Case No: C/2000/5441 S/B 2001/9014

Neutral Citation Number: [2001] EWCA Civ 895
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday 15th June 2001

B e f o r e :

LORD JUSTICE SIMON BROWN
LORD JUSTICE BROOKE
and
LORD JUSTICE MANCE

- -

YURIY STOROZHENKO — Appellant
- and -
SECRETARY OF STATE FOR THE HOME DEPARTMENT — Respondent

- -

(Transcript of the Handed Down Judgment of
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Pushpinder Saini (instructed by the Treasury Solicitor for the Respondent)

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Judgment

LORD JUSTICE BROOKE :

1. This is an appeal by Yuriy Storozhenko against a determination of the Immigration Appeal Tribunal on 10th December 1999 when it dismissed his appeal against the decision of a special adjudicator on 22nd December 1998 who had dismissed his appeal against the refusal of his application for asylum by the Secretary of State on 15th August 1997. At the start of the hearing we granted him permission to appeal.

2. Mr Storozhenko was born in 1968 and is a citizen of the Ukraine. He lived in Chirkassy. He was an engineer, working in a reasonably well paid job when he decided to leave the Ukraine. He had been unemployed for a time in 1995. He arrived in this country with his wife and six-year-old daughter on 19th December 1996, and claimed asylum on arrival. The special adjudicator found that his description of the facts on which his application was based was credible. It ran along the following lines.

3. His troubles began in the spring of 1994, when a speeding police car narrowly missed hitting him when he was out walking in a street. The car, however, did knock down and injure a young girl who was walking nearby. He went over and remonstrated with the two police officers in the car. They both got out of the car. They appeared to be drunk. One of them hit him in the face with a baton.

4. His next memory was of waking up in hospital with a broken jaw. He was detained in hospital for a month. When he was discharged he discovered the identity of the police officer who had assaulted him. His name was Captain Mironsky. He then made a formal statement at a different police station, so that Captain Mironsky could be charged. Nothing happened.

5. He went back to this police station a number of times. In the end he was told that no proceedings would be taken because there were no other witnesses. Before this happened, he had received an anonymous telephone call threatening him if he did not withdraw his statement. He paid no attention to this. After the decision had been taken not to prosecute, he received further threatening calls. He was told that Captain Mironsky had been transferred, but he was not convinced that this meant the police had taken his complaint seriously.

6. Some time later, in June 1995, two tough-looking men came to his flat and demanded money because he had "caused a lot of trouble to respectable people and would have to pay for it". He went to Moscow for two months soon after this in an unsuccessful attempt to find work.

7. When he returned, his wife told him that the phone calls had continued. He therefore went to the central police station in November 1995 to seek protection. In the following month three men punched and kicked him near his home, leaving him bruised but not seriously hurt. The men were not known to him, and did not say anything to him by way of explanation of the motive for this assault. He did not report the incident immediately, but after the telephone calls continued, he went to the police in February 1996 to report the matter. He received an unsympathetic response. In June 1996 the door to his flat was set alight one night. He did not know who was responsible, but he supposed it was friends of Captain Mironsky.

8. Three months later he discovered that a special police unit had been set up to combat organised crime. He made a statement to a major in that unit, who promised to look into the matter. That evening, on his return home, he was accosted by three men in a jeep who told him that if he complained again he would "collect my daughter in pieces". The telephone

calls continued, and this incident and the continuing threats over the telephone persuaded him and his wife to leave the Ukraine and seek asylum in this country. He sold his flat and bought tickets to come here with the proceeds.

9. This appeal raises issues relating to the meaning of the words "political opinion" in Article 1A(2) of the Geneva Convention. This article provides that a refugee is a person who:

> "owing to well-founded fear of *being persecuted for reasons of* … 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 on the protection of that country." (Emphasis added).

10. The case for the applicant was originally put on the alternative bases that he was being persecuted for reasons of his political opinion, or for reasons of membership of a particular social group. He has now abandoned the second of these contentions and I need say no more about it. So far as the first ground is concerned, the only point urged in favour of it before the Special Adjudicator was that the girl who was knocked down was the granddaughter of a candidate in the elections for mayor. This particular point is no longer pursued.

11. A new argument was put before the Immigration Appeal Tribunal. It was now said that the applicant had been persecuted because he was considered to be in favour of law and order, and that a political opinion along these lines should be imputed to him. The tribunal had before it evidence that the authorities in the Ukraine were unable or unwilling to give protection to people like him in the circumstances he described. Particular reference was made to the US Department of State's Ukraine Country Report for 1998, which contained a comment that the security services, police and prosecutor's office had:

> "drawn domestic and international criticism for their failure to take adequate action to curb international corruption and abuse in the Government. Members of the security forces committed human rights abuses."

The report also contained passages commenting on political interference with and corruption of the judiciary, and the widespread problem of politically motivated crime.

12. The tribunal held that the reality in this case was that the applicant was entirely understandably and reasonably seeking redress for a serious criminal assault. His witnessing of the accident involving the girl was incidental. The persecution he suffered resulted from his attempts to ensure that his assailant was punished. It was manifestly artificial to talk in terms of imputed political opinion.

13. Our consideration of this case has been hampered by the fact that the point (in the way it was eventually formulated) was not taken before the Special Adjudicator, and the only case cited to the appeal tribunal on the point seems to have been the very recent decision of another division of the same tribunal in *Arcero-Garces* [1999] INLR 460, a case in which there had been a total breakdown of law and order in Colombia. In contrast, we have been shown a substantial number of cases decided in Canada and Australia in recent years, and argument has been very much fuller than it was before the appeal tribunal. Collins J, who delivered the appeal tribunal's determination, ruled on the matter in these terms at pp 5-6:

> "We do not regard *Garces* as authority for the proposition that any victim of crime who seeks redress but cannot because of police corruption or the power of criminal elements is entitled to the protection of the Convention because he may be perceived to be on the side of law and order. Normally, imputed political opinion will arise where there is perceived opposition to a policy espoused by the government or its agents. Since protection can be extended to cover those who are persecuted not by the government or its agents but because the government is unable or unwilling to afford protection from the persecutors, witnesses to crime may, if they come forward to help, be properly regarded as coming under the umbrella of imputed political opinion. But we think that such cases would be rare and limited to situations such as exist in Colombia where no protection can be given because the criminals are in effective control."

14. He concluded this part of the determination by saying that the tribunal was satisfied that there was not in the Ukraine that lack of protection which showed that there was an inability or unwillingness to provide protection. Furthermore, the appellant was not acting as a proponent of law and order, as might an otherwise uninvolved witness, but as a victim of a crime seeking redress. After setting out the appeal tribunal's reasons for rejecting arguments based on the existence of a particular social group, Collins J concluded:

> "We naturally have considerable sympathy with the appellant. But sympathy and a reluctance to send someone back to face a situation which has put him and his family in fear and has subjected him to violence is no reason to extend the protection of the Convention to those it should not cover."

15. The meaning of the words "political opinion" in a context like this has not previously been considered by an English court. In these circumstances it is convenient to take as a starting point an extract from the UNHCR Handbook and a passage from Professor Goodwin-Gill's book, *The Refugee in International Law* (Second Edition, 1996).

16. The UNHCR Handbook states under the heading "political opinion" (at para 80):

> "Holding political opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant …"

17. Professor Goodwin-Gill, for his part, writes (at p 49):

> "In the 1951 Convention, 'political opinion' should be understood in the broad sense, to incorporate, within substantive limitations now developing generally in the field of human rights, any opinion on any matter in which the machinery of State, government and policy may be engaged. The typical 'political refugee' is one pursued by the government of a State or other entity on account of his or her opinions, which are an actual or perceived threat to that government

> or its institutions, or to the political agenda and aspirations of the entity in question. Political opinions may or may not be expressed, and they may be rightly or wrongly attributed to the applicant for refugee status. If they have been expressed, and if the applicant or others similarly placed have suffered or been threatened with repressive measures, then a well-founded fear may be made out, unaccompanied by evident or overt expressions of opinion."

18. The only cases cited in the footnotes to this paragraph are the decisions of the Supreme Court of Canada in *Canada (Attorney-General) v Ward* [1993] 2 SCR 689, and a decision of the US Supreme Court in *INS v Elias-Zacarious* 112 S Ct 812 (1992) which was not cited to us. The formulation "any opinion on any matter in which the machinery of State, government and policy may be engaged" also appeared in the text of the first edition of Professor Goodwin-Gill's book (published in 1983), as is clear from the judgment of La Forest J in the Supreme Court of Canada in the *Ward* case, to which I now turn. This judgment needs to be read subject to the caveat that the definition contained in Article 1A(2) of the Convention was broken down into sub-paragraphs when reproduced in Section 2(1) of the Canadian Immigration Act 1976.

19. In that case the appellant was a resident of Northern Ireland. He had been motivated by a perceived need to "take a stand" in order to protect his family, mainly from the IRA, and for this reason he voluntarily joined a para-military terrorist group called the INLA. On one occasion, when he was detailed to guard innocent hostages, he secured their escape after learning they were to be executed. This came to the notice of the INLA, who confined and tortured him and sentenced him to death. He then escaped, obtained police protection, and was in due course sentenced to three years' imprisonment for the offence of forcible confinement. At the end of this prison sentence he travelled to Canada and sought asylum.

20. His claim was initially rejected, but was allowed on appeal. The full court of the Federal Court of Canada then set aside the decision of the original appellate authority and remitted the case to that authority for redetermination. On the further appeal, the Supreme Court held that the appellant, as a member of the INLA, was not a member of a "particular social group" within the meaning of the Convention, but that the persecution he feared had stemmed from his imputed political opinion as to the proper limits to the means used for the achievement of political change. The case was remitted because the appellant conceded he had dual nationality (Irish and British), so that an inquiry could be made into the question whether he could be afforded protection in Great Britain.

21. In discussing the question of imputed political opinion, which was raised for the first time in the Supreme Court, La Forest J said at pp 746-7:

> "Political opinion as a basis for a well-founded fear of persecution has been defined quite simply as persecution of persons on the ground 'that they are alleged or known to hold opinions contrary to or critical of the policies of the government or ruling party', see Grahl-Madsen, [*The Status of Refugees in International Law* (1966)], at p 220. The persecution stems from the desire to put down any dissent viewed as a threat to the persecutors. Grahl-Madsen's definition assumes that the persecutor from whom the claimant is fleeing is always the government or ruling party, or at least some party having parallel interests to those of the government. As noted earlier, however, international refugee protection extends to situations where the state is

> not an accomplice to the persecution, but is unable to protect the claimant. In such cases, it is possible that a claimant may be seen as a threat by a group unrelated, and perhaps even opposed, to the government because of his or her political viewpoint, perceived or real. The more general interpretation of political opinion suggested by Goodwin-Gill *The Refugee in International Law* (1983), at p 31, ie 'any opinion on any matter in which the machinery of state, government, and policy may be engaged', reflects more care in embracing situations of this kind.
>
> Two refinements must be added to the definition of this category. First, the political opinion at issue need not have been expressed outright. In many cases, the claimant is not even given the opportunity to articulate his or her beliefs, but these can be perceived from his or her actions. In such situations, the political opinion that constitutes the basis for the claimant's well-founded fear of persecution is said to be imputed to the claimant. The absence of expression in words may make it more difficult for the claimant to establish the relationship between that opinion and the feared persecution, but it does not preclude protection of the claimant.
>
> Second, the political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant's true beliefs. The examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution. The political opinion that lies at the root of the persecution, therefore, need not necessarily be correctly attributed to the claimant. Similar considerations would seem to apply to other bases of persecution."

22. This judgment therefore represents high Canadian judicial authority for the propositions that:

> i) The phrase "political opinion" may embrace any opinion on any matter in which the machinery of state, government and policy may be engaged;
>
> ii) The political opinion at issue need not have been expressed outright but may have been imputed to the claimant;
>
> iii) If the claimant fears that he may be persecuted for an imputed political opinion, he may have the basis for a successful claim for asylum even if he does not in fact hold the opinions imputed to him.

We were shown a number of later Canadian and Australian judgments in which this thinking was carried forward.

23. I turn from this exposition of the meaning of "political opinion" to another relevant facet of the Convention. The Immigration Appeal Tribunal decided this case in December 1999. The decision of the House of Lords in *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 379 was not then available to it. Although *Horvath* was a case concerned with the sufficiency of state protection in the face of violence by non-state agents, the House of Lords cast helpful light on the relationship between the persecution that is

feared and the availability of state protection for someone in fear of that persecution. In this context, Lord Hope said at p 383E-H:

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

24. Lord Hope had earlier, at p 383B, explained what he meant by the principle of surrogacy when he said that the general purpose of the Convention was to enable person who no longer had the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community.

25. In order to succeed in this appeal, Mr Storozhenko has to show that "owing to a well-founded fear of being persecuted for reasons of … political opinion, [he] 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".

26. Mr Lewis has treated us to a rich harvest of cases decided in the Federal Court of Canada and the Federal Court of Australia in support of his contention that his client should properly be regarded as a refugee within that definition. All these cases, however, ultimately turn on their own facts, and before referring to any of these cases, it is first necessary to return briefly to the facts before the appeal tribunal.

27. Mr Storozhenko was a private citizen. He did not involve himself in any public activities in relation to his wish to see Captain Mironsky disciplined or brought to justice. He did not write to the newspapers or allow himself to be interviewed by the media or become involved in a public campaign of any kind. His difficulties arose because he made a statement to the police about what had happened, which he refused to withdraw (see paragraph 5 above). They continued after he had gone to the central police station to seek police protection (see paragraph 7), and revived after he had reported being assaulted following his request for protection (see also paragraph 7). Finally, on the day he reported his problems to a major in the special police unit set up to combat organised crime, he was accosted and threatened by three men in a jeep in an incident which was directly related to the complaint he had made that morning, and threats continued thereafter (see paragraph 8).

28. So far as the situation in the Ukraine was concerned, the appeal tribunal was invited to consider the Ukraine Country Report on Human Rights Practices for 1998 which was published by the US Department of State in February 1999. On the one hand this report described problems stemming from the pervasiveness of corruption and inefficiency, the way

in which court decisions might be influenced by "organised crime elements", and the lack of effective measures to give practical effect to the legal framework for the protection of civil and human rights provided by the 1996 constitution. On the other hand, as the appeal tribunal found, the government of the Ukraine had not entirely abdicated its responsibilities to protect its citizens. For instance, the report states in its introductory section that:

> i) The country has made progress on a number of basic freedoms, including freedom of speech, which is generally respected;
>
> ii) On several occasions the government implemented measures to punish officials who committed or abetted mistreatment of detainees and to purge local law enforcement agencies of corrupt elements;
>
> iii) The first Human Rights Ombudsman was appointed pursuant to a new law in April 1998, and although the Ombudsman received no budget for offices or staff the Ombudsman's office was active in investigating human rights violations.

29. Moreover, section 1(c) of the report shows that in April 1998 the government created a penal department, now placed under the ministry of justice (as requested by international observers), to oversee reform of the penal system. There is also evidence that it has acted to punish some prison and police officials who committed or condoned violence against prisoners, although the writers of the report commented that, given the scope of the problem, these isolated actions failed to limit abuses, and that police corruption also remained a serious problem.

30. The recitation of these facts show how very different Mr Storozhenko's case is from some of the Canadian and Australian decisions on which Mr Lewis relied. For example, the courts were willing to find the necessary *nexus* between the applicant's fear of persecution and his imputed political opinions in the following cases, which went much further than the private activities of a private citizen seeking to bring an individual police officer to justice:

> i) In *Ranwalage v Minister for Immigration and Multicultural Affairs* (1998) 159 ALR 349 the applicant openly blamed a government minister in Sri Lanka for being engaged in serious criminal activity (involving murder) and gave an interview on the topic to a local newspaper;
>
> ii) In *Voitenko v Minister for Immigration and Multicultural Affairs* [1999] FCA 428 the applicant and a friend came to the attention of the authorities in Russia when they were obtaining information about institutionalised corruption in that country;
>
> iii) In *C and S v Minister for Immigration and Multicultural Affairs* [1999] FCA 1430 the applicant had been identified as the author of a series of anonymous telephone calls to the police in which he had revealed information about illegal activities involving local politicians, political candidates and officials at a nightclub at which he worked;
>
> iv) In *Klinko v Minister of Citizenship and Immigration* (FCC 22 February 2000) the applicant, along with other businessmen, had filed a formal complaint with the relevant regional governing body in the Ukraine about widespread corruption among government officials.

31. I do not have to decide whether an English court would necessarily have decided these cases the same way. It is sufficient to say that I can understand the reason why courts in Canada and Australia were willing to identify a Convention reason ("[imputed] political opinion") for the persecution those applicants feared.

32. There are two Commonwealth decisions in which the link between the applicant's fear of persecution and an imputed political opinion is not so immediately obvious, and these call for more detailed consideration.

33. In *Vassiliev v Minister of Citizenship and Information* (Federal Court of Canada, 4 July 1997), the appellant was a citizen of Russia. In 1990 he became the secretary of a committee which organised a union of small businesses as an instrument of regional government. Through this committee the Communist party became able to gain a measure of control and influence over the development and work of small businesses in Russia. The committee went on to organise an association which controlled all small business in Russia. Elections to executive positions within the association were rigged, and the appellant came to realise just how ruthless and dishonest the politicians were in their grab for control of small fledgling enterprises. He made several attempts to resign, but was always refused permission on the grounds that "he knew too much". He eventually succeeded in resigning, and became commercial director of a state-run business. A former associate then invited him to launder some money through his new firm, which he refused to do. He was warned that he should fall in line.

34. There followed acts of persecution in which the Russian police participated. They included detention in a police station for no good reason, transfer to a dangerous part of Moldova, demotion to the rank of a clerk at the minimum salary, a very severe beating, two car accidents and the vandalisation of his apartment. In the late spring of 1995 Mr Vassiliev realised he would have to flee Russia because he knew he could never hope to receive protection from the police or anyone else. His application for asylum in Canada was initially refused, but Muldoon J quashed the original determination and remitted the case to a different panel of the Convention Refugee Determination Division ("CRDD") for reconsideration. He said:

> "Some of the matters of which the panel might well have had knowledge, notorious matters of which this court has knowledge is that President Boris Yeltsin does not control the Duma, much less a honeycomb of corrupt offices and officers, who resent an idealist or just a garden-variety honest person attempting to operate honestly. This claimant was assaulted and battered by thugs while he was riding with the director in the director's car, but the director was spared any assault or battery by those thugs on that occasion. When persecutors operate State organisms with impunity, because they operate State organisms, the CRDD should re-think whether the claimant shows a *nexus* with the definition of refugee (*Ward* [1993] 2 SCR 680 at p 717 and pp 746-47).
>
> On the evidence before it, the CRDD erred in determining that Mr Vassiliev did not express a political opinion when he refused to transfer bribes and launder money.
>
> Refusing to participate in criminal activity, while laudable, has often been found not to be an expression of political opinion. In this regard,

> the Board's finding does not depart from recent jurisprudence of this court which has found that opposition to criminal activity *per se* is not political expression. One example which this court has considered is informing on drug traffickers (*Munoz v MCI)* (IMM 1884-95) (February 22, 1996) and *Suarez v MCI* (IMM 3246-96) (July 29, 1996)). The situation before the court is distinguishable from these cases. The facts as found by the CRDD show that in this case criminal activity permeates State action. Opposition to criminal acts becomes opposition to State authorities. On these facts it is clear that there is no distinction between the anti-criminal and ideological/political aspects of the claimant's fear of persecution. One would never deny that refusing to vote because an election is rigged is a political opinion. Why should Mr Vassiliev's refusal to participate in a corrupt system be any different? His is an equally valid expression of political opinion and is contemplated by Mr Justice La Forest's words in *Ward*. While this error alone is sufficient to send this decision back for reconsideration, the CRDD also erred in its assessment of State protection and internal flight alternative."

35. This case is notable for the fact that Mr Vassiliev was considered a possible candidate for asylum because the CRDD had found that in Russia criminal activity permeated State action. It was therefore arguable that because Mr Vassiliev had been persecuted for refusing to involve himself in criminal activity he might face further persecution, if he was returned to Russia, for an imputed political opinion on his part that he was opposed to a corrupt state system in which he refused to participate. In contrast to Mr Storozhenko, Mr Vassiliev had been involved in the activities of a committee with a nationwide influence from which he eventually resigned because of his political views, and the case can be distinguished on those grounds. It is unnecessary to go any further to compare Muldoon J's view of the situation in Russia in 1995 with the evidence before the appeal tribunal in the present case about the situation in the Ukraine in 1998.

36. The other decision which warrants closer examination is the decision of Davies J in *Minister v Immigration and Multicultural Affairs v Y* (FCA, 15 May 1998, No 515 of 98) which was subsequently approved by the full court of the Federal Court of Australia in *Voitenko v Minister for Immigration and Multicultural Affairs* [1999] FCA 428. *Y* was a citizen of Brazil. He had a friend who was an investigative reporter, and the two men had witnessed an incident implicating local police in criminal activities. Eight boys were being assaulted by the police, and the applicant saw a policeman shoot and possibly kill one of them. Because the authorities seemed disinterested when the matter was reported, the two men began their own investigations, as a result of which they were able to report to the authorities the names of two serving police officers who were involved in the assault.

37. Shortly afterwards the applicant and his friend were abducted, separated from each other, and tortured. His friend was then run over by a motor vehicle and killed. He assumed that he had been murdered. The authorities told the applicant that they could not investigate the matter due to insufficient evidence, and he was also told by officials that he was a possible target. When he and his family moved to another city, he received anonymous threatening phone calls. The authorities declined to give him protection. His wife was abducted and raped, and another anonymous caller told the applicant that his younger daughter would suffer worse treatment if he insisted on proceeding with the case. He nevertheless did make

a statement to the Department of Justice before he left Brazil with his family in search of safety. Soon after they left, the house in which they were living was burnt down.

38. In his judgment Davies J included a citation from an earlier tribunal decision (in reference BN94/02973) which illustrated the way in which the meaning of the phrase "political opinion" was being extended and the concept of "imputed political opinion" was being developed.

39. That tribunal had referred to what it described as a meaning of the phrase "political opinion" in "the narrowest sense" in paragraphs 80-86 of the UNHCR Handbook (for paragraph 80 of the Handbook see paragraph 16 above). It then cited the passage in the first edition of Professor Goodwin-Gill's book which was mentioned by La Forest J in his judgment in *Ward* (for which see paragraphs 18 and 21 above). It then described how in the context of anti-discrimination legislation in Australia, and in decisions made under that legislation, the expression "political conviction" had been given wide meanings. An Australian text-book writer (Peter Bailey, *Human Rights, Australia in an International Context* (1990)) had related at pp 244-5 how at least one government report had suggested that this expression included:

> "beliefs or opinions concerning the nature and purpose of the state, the distribution and utilisation of state power, and the distribution and utilisation of economic, social and cultural power in a society."

40. The earlier tribunal had also referred to the judgment of Bennett J in *Guo Wei Rong v Minister for Immigration and Ethnic Affairs* (FCA 26 February 1996) in which he had held that a political opinion might be imputed by others to an individual because of perceptions about that individual. The tribunal had commented that the term was not limited to the overt expression of a political opinion: a mere act or refusal to act might constitute the expression of political opinion.

41. Against this background Davies J said that he did not see any error in the general approach taken by the Refugee Review Tribunal, which had held, contrary to the views ascribed to the authors of the UNHCR Handbook, that the words "political opinion" should not be narrowly read. He added:

> "In the context of the Refugees' Convention, an opinion could be thought to be a political opinion if it were such as to indicate that its holder, the claimant for refugee status, held views which were contrary to the interests of the State, including the authorities of the State. A person may be regarded as an enemy of the State by virtue of holding and propounding views which are contrary to the views of the State or its Government, or which are antithetic to the government and the instruments which enforce the power of the State, such as the Armed Forces, Security Forces and Police Forces or which express opposition to matters such as the structure of the State or the territory occupied by it and like matters. In his *General Theory of Law and State*, Harvard University Press, 1945, Kelsen said:
>
> > 'The identity of State and legal order is apparent from the fact that even sociologists characterise the State as a 'politically' organised society. Since society – as a unit – is constituted by

> organisation, it is more correct to define the State as 'political organisation'.
>
> An organisation is an order. But in what does the 'political' character of this order lie? In the fact that it is a coercive order. The State is a political organisation because it is an order regulating the use of force, because it monopolises the use of force.'

> Of course, it is not for the court to form its own view as to whether the applicants were likely to be subjected to persecution for reasons of political opinion should they be returned to Brazil. The words 'political opinion' are ordinary words of the English language and have not been the subject of judicial exposition limiting their meaning in the context of the Refugees' Convention."

42. Davies J then considered the way the tribunal had applied the law to the facts. The tribunal had cited a report to the effect that most of Rio de Janeiro's police remained abusive, violent and corrupt, despite the good intentions of some public officials, and had added that there was a substantial body of evidence to suggest that individuals who witnessed, exposed or prosecuted the actions of corrupt public officials were often subject to intimidation and serious ill-treatment. Davies J observed that the tribunal was seeking to determine whether the applicant would be looked upon merely as a campaigner against corruption who was at risk of retribution by individual corrupt officials, or whether corruption was so much a part of government and the exercise of State power in Brazil that opposition to it could be regarded as opposition to authority as it was organised and operated in Brazil. He refused to disturb the tribunal's conclusion that the applicant's knowledge and conduct:

> "made him a danger not only to the policemen involved in the incident which he had observed but to the Police Force in general and to the manner in which power is exercised in Brazil."

43. Again, I do not find it necessary on this occasion to express any views about Davies J's discussion of the width of the phrase "political opinion". On the facts of that case he refused to disturb a finding that the applicant was entitled to refugee status because his investigations of a crime in which he was not himself involved could properly be seen to be part of a campaign against the exercise of state power in a country where corruption was part of government itself. It would, in my judgment, be impossible on the facts to categorise Mr Storozhenko's activities in this manner.

44. I do not consider it necessary in the present judgment to try to define the boundaries of the expression "political opinion" in the present context. I remind myself, of course, of the lower standard of proof that has to be applied, and also that one must judge the reasons that might trigger off a particular form of persecution through the eyes of those from whom that persecution is feared. But it would, in my judgment, on the face of it be stretching the expression much too far if one was to apply it to the facts of Mr Storozhenko's case. He was being persecuted because the local police did not want him pressing an inquiry into the misconduct of one of their officers who had assaulted him. I am inclined to agree with the appeal tribunal that the persecution he suffered resulted from his attempts to ensure that his assailant was punished, and that it was manifestly artificial to talk in terms of imputed political opinion.

45. I would add, for the sake of completeness, that I do not consider that we can obtain much help from the two leading lines of English authority in which the meaning of the epithet "political" has been in issue. The concept of a trust for political purposes, which was authoritatively discussed by Slade J in *McGovern v Attorney-General* [1982] 1 Ch 321, takes one far away from the present subject-matter. The phrase "offence of a political character" in the Extradition Acts is more to the point, and there are passages in the speeches in the House of Lords in *Schtraks v Government of Israel* [1964] AC 556, 584, 589-92 and *Cheng v Governor of Pentonville Prison* [1973] AC 931, 942-3, 944-6 which would have been helpful if it had been necessary on the present occasion to go further down the road towards explaining the meaning of the phrase "political opinion" in the Geneva Convention.

46. During the course of argument we considered the recent case of *Omoruyi* [2001] Imm AR 175 in which a question arose whether the applicant's fear of persecution could properly be said to flow by reason of his religion (because the tenets of his Christian faith had caused him to attract the disfavour of a Nigerian cult), or whether his fears stemmed from the fact that that body was an intrinsically criminal organisation which engaged in certain rites and rituals as mere trappings. Simon Brown LJ said (at para 27):

> "The risk of being harmed by the Ogboni to which he is subject is not truly one resulting from any religious difference between them: he is simply at risk for having crossed a ruthless criminal gang."

Although the facts were very different, the need to be cautious about over-enthusiastically seeking a Convention reason for persecution where such a reason cannot be found without distorting the facts is present in Mr Storozhenko's case, too.

47. I have set out the conclusion of the appeal tribunal in paragraphs 13 and 14 of this judgment. Mr Lewis, who argued his client's case tenaciously, submitted that the tribunal misdirected itself when it showed itself to be influenced by the fact that, unlike the situation in Colombia, where there was a total breakdown of law and order, in the Ukraine the state was seeking to do something about the situation. The government of the Ukraine, Collins J said, had taken steps to punish officials who had offended and to purge local law enforcement agencies of corrupt agencies. The machinery was there, even though the process was a slow one.

48. Mr Lewis derived assistance from phrases used in some of the Australian and Canadian cases I have cited in support of his submission that the appeal tribunal ought to have identified Mr Storozhenko's imputed political opinion as the reason for the prospective persecution he feared. Thus he argued that his client's actions could be seen in any or all of the following ways, all going further than a mere wish for redress for the original incident:

i) A refusal to acquiesce in criminal activity (*Vassiliev*);

ii) Opposition to the methods and conduct of members of a state organ (*Vassiliev*);

iii) Possession of knowledge of acts, and expression of the knowledge of those facts, being criminal activity by police (*Y, Ranwalege*);

iv) An act that demonstrates the corruption of a state organ (*Y, Voitenko*); a denunciation of state officials' criminality (*Y, Vassiliev*).

49. He argued that the actions of his client's persecutors might potentially be seen as persecution stemming from the desire to put down any dissent viewed as a threat to them and their place in society, and/or their ability to control their environment. Alternatively they might be treated as a reaction to a statement of facts perceived to be dangerous to those in authority (*Y*) or to acts of Mr Storozhenko perceived to be reflective of an unstated political agenda (*Y, Voitenko*).

50. Finally, he submitted that in respect of the background situation there was scope to conclude that his client's persecutors operated a state organ (*Vassiliev*) and that corrupt/criminal elements permeated that organ to such an extent as to be part of the very fabric of state organs (*Klinko*).

51. In my judgment, this analysis is altogether too sophisticated on the facts of the present case. It illustrates the dangers of trying to place more weight on the dicta of other judges deciding other cases concerned with different factual situations than those dicta can properly bear. A layman would be very surprised to be told that the way in which Mr Storozhenko was treated when he sought to bring this police officer to justice qualified him for refugee status on the grounds that he had a well-founded fear of persecution for a political opinion.

52. I would therefore dismiss this appeal.

LORD JUSTICE MANCE:

53. I agree.

LORD JUSTICE SIMON BROWN:

54. I agree with all that Brooke LJ has said and not least that it is unnecessary on the present appeal to explore or explain fully the meaning of the phrase "political opinion" in the Geneva Convention. I add only this: as I observed in *Omoruyi* [2001] ImmAR 175 (para 7), even though we are rejecting this asylum claim, the appellant "may nevertheless be entitled to exceptional leave to remain under Article 3 of the European convention, the Secretary of State having long since undertaken not to expel those whom there are good grounds to believe would on return home be at real risk of serious harm – see *R v Secretary of State for the Home Department ex parte Turgut* [2000] UK HRR 403".

55.

56. ORDER: Appeal dismissed. Detailed assessment of the appellant's costs.

57. (Order does not form part of approved Judgement).