C/2000/3504

Neutral Citation Number: [2001] EWCA Civ 832

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice

Strand

London WC2

Thursday, 10th May 2001

B e f o r e :

LORD JUSTICE SCHIEMANN

-and-

LORD JUSTICE TUCKEY

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

FRANTISEK KATRINAK

Appellant

- v -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT Respondent

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

(Computer Aided Transcript of the Stenograph Notes of

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MR M GILL, QC AND MISS S JEGARAJAH (instructed by Lloyd & Associates, London W12 8LP) appeared on behalf of the Appellant

MISS E LAING (instructed by Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Respondent

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J U D G M E N T

1) LORD JUSTICE SCHIEMANN: Before the court is an asylum case. We heard an appeal against a decision of the Immigration Appeal Tribunal rejecting an appeal against a decision of a special adjudicator who himself had rejected an appeal from the Secretary of State for the Home Department.

2) The appellant is a citizen of the Czech Republic. He is a Roma. He and his wife had suffered physical and verbal abuse because of the fact that they were Romas. The abuse did not come from the state or organs of the State. However, the forces of the State had not sufficed to prevent the abuse happening. The term "refugee" is defined in the Geneva Convention as follows:

> "The term "refugee" shall apply to any person who... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, unwilling, to avail himself of the protection of that country."

3) The definition of refugee, it can be seen, looks to the future. The past is only relevant inasmuch as it is one of the evidential factors which it is often, but not always, relevant to consider when deciding whether the claimant has a well-founded fear that he will be persecuted in the future if he returns to the country of his nationality.

4) In those circumstances the task of the decision taker, whether it be the Secretary of State or the appellate tribunals, is to decide whether the applicant has a fear of persecution in the future and, if so whether that fear is well-founded. A fear will be regarded as well-founded if there is a reasonable degree of likelihood that, if he is returned the applicant will be subjected to a degree of ill-treatment which is sufficiently severe to qualify as persecution.

5) If as in the present case one is concerned not with acts by the state or its organs but acts by others, then, however severe the ill-treatment, persecution will only be found if the lack of protection afforded by the home state against such attacks is such as to indicate that that state is unable or unwilling to discharge its duty to establish and operate a system for the protection against persecution of its own nationals.

6) All this is established in a case concerning Roma from the neighbouring Republic of Slovakia, Horvath v Secretary of State for Home Department [2000] 3 WLR 379 at 383. That, as appears from page 384, was a case where skinheads did perpetrate racial violence against the Roma where the police did not conduct proper investigations in all cases and where their investigations were sometimes very slow, but where on the other hand they had intervened when asked and heavy sentences had been imposed. The conclusion of the tribunal in that case was that the violent attacks upon Roma were isolated and random attacks by thugs. The finding of the tribunal that this did not amount to persecution was upheld.

7) In the present case the special adjudicator accepted the appellant as truthful. He said this:

> "In summary the appellant seeks asylum because of the racial attacks that both his wife and himself have suffered. His wife was attacked by a group of skinheads while she was shopping, she being pregnant at the time and the subsequent child who was born suffering kidney problems. This attack was reported to the police

but the appellant is of the view that the police were not interested in pursuing an investigation being of the view that the wife had probably fallen.

The appellant himself worked on a building site and suffered racial abuse from skinheads at that venue. He was able to run away on these occasions. However, in June of last year he was attacked and suffered personal injury including the loss of two teeth, and a cut face. He says he reported this matter to the police but the officer took no notice and said that the appellant had no proof he was beaten.

He says that the skinheads were still waiting for him at his place of employment following this attack and despite going to the police to make a further complaint he is of the view that they have told him that they, the police, were not going to stand there and protect him as they, the police, had work to do."

8) Later in his reasons the special adjudicator said this:

> "I find as a fact that the appellant is a credible witness and find as a fact that all of which he told me in his witness statement was the truth. However, I find as a fact that the attack which took place upon the appellant, and the attack which took place upon his wife, and the racial abuse which he claims to have suffered from the skinheads does not either individually or in the aggregate constitute persecution as defined in the leading cases. For example, deriving from Sandralingham and Ravichandran, I am of the view that persecution must at least be persistent and serious ill-treatment without just cause by the State or from which the State can provide protection but chooses not to do so. Here, I find that the human rights abuse which the appellant and his wife have suffered do not constitute persistent and serious ill-treatment. Without wishing to minimise the seriousness of the attacks, I am faced with evidence of one attack causing personal injury to the appellant and one attack causing personal injury to his wife and instances of racial abuse which have not been further or better particularised before me. Accordingly, I disagree with the appellant's representative and find that this appellant has not crossed the threshold which separates racial abuse and discrimination from persecution."

9) Thus it can be seen that in substance the special adjudicator held, first, that the treatment suffered by the appellant and his wife in the past did not amount to persecution because it was not both persistent and serious; and second that he was not satisfied that there was insufficient state protection.

10) Permission was given to appeal to the Immigration Appeal Tribunal. The Immigration Appeal Tribunal had therefore to consider the following: 1. Was there a reasonable degree of likelihood that the appellant would be subjected to ill-treatment if he were returned? 2. If so would any such ill-treatment be of a severity which, in the case of this appellant, would amount to persecution if done by the state? 3. If so was the protection against such ill-treatment afforded by the state nevertheless of such a quality as not to call for surrogate protection by the international community.

11) The IAT did not separate these questions out in this fashion. Their decision starts by rehearsing the beginning of the submissions made on behalf of the appellant. Those were that the special adjudicator had erred in requiring persistency of ill-treatment before there could be persecution

and in failing to assess the likelihood of future persecution. The advocate for the appellant then started to address the tribunal on other matters, but the tribunal stopped him. The tribunal's decision says this:

> "At this point we adjourned in order to consider the submissions made thus far. We stated to Mr O'Ryan"

- who was the advocate for the appellant -

> "that we did not need to hear from him further since we were not persuaded that he had shown that the evidence properly led to the conclusion that the appellant had shown a risk that he would be treated in the same way again and therefore questions of whether what he suffered was persecution or would be and the question of protection if he suffered the same again did not properly arise."

12) It is to be noted that the appellant's advocate was stopped before he had concluded his case and his submissions.

13) While not wishing to circumscribe the way in which the tribunal organises its own hearings, I have to say that if it stops an appellant's advocate from developing his client's case it needs to be very sure of its ground. Read on its own the paragraph which I have cited from the tribunal's decision indicates the possibility of a wrong approach in law. An appellant has to show a reasonable likelihood that he will be persecuted if returned. He does not have to show any likelihood that he will be subjected to the same treatment as he has already experienced.

14) The tribunal went on to reject an argument that a person who had been attacked in the past was at particular risk in the future because he had been attacked. As they put it:

> "The fact of that one attack does not make him more likely to suffer similar attacks in the future than would be the case if he had not been attacked."

15) That conclusion was, as it seems to me, open to them. The IAT had before it evidence both as to what had happened to the appellant and his family, and the position of Roma in general in the Czech Republic. They rejected his claim because he had lived as a Roma in the area of land which is now contained in the Republic for 29 years during which time he had suffered only one attack. I read the last three paragraphs from the tribunal's decision:

> "10. ... O'Ryan suggested to us that the appellant was more at risk because of increased violence to the Roma community in the Czech Republic. For example, he took us to paragraph 8 at page 106 of the bundle referring to a recorded six-fold increase in racially motivated crimes between 1994 and 1996. That was several years ago however, and in our view can not be taken as indicative of an increased threat to this appellant at this time. Mr O'Ryan also referred us to paragraph 19 at page 42 of the bundle. The Czech Documentation Centre for Human Rights has stated that as of 30 September 1999 there were 1,781 racially or idealogically motivated crimes committed in the Czech Republic since 1990. 830 of these were violent attacks, the remainder being verbal. In 22 cases, the victim died as a result of the attack. 390 attacks in 1998 are said to represent a significant increase from previous years. It is the case however that we are dealing with an appellant who suffered an attack in 1999. We do not have evidence before us to show significant

increases continuing from either the 1994 to 1996 period or the 1998 period as indicative of a significantly increased threat.

11. At the end of the day therefore the appellant is a man who in the 29 years of his life in Czech Republic has suffered one attack which appears to have been on account of his Roma ethnic origin. He has otherwise been subjected to harassment. His experiences must be taken as a whole, and we cannot ignore the significance of the fact that he has been the victim of only one such attack, however regrettable that of course is, during those 29 years. We find it impossible to extrapolate from that and the general situation of the Roma in the Czech Republic a reasonable degree of likelihood of repetition of such events in the future. Mr O'Ryan argued that the appellant was vulnerable because he worked in a trade where many Roma worked, but again he had worked in that trade for more than ten years and had only been subject to one attack. We do not find ourselves at all persuaded by the argument that the fact of one attack puts him particularly at risk in the future. Nor do we find that the degree of increase of hostility and violence towards the Roma community in the Czech Republic in the general sense in which that has developed is such as to entail a reasonable degree of likelihood that this appellant is at serious risk of persecution if returned to the Czech Republic.

12. This appeal is accordingly dismissed."

16) It can be seen that the IAT did not address two questions in terms. 1. The question whether what had happened to the applicant in the past had sufficiently severe consequences as to amount to persecution if done by the state. 2. The question of sufficiency of protection by the state against such treatment.

17) For my part I would think that acceptable if the tribunal decision indicates that it found that there was no reasonable degree of likelihood that the appellant would be subjected to ill-treatment of a severity as to amount to persecution if done by the state, and it articulated its reasoning process in an acceptable manner.

18) Reading the decision of the IAT as a whole I consider that paragraph 11 does indicate the view of the tribunal that the appellant, if returned, would not be at risk of ill-treatment of such severity as to amount to persecution if done by the state. Therefore, as it seems to me, the crucial question is whether it can be shown that the tribunal reached this conclusion by a legally adequate process of reasoning.

19) In considering this question the following matters appear to me to be relevant. First, the fact that the appellant and his wife have each, in the year before they fled, been the subject of physical violence because they were Roma is in itself a pointer to the fact that, absent any change since then in the republic in either the attitudes towards Roma or the quality of protection they would be at some risk in the future; not because they had been attacked in the past, but because they remained Roma.

20) Second, the tribunal identified no such change either in the quality of protection or in the attitudes of a significant number of the Czech population towards Roma. The tribunal identified no such change in the Republic. Instead in paragraph 10 (which I have read) they quoted some statistics. For my part in so far as the statistics have any significance they indicate that in 1998, the year in

which the appellant's wife was attacked, the chances of such an attack were higher than the average in the previous years. Whether there has been a further increase since then is not, as it seems to me, decisive of the question whether the risk of attack during that year can be described as a reasonable likelihood of attack.

21) Third, the attacks also potentially evidence the appellants' vulnerability in the future. An activity which would not amount to persecution if done to some people may amount to persecution if done to others. It is easier to persecute a husband whose wife has been kicked in a racial attack whilst visibly pregnant than one whose family has not had this experience. What to others may be an unbelievable threat may induce terror in such a man.

22) Fourth, the tribunal's concentration on the 29 years during which this appellant had only had one attack and on whether “he would be treated the same way again” gives rise to the suspicion that it did not bear in mind the possibility that a man may be persecuted by what is done or threatened to his wife.

23) Miss Laing submitted that the tribunal was under no obligation to take into account what had happened to her and might happen to her again in the future. She submitted that that would only be relevant if it could be shown that the notional future attacker intended by that attack to harm the husband. I would reject that submission. If I return with my wife to a country where there is a reasonable degree of likelihood that she will be subjected to further grave physical abuse for racial reasons, that puts me in a situation where there is a reasonable degree of risk that I will be persecuted. It is possible to persecute a husband or a member of a family by what you do to other members of his immediate family. The essential task for the decision taker in these sort of circumstances is to consider what is reasonably likely to happen to the wife and whether that is reasonably likely to affect the husband in such a way as to amount to persecution of him.

24) I am not satisfied that the question whether this man has a well-founded fear of persecution has been properly considered by this tribunal. It is noticeable that when one of the Vice-Presidents of the tribunal, Mr John Freeman, gave leave to appeal from the special adjudicator, he said:

> “There is no clear finding as to whether the police in action complained of arose in each case from lack of evidence or lack of will. The tribunal may wish to consider whether police in action in an individual case such as this can ever be sufficient evidence of lack of protection nationally and if not to consider whether there is any general evidence to show a lack of national protection for gypsies in the Czech Republic.”

25) My impression of the decision of the tribunal read as a whole that, while they came to a conclusion which may possibly have been open to them they got there without a process of reasoning which is clearly set out and did so after having stopped the appellant's advocate from developing his case as he wished without there being any suggestion, in any event in the decision, that the advocate, who I think I am right in saying was not professionally qualified, was in some way abusing his position.

26) Therefore, for my part, I would quash the decision of the tribunal and remit the matter to be considered by another constitution of the tribunal.

27) LORD JUSTICE TUCKEY: I agree.

(Application granted; costs awarded to the applicant to be subject to detailed assessment; remitted to a differently constituted tribunal).