 12). But again, it is submitted, asylum cases are different. In Bugdaycay [1987] Imm AR 250 the House of Lords emphasised the importance of care in asylum determination. In Sivakumaran [1988] Imm AR 147, Lord Keith endorsed Diplock's point that "... bearing in mind the relative gravity of the consequences of the court's expectation being falsified either in one way or the other, I do not think the test.. is that the court must be satisfied that it is more likely than not that the [applicant] will be detained or restricted if he is returned." Herein, it is submitted, lies a very important distinction between asylum appeals and Children Act proceedings. In the latter, if the judge wrongly (as it subsequently turns out) makes a care order, then a child is taken from its parents, a family is disunited (even if only temporarily if the true facts later come to light) - in family and child law terms, a disaster. If the judge wrongly does not make the order, then a child may be subjected to serious abuse - also a disaster in child and family law terms. The second, mistaken outcome, in most cases would be worse than the first (which is why, it is submitted, the view of the minority of their Lordships in In re H is to be preferred) but there is clearly a degree of balance to be struck between the various interests. With asylum appeals it is different. If the special adjudicator wrongly dismisses the appeal, the appellant may be subjected to death and/or persecution - in human rights, asylum and immigration (in as far as it is subordinate to asylum - see Section 2 of the 1993 Act) law terms, a disaster. If the special adjudicator wrongly allows the appeal, then the worst thing that can happen is that a non-refugee is allowed to stay in the United Kingdom (one or more person or family amongst 57 million) - in human rights and asylum law terms of no consequence at all; in immigration law terms, an abuse which, if the true facts later come to light, can be reversed. Clearly there is an even greater need for special adjudicators to err on the side of allowing appeals than there is for judges to err on the side of making care orders in Children Act cases.

3.3 Furthermore it is submitted that, in practice, what special adjudicators are supposed to do is to ascertain whether the appellant's evidence is credible (cf. Kingori [1994] Imm AR 539 per Glidewell LJ) rather than to determine which opposing sets of evidence is true - the advantage going to the defendant/respondent in accordance with the burden of proof where both versions are equally likely to be true (as in other civil proceedings). Credible is defined (in the Collins dictionary) as 1. capable of being believed. 2. trustworthy. This, it is submitted, is a lesser test than more likely than not to be true."

4. The respondent's critique

4.1 The respondent submits, inter alia, that the majority determination in Kaja was per incuriam 'particularly in the light of the binding decision of Nolan J. in Jonah'(at paragraph 6.4(b)(i). it is submitted that in Jonah Nolan J. found that the adjudicator had not erred in law by stating that "After reviewing the totality of the evidence before me, I cannot be satisfied, even on balance of probabilities, that the appellant's declared fears of persecution if he was to be return to Ghana are well- founded." Jonah pre-dates the judgment of the of the House of Lords in Sivakumaran and it is submitted that following that judgement there can be no dispute that the adjudicator's statement was an error of law. It is submitted that Nolan J's comments on the standard of proof to be applied to evidence of past events was obiter and was not binding on the Tribunal in Kaja (cf. per the majority at page 4 of [1995] Imm AR). It is further submitted that had it been binding, and that accordingly the determination of the majority in Kaja was per incuriam, it is inconceivable that that determination could have survived without effective challenge in the higher courts for so many years."

33. One matter, referred to us by Mr Jorro, persuades us that we must approach this matter with considerable caution. Parliament, for better or worse, has approved the reasonable likelihood standard to the assessment of past events in relation to torture in paragraph 5(5) of Schedule 2 to the 1993 Act as amended by s 1 of the 1996 Act. The point is developed in paragraph 5.2 of his supplementary skeleton.

"If the minority decision in Kaja were now (post the passing of the 1996 Act) to be substituted for that of the majority (as argued for by the respondent) this could easily - in an appeal to which the provisions of paragraph 5 had been applied - result in a genuinely absurd situation in which a special adjudicator, on assessment of the evidence concerning the appellant's claim to have been tortured and therefore persecuted in the past (and the appellant's claim being based on the fact that he has been persecuted in the past for a Convention reason and as nothing has changed in the relevant surrounding circumstances that his fear of being persecuted again if returned is well-founded), could properly find that there is a reasonable likelihood that the appellant has been tortured in the past (and on this basis disagree with the certification of the claim) but that there is not a probability that he has been persecuted (and on this basis dismiss the appeal) even though the claimed persecution and torture are one and the same."

34. We are persuaded by this argument, and it does not seem a sound argument to suggest that Parliament, when enacting the amendment to the 1993 Act, simply got the law wrong. We must follow the intention of Parliament and the intention of Parliament is very clearly expressed in s 1 of the 1996 Act. It would be difficult to argue for a different standard of proof in relation to allegations of torture as opposed to other allegations of persecutory acts in the context of a composite asylum claim.

35. For us the matter must remain as laid down by the majority in Kaja until such time as Parliament reconsiders the issue, which it is likely to have an early opportunity of so doing. Until it does so, it is the view of the Tribunal that adjudicators would be well advised to concentrate on considering the whole issue which is before them and to consider on that evidence, whether there is a reasonable degree of likelihood that the appellant has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.

DEFINITION OF PERSECUTION

36. We turn now to the most important part of this case. Is the appellant entitled to international protection in the sense that he can demonstrate to the standard of a reasonable likelihood that he has a well-founded fear of persecution by virtue of a Convention reason? We agree with the UNHCR submission in this case that the history of the Roma in Slovakia has a bearing both on the subjective fear of the appellant and on the reasonableness of the appellant's assessment of what may happen to him on his return. We have read, in this context, very carefully indeed the UNHCR Guidelines relating to the eligibility of Slovak Roma Asylum seekers of 10th February 1998. We have also read of course the material which has been submitted in relation to the results of the Slovak elections and the likely change of Government. It is our view that it is too early to draw any inferences from the election results, and it would be wrong of us to speculate. As of the latter part of 1998, therefore, we do not think that the plight of the Roma is markedly different to that which is documented in the UNHCR Guidelines of February 1998. Suffice it to say that there is enough evidence for us to conclude that the "fear" of the appellant is well-founded. The Secretary of State concedes that he falls within a category, namely race, which is protected by the Convention. The question with which we must deal now is whether the "fear" is of persecution for a Convention reason, or of something less than that.

37. Mr Jorro submits that the background documentary evidence clearly demonstrates that Roma are racially discriminated against in the Slovak Republic in terms of their access to justice, education, employment, housing, health care and generally their civil rights. Mr Jorro then develops the arguments advanced both by Professor Guy Goodwin-Gill and by Professor James Hathaway that international protection must be available if there is proof of a "sustained and systemic denial of core human rights." The UNHCR in its submissions to us stressed, by way of summary, that the term "persecution" while not defined in the 1951 Convention is fundamentally linked with the regime of human rights law which has been accepted by the international community and which is found in a variety of international and regional treaty instruments. The UNHCR refers to the preamble to the 1951 Convention and refers us also to the submissions made by it in the case of Gashi and Nikshiqi [1997] INLR 96. In the submissions in Gashi, the UNHCR had said: "without reference to these fundamental rights standards, the assessment of persecution may take place in somewhat of a legal vacuum. In UNHCR's opinion this linkage exists as a matter of law and not only for the subjective convenience of the decision-maker in any particular case." The UNHCR makes its position clear at para 1.4 of its further submissions in the Gashi case.

"It is clear that some human rights are more quintessential than others. Where the harm feared involves the violation of a core human right, such as the sanction against torture, then an isolated episode might constitute persecution. Where the harm feared involves the violation of some lesser human right, then the decision maker might require evidence of a sustained or systemic denial of the rights that have a cumulatively intolerable effect, for the threshold of persecution to be met."

38. Professor Hathaway develops a four fold category at pp 109-112 of his book. This reads as follows:

"First, in the hierarchy are those rights which were stated in the Universal Declaration, translated into immediately binding form in the ICCPR, and from which no derogation whatsoever is permitted, even in times of compelling national emergency. these include freedom from arbitrary deprivation of life, protection against torture or cruel, inhuman, or degrading punishment or treatment, freedom from slavery, the prohibition on criminal prosecution for ex post facto offences, the right to recognition as a person in law, and freedom of thought, conscience, and religion. The failure to ensure these rights under any circumstances is thus appropriately considered to be tantamount to persecution.

Second are those rights enunciated in the UDHR and concretized in binding and enforceable form in the ICCPR, but from which states may derogate during a "public emergency which threatens the life of the nation and the existence of which is officially proclaimed". These include freedom from arbitrary arrest or detention; the right to equal protection for all, including children

and minorities; the right in criminal proceedings to a fair and public hearing and to be presumed innocent unless guilt is proved; the protection of personal and family privacy and integrity; the right to internal movement and choice of residence; the freedom to leave and return to one's country; liberty of opinion, expression, assembly, and association; the right to form and join trade unions; and the ability to partake in government, access public employment without discrimination, and vote in periodic and genuine elections. The failure to ensure any of these rights will generally constitute a violation of a state's basic duty of protection, unless it is demonstrated that the government's derogation was strictly required by the exigencies of a real emergency situation, was not inconsistent with other aspects of international law, and was not applied in a discriminatory way. Where, for example, the failure to respect a basic right in this category goes beyond that which is strictly required to respond to the emergency (in terms of scope or duration), or where the derogation impacts disproportionately on certain subgroups of the population, a finding of persecution is warranted.

Third are those rights contained in the UDHR and carried forward in the International Covenant on Economic, Social, and Cultural Rights. In contrast to the ICCPR, the ICESCR does not impose absolute and immediately binding standards of attainment, but rather requires states to take steps to the maximum of their available resources to progressively realize their rights in a non-discriminatory way. The basic values protected are the right to work, including just and favourable conditions of employment, remuneration, and rest, entitlement to food, clothing, housing, medical care, social security, and basic education; protection of the family, particularly children and mothers; and the freedom to engage and benefit from cultural, scientific, literary, and artistic expression. While the standard of protection is less absolute than that which applies to the first two categories of rights, a state is in breach of its basic obligations where it either ignores these interests notwithstanding the fiscal ability to respond, or where it excludes a minority of its population from their enjoyment. Moreover, the deprivation of certain of the socio-economic rights, such as the ability to earn a living, or the entitlement to food, shelter, or health care will at an extreme level be tantamount to the deprivation of life or cruel, inhuman or degrading treatment, and hence unquestionably constitute persecution.

Fourth, a few of the rights recognized in the Universal Declaration were not codified in either of the binding covenants on human rights, and may thus be outside the scope of a state's basic duty of protection. The right to own and be free from arbitrary deprivation of property and the right to be protected against unemployment are examples of rights which are included in this group, and which will not ordinarily suffice in and of themselves as the foundation for a claim of failure of state protection.

In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community. The types of harm to be protected against include the breach of any right within the first category, a discriminatory or non-emergency abrogation of a right within the second category, or the failure to implement a right within the third category which is either discriminatory or not grounded in the absolute lack of resources. The sections which follow examine the application of this general principle in specific contexts."

39. Hathaway's approach was considered in Gashi where the Tribunal accepted the thesis advanced by Hathaway. Indeed, it is arguable that Gashi goes further than Hathaway in perhaps overlooking the requirement of a threshold at which ill treatment becomes persecution.

40. Mr Tam submits that there is ample authority in English law for the proposition that breach of first or second category rights as defined by Hathaway can amount to persecution (Ahmad [1990] Imm AR 61, Binbasi [1989] Imm AR 595, Moezzi [1989] Imm AR 600 note, Jonah [1985] Imm AR 7, Ravichandran [1996] Imm AR 97), but that when one looked to the third category, Hathaway is referring really to "goals of achievement". Mr Tam says that the third category does not include rights in themselves, but rather an obligation to provide those rights progressively. Mr Tam acknowledges however that with a suitably high threshold, it is possible in this context to talk of persecution. The only cases which Mr Tam says he could find where third category

rights alone were involved were Chiver [1997] INLR 212 and Gashi. He submits that the point was not argued in Chiver, and that if it had been it may be that the Tribunal in that case would have accepted that the deprivation was so severe as to amount either to a deprivation of life or to leave the claimant hungry or starving (ie degrading treatment). Mr Tam submits that Chiver is not a good authority for the proposition that third category rights could of themselves amount to persecution. Mr Tam submits further that the result in Gashi can be explained because the ill-treatment amounted to the removal of an entire ethnic group from the region and there was a plain breach of third category rights; in effect the threshold had been breached. He went on to say that if Gashi is taken to have gone further; namely that breaches of some aspects of third category rights are capable in themselves of forming the basis of an asylum claim, then the case is simply wrong. He submits that the only breaches of third category rights which amount to persecution should be those which are so serious that they amount to persecutory breaches of first or second category rights.

41. In developing this last point, Mr Tam states that if lesser breaches of third category rights were capable of founding asylum claims, the consequence would be that international protection would be required to be offered against any failure of a country of origin adequately to implement such rights.

42. So far as the fourth category was concerned, Mr Tam says that breach here would be outside the scope of the Geneva Convention.

43. In our considered opinion, the term "persecution" should be defined by reference to human rights standards. In this respect we agree with the academic commentators, in particular Goodwin-Gill and Hathaway, and we associate ourselves with the view expressed in Gashi that decision makers should look in particular at the preamble to the 1951 Convention. Mr Tam in his submissions accepts that English law has moved towards an acceptance of Hathaway's analysis of categories of human rights.

44. The UNHCR accepts of course that discrimination may amount to a violation of human rights, not necessarily amounting to persecution. The UNHCR states that it amounts to persecution where the measures of discrimination "lead to consequences of a substantially prejudicial nature for the person concerned" and it cites para 53 - 55 of the UNHCR Handbook. We refer also to paragraph 42 of the Handbook.

"53. In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (eg discrimination in different forms), in some cases combined with other adverse factors (eg general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds". Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, eg serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.

55. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be

stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved."

"42. As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgment on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin - while not a primary objective - is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there."

45. Mr Jorro adopts these paragraphs, and further, by referring to the East African Asians Case [1981] 3 EHRR 76, argues that discrimination on the basis of one's race is particularly pernicious.

46. It is essential in our view that we bear in mind the words of Nolan J in Jonah who said "...the courts must remember that the test of persecution is and must be kept at a high and demanding level." We read the approach by Lord Goff in the House of Lords in Sivakumaran to imply that the last sentence to paragraph 42 of the UNHCR Handbook does not represent English law. The fact that the Handbook is a valuable and essential tool for all those involved in asylum and refugee law, does not mean that it fully reflects English law in every particular. We agree with Mr Tam when he says that the rejection of the "partly subjective" approach in Sivakumaran carries with it the logical consequence of the rejection of the "feeling of apprehension and insecurity" approach as set out in paragraph 55. We do not think that the East African Asian case, dealing as it does with the European Convention on Human Rights, can be relevant in the context of defining "persecution": discrimination for any reason is pernicious, and it is our opinion that the circumstances for the threshold being crossed so as to amount to persecution should have nothing to do with the reason for the discrimination.

47. We have formed the view that we must look at the acts of discrimination which have been identified in this case. We accept that a well-founded fear of persecution may arise on the basis of an accumulation of discriminatory measures. In the case of Kloc and others (CC/59478097), Mr McGeachy, the Special Adjudicator, made the following findings:

"I find that discrimination against Roma in Slovakia is rife among all sections of society from individuals such as employers or shopkeepers to officials such as hospital managers, local authority personnel dealing with matters such as residence permits or local mayors reflecting local opinion and instructing local officials to act in a discriminatory way. Discrimination is present in all fields. I accept the detailed analysis in the UNHCR Report annexed to this Determination. While it is evident that Roma receive the same entitlement to Social Security as other Slovakians and do receive housing and education there is clear evidence before me that the housing that Roma receive, which may well reflect the way in which nomadic Roma were "settled" in recent decades is of a lower standard than that given to ordinary Slovakians. There is also evidence that it is extremely difficult for Roma to obtain work, despite their qualifications, from either State or private employees because of discrimination. They face discrimination in obtaining medical treatment and in relocating within Slovakia. Moreover even given the caveats to which I refer below the treatment of Roma by the police is clearly also discriminatory. I note that the UNHCR guidelines states, in section 7 headed "Analysing the basis for the claim of persecution" the following "On the basis of the foregoing information while there should not be a prima facie acceptance of status, it is clear that Slovak Roma may well be able to substantiate refugee claims based on severe discrimination on ethnic grounds."

He then considered cumulatively the discrimination the appellants in the cases before him suffered and will suffer. He found that although each act of discrimination does not of itself amount to persecution, looking at the apprehension it engenders together with the violence they

have suffered and would suffer, there is a serious likelihood that they would face serious and persistent ill-treatment.

48. Mr McGeachy's determination is a very full and lucid account. However, we would disagree with Mr McGeachy's analysis in a number of respects. First, in talking about "apprehension" it is our view that he moves towards a subjective approach which of course was, in terms, rejected by Sivakumaran. More importantly, the various acts of discrimination identified in all the literature, and commented upon by Mr McGeachy, being third category rights, are not in our view sufficiently serious, even when treated cumulatively, as to amount to persecution. It is our view that the problems associated with unemployment amongst the Roma in Slovakia are due primarily to poor education and lack of professional qualifications making it difficult for them to compete successfully in the labour market.

49. The problems arise from the long term effects of decades of poor conditions. The problems associated with housing is mentioned in the UNHCR document (p 192 of the Tribunal bundle). The UNHCR states:

"2.1.4. Housing/Residence - One of the chief goals of the former communist regime's assimilationist approach to Romany issues was urbanization, the consequences of which are strongly felt today. By these policies, Roma previously accustomed to living in their own communities were forced to move to cities and villages and abandon for the most part their traditional way of life. The forced socio-cultural integration of Roma almost brought the traditional social hierarchy of Roma communities to an end. As their cultural lifestyle was not compatible with such urbanization, some demolished their new living space. This in turn exacerbated resentment at the seemingly favourable treatment granted to Roma.

Roma are now discouraged from moving towards urban employment centers through the use of location-specific residence permits. Further, their reputation for abusing flats and housing leads to discriminatory practices by local housing authorities. Roma are expelled from their homes or live under the threat of expulsion by local and regional authorities, and have difficulties registering their permanent residence.

Slovakia's chronic housing shortage combined with local initiatives to remove from town centers those delinquent in rent (many Roma) make life all the more difficult for many Roma. Slovak authorities have begun to crack down on individuals and families without legitimate local residence permits for the flats in which they live. This is one method of removing them from urban centers. Those already living on the outskirts of towns and villages are often without electricity, water or both. Sanitation services in such settlements are minimal. It is not uncommon for three-room apartments to be occupied by three Roma families, each with more than six members. Others are forced by the circumstances to squat in abandoned apartments which are either condemned or are publicly-owned buildings awaiting sale to private bidders."

This is a mixed picture. We do not, however, think that it amounts to persecution. Some landlords are clearly concerned to protect their property, as Mr Tam suggests in his arguments before us. We do not necessarily accept the argument advanced by Mr Tam, if we understand him correctly, that we are entitled to see if there is any justification for the feelings by the local population. The manifestations of violence that have been documented are not, however, in our view sufficiently serious to entitle us to conclude that acts of discrimination and breaches of third category rights are such that the fear which the appellant has of return is that of persecution rather than that of discrimination. It is our view that while the appellant has a genuine and well-founded fear of discrimination, this does not entitle him to surrogate protection under the Geneva Convention as understood and applied in the United Kingdom.

NON STATE AGENTS OF PERSECUTION

50. It is our view that the line between discrimination and persecution may be crossed when the State becomes involved (as in Gashi) or when the State does not provide a "sufficiency of protection" for its citizens against the most blatant forms of discrimination by sections of the populace. The Tribunal developed this approach in Mojka (18265). It is perhaps appropriate to

say here that the phrase "the most blatant forms of discrimination" (as stated in Mojka) carries with it the same meaning as "a high threshold" which we have used in this case.

51. The Tribunal has had cause in recent months to consider this matter in some detail in the cases of Jaworski (17152), Debrah [1998] INLR 383 (17606), Chinder Singh (BILS 2E [701](G0055), Mojka (18265), and Dymiter (18467). Both Mr Tam and Mr Jorro accept that the Tribunal's approach in these cases is correct. Thus the test is:

"Is there in place in the country a sufficiency of protection? One needs to enquire into the various steps which have been taken by the country to see whether this protection is in place. If this sufficiency of protection is in place, then the need for international protection is not required. Thus it is not the test simply to ask whether the country "knowingly tolerates" persecutory acts by its agents or by sections of the community. Neither is it the test to ask whether the protection is effective...we believe that it is indeed the responsibility of the decision maker to ascertain whether the systems of domestic protection which are in place are sufficient from the perspective of international law." (Debrah). As the Tribunal said in Chinder Singh, "In order to decide whether the protection is sufficient, it will of course be necessary to have some regard to its effectiveness. How much regard will depend upon the circumstances of the individual case."

52. Mr Tam's approach is contained in paragraph 15.7 - 15.9 of his skeleton argument:

"15.7 With particular relevance to this case, if there is an issue as to whether the minimum standard has not been met because of "unwillingness" to protect against ill-treatment, this should be construed by reference to ill-treatment which is "supported or tacitly approved"; it is that type of "unwillingness" to protect which constitutes the failure by the country of origin to provide protection of the asylum seeker's rights.

15.8 Consequently, where there is willingness to take action, but it is not enthusiastic or is patchy or unreliable, that is unlikely to be the type of "unwillingness" which is necessary to make the actual perpetrators of the ill-treatment "agents of persecution".

15.9 "Agents of persecution" and discrimination

If there is ill-treatment by discrimination, the principles regarding "agents of persecution" remain applicable. Discrimination cannot amount to "persecution" within the meaning of the Convention unless:-

(a) the discrimination is carried on by the authorities of the country of origin (see, potentially, Ahmad, Moezzi and Binbasi); or

(b) it is carried on by others and is supported or tacitly approved by the authorities; or

(c) it is carried on by others and the authorities are unwilling, or unable, to provide a minimum level of protection against such discrimination required by international law."

53. We agree with Mr Tam's analysis on this point, although it is important to emphasise (as indeed Mr Tam did) that acts by private citizens when combined with State inability to protect, may constitute "persecution". But it is the failure of the State to provide protection which in our view converts the discriminatory acts into persecution (that is an objective test) rather than looking at the issue from the perspective of the allegedly persecuted (the subjective test).

54. Mr Jorro, in trying to persuade us away from that conclusion, submits that, as a matter of law, in order to ascertain whether the systems of domestic protection which are in place are sufficient from the perspective of international law, the decision maker must decide whether in all the circumstances it is reasonable to expect the applicant to seek and obtain domestic protection. He seeks support for this proposition from the words of Lord Lloyd in Adan [1998] INLR 325 at 329 and the analogous "internal flight" issue in Robinson [1997] Imm AR 568. Applying that proposition to this case, Mr Jorro goes on to submit that

"in the context of the serious racial discrimination directed against Roma in the Slovak Republic and the sympathy shown towards racists by many elements within the higher echelons of power

in that State and the frequent unwillingness of local State authorities to assist Roma when attacked by racists (as all demonstrated by the background evidence) it cannot be reasonable to expect Roma to seek and obtain domestic protection from agents of persecution in the Slovak republic."

55. Attractively as Mr Jorro puts this argument we do not think he is correct. First and foremost it is evidence of State failure to protect which in our opinion transforms discriminatory acts into persecutory ones. We agree with Mr Tam on this point. It cannot be right that the act becomes persecutory simply because an individual thinks that he cannot obtain protection. That places too great a responsibility on the individual concerned; and international or surrogate protection must surely only be required when domestic protection is not available. It is not for an individual to decide for himself when he thinks the domestic protection is unavailable. We think Lord Lloyd is really making the same point when he says:

"If the State in question can make protection available to such persons, there is no reason why they should qualify for refugee status. They would have satisfied the fear test, but not the protection test. Why should another country offer asylum to such persons when they can avail themselves of the protection of their own country? But if for whatever reason the State in question is unable to afford protection against factions within the State then the qualifications for refugee status are complete."

We cannot possibly read Lord Lloyd as suggesting "for whatever reason" to include the decision of the claimant not to seek the protection of the State. Such a reading of Adan is not justified by a reading of the entirety of Lord Lloyd's speech.

56. Likewise we do not think that Robinson [1997] Imm AR 568 and the discussion there of the internal flight alternative helps Mr Jorro's argument. The "reasonableness" of a relocation to another part of the country is predicated on the reality that there is a well founded fear of persecution in a particular part of the country. Robinson then concerns itself with the question of whether relocation to another part of the country is unreasonable or unduly harsh. It is not concerned with the question of whether the acts are persecutory in the first place.

57. La Forest J in Canada v Ward [1997] INLR 54 put the point correctly in our view when he said that acts by private citizens, when combined with State inability to protect, may constitute persecution. State complicity is, of course, not a necessary component. La Forest J goes on to develop the point. He states:

"...how in a practical sense [does] a claimant make[s] proof of a State's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection?"

La Forest J says that clear and convincing confirmation of a State's inability to protect must be provided.

"For example a claimant might advance testimony of similarly situated individuals let down by the State protection arrangement or the claimant's testimony of past personal incidents in which State protection did not materialise. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens."

We would only add one important point to this analysis, and it is that if the persecution being complained of amounts in effect to cumulative acts of discrimination (breaches of lower order rights) then the unwillingness on the part of the claimant to avail himself of domestic protection must be accompanied by cogent evidence; otherwise the "threshold" will be set unduly low, and potentially successful refugee claims will extend well beyond those involving feared persecution at the hands of the claimant's Government.

THE APPLICATION OF THESE PRINCIPLES TO THE ISSUE OF ROMA FROM SLOVAKIA, AND THIS PARTICULAR APPELLANT

58. Mr Jorro, whilst not necessarily agreeing with the Tribunal's conclusions relating to the Roma from Poland, asks the Tribunal in the present case to "apply the same logic to the background situation in the Slovak Republic". Mr Jorro refers us to the OSCE Report which makes specific reference to violence and discrimination against Roma, to the UNHCR view [pp 197-184 of Tribunal bundle] which Mr Jorro argues is a view very different to the UNHCR approach on Poland, to the US State Department report [pp 183-171 of the bundle] and the totality of the second supplementary bundle of the appellant [8 documents from BBC Summaries, the Prague Post, the International Herald Tribune, memorandum of the International Helsinki Federation for Human Rights, Articles in Transitions]. We have of course read carefully all this documentation. We have read also all the documentation which was before Mr McGeachy in the case of Kloc, and which was before Mr Chalkley in the present case.

59. We can summarise this evidence by stating that it is our view that it shows quite conclusively that there is racial violence against the Roma perpetrated by "followers of the Skinhead movement". The police do not conduct proper investigation in all cases and there are instances where they have been very slow to conduct a full investigation. But stiff sentences are imposed at times for crimes which are racially motivated, for example the case of Mario Goral's death. There is increasing evidence of human rights activists being involved in Roma cases, and in Topolcany the perpetrators of a brutal attack by a gang of skinheads on Romani children were prosecuted. The risks of attacks by skinheads is real and we have cogent evidence that it has happened. Of course, even on the appellant's own story, such attacks have not happened to the appellant; and we conclude, on the basis of the evidence we have read that these violent attacks are on the whole isolated and random attacks by thugs.

The police are seen to be inefficient and ineffective by the Roma, and it is the case that they very rarely seek police protection. There is some evidence that the police have been slow to deal with complaints. On the other hand, there is also evidence that there have been prosecutions, and the police have intervened to provide protection when asked. Indeed in the instant case itself, the police did come to investigate.

There is evidence of clear breaches of lower order "rights" relating to employment, housing, and education.

60. We have looked at all this evidence, and have applied the principles which we have enunciated in this determination in deciding whether or not the appellant has demonstrated that he has a reasonable likelihood of a well-founded fear of persecution if he is returned to Slovakia. We have decided that he falls below the high threshold which we believe is required for international protection in a case where the fear is of an accumulation of discriminatory acts and where it is alleged that there is not a sufficiency of protection from non-state agents. It is our view that his fear is not that of persecution.

61. Our reasons are, in summary, as follows:

(a) the framework within which the appellant would be required to readapt if he were to return to Slovakia has to an extent now changed since the 1998 Election, and the subsequent departure of Meciar. It is of course too early to know what will happen, and there are bound to be difficult economic times ahead for the country. However, it is our view that, now that the extreme nationalist tendencies have been relegated to a much smaller section of the community than previously, it is likely that there will be much more emphasis on ties with the EU and other West European organisations. This is likely to enable international pressure to be placed on the Government to improve the human rights situation in the country for the minority groups, especially the Roma. The situation therefore is today quite different from the situation in the country when Mr McGeachy was writing his determination in Kloc.

(b) But in any event and more importantly, our reading of the literature, although troublesome, does not bring us to the conclusion that the discrimination combined with the violence, together and accumulated, can amount to persecution. We believe that the literature shows that Slovak Roma as a group and as individuals have a fear, which is genuine and well-founded, of

discrimination. It may be that for some Slovak Roma, who perhaps have been the victims of serious violence, the threshold would be crossed. But for the majority of Roma from Slovakia, and in particular for this appellant, we believe that the threshold has not been crossed, and he cannot claim the benefit of international protection under the terms of the Geneva Convention.

For these reasons, therefore, we dismiss the appeal and uphold the determination of Mr Chalkley, although of course for different reasons. This determination is promulgated as from the date it is handed to the parties, which is December 4th 1998.