C/2001/2727

Neutral Citation Number: [2002] EWCA Civ 1180

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

Monday, 27th May 2002

B e f o r e :

LORD JUSTICE LAWS

LORD JUSTICE MANCE

-and-

SIR MARTIN NOURSE

- - - - - - - -

DUSAN SUGAR

Appellant

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - - - - -

(Computer Aided Transcript of the Stenograph Notes of

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MR R SCANNELL and MR G HODGETTS (instructed by Wilson & Co, London N17 8AD) appeared on behalf of the Appellant

MISS J RICHARDS (instructed by The Treasury Solicitor, London SW1HG 9JS) appeared on behalf of the Respondent

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J U D G M E N T

Monday, 27th May 2002

1) LORD JUSTICE LAWS: This is an appeal with permission granted by Sedley LJ on 20th February 2002 against the determination of the Immigration Appeal Tribunal notified on 19th October 2001 when the Tribunal dismissed the appellant's appeal to it against the decision of the adjudicator, who in his turn had dismissed the appellant's appeal against the refusal of the Secretary of State to grant him asylum.

2) The appellant is a Roma from the Czech Republic. He was born on 14th May 1977. He arrived in the United Kingdom on 3rd March 2000 and claimed asylum. His case was as follows. From 1993/1994 he had been in an established relationship with a white Czech girl, who was not a Roma, called Miss Rejchova. Her father, and to a lesser extent her mother, had greatly objected to this union; however it persisted and a son, Dominic, was born on 8th April 1996. It was said that the appellant had earlier, when he was a teenager, suffered abusive attacks by skinheads and in his written reply put in today Mr Scannell refers to some other matters also. Before the appellate authorities he relied essentially on three incidents. The adjudicator, who found the appellant's evidence to be generally credible despite some discrepancies described his account of these incidents as follows:

> "12. In late autumn or early winter 1999 about seven skinheads attacked the appellant and his partner. He was pushed to the ground and kicked. He heard his partner screaming and he saw her fall to the ground. The appellant tried to protect her but was unable to do so because there were so many skinheads. As a result of his efforts to save his partner the appellant was punched and kicked extremely hard and suffered badly. They both went to the doctor for treatment who gave them a report of their injuries and told the appellant to go to the police. They did so and a statement was taken. The appellant's partner asked why the police had not arrived to help and was told that nothing had been reported to them. She then asked how such things could occur but the policeman told her to shut up and that it was her problem for going out with a gypsy. The appellant waited for progress in the case but later heard that the police had been unable to catch anyone. He does not believe that they carried out any kind of investigation at all. The appellant was again attacked and beaten up in December 1999 by seven or eight skinheads. He did not think that his injuries were serious enough to go to the doctor and he managed to return to work. He and his partner discussed the possibility of him going to the police but in the light of his previous experiences decided that there would be little point in doing so. There was a further incident in February 2000 when he and his partner and a group of friends went to the nearby town of Karlovy Vary to a new disco there. As they left the disco they saw a large gang of skinheads on the other side of the road and the appellant and his friends started to run. He and his partner managed to escape. He later found out that three of his friends had been hospitalised following the attack. The appellant and his partner did not go to the police because they had not been assaulted and felt that there was no need to do so. He thinks that the friends who had been injured went to the police and a Roma organisation later became involved in the case. Following this attack they decided to leave for the United kingdom."

3) Indeed, the adjudicator said this (at paragraph 22):

> "The appellant alleges that following the attack in autumn 1999 he believes that the police did not carry out any kind of investigation at all. His reason for saying

this is that 'we later heard that the police had been unable to catch anyone'. There are many reasons why criminals are not brought to justice, including lack of admissible evidence, even where the best endeavours are made. They are not always convicted because of the high standard of proof required, and the desire to protect the rights of accused persons. In any event the appellant does not know whether anyone was apprehended in relation to the attack or not. He has not stated the source of his belief that no kind of investigation was carried out."

4) The adjudicator for his part went on to hold that there was sufficiency of protection in the Czech Republic for the appellant and his family and accordingly he dismissed the appeal.

5) A central theme of the appellant's grounds of appeal to the IAT was that his relationship with a white non-Roma Czech woman put both of them at heightened risk of attacks from skinheads, and in particular that this mixed relationship, as it has been called, meant that the police were especially unwilling to act to protect them.

6) It is convenient at this stage to recall that the starting point for consideration of cases of this kind where the claim is an alleged want of sufficient protection by the home State against persecutory acts by non-state agents is the decision of their Lordships' House in Horvath [2000] 3 All E R 577. Horvath concern not a Czech but a Slovak Roma, a fact which appears to have slipped the Tribunal's mind at paragraph 15 of their determination. That is a circumstance to which I will briefly return in due course. I need do no more than set out two passages in the speech of Lord Hope of Craighead as follows at page 585D to F:

> "I consider that the obligation to afford refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals. I think that it follows that, in order to satisfy the fear test in a non-state agent case, the applicant for refugee status must show that the persecution which he fears consists of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection. The applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill-treatment for a convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well-founded, do not entitle him to the status of a refugee. The convention has a more limited objective, the limits of which are identified by the list of convention reasons and by the principle of surrogacy."

7) Secondly, at 586 B to C:

> "The primary duty to provide the protection lies with the home state. It is its duty to establish and to operate a system of protection against the persecution of its own nationals. If that system is lacking the protection of the international community is available as a substitute. But the application of the surrogacy principle rests upon the assumption that, just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard, which takes proper account of the duty which the state owes to all its nationals."

8) The Immigration Appeal Tribunal expressed its view of the facts of the incidents to which I have referred and which were relied on by the appellant in this way:

> "6. Mr Hodgetts' submissions are based largely on the assumption that the attacks upon the appellant arise out of his mixed relationship, if we may put it that way. The evidence does not indicate that this is necessarily the case and we refer in particular not only to the determination but Miss Rejchova's own witness statement for the events upon which this claim is based: the assault of 8 October 1999, the assault in December of that year and the later one in February of the following year.
>
> 7. The assault of 8 October was clearly against the appellant himself. Miss Rejchova refers to the skinheads stating 'black swine', 'you're getting it now'. She was pushed aside and fell over but she was not actually assaulted.
>
> 8. The assault in December 1999 was upon the appellant personally. Miss Rejchova was herself at home at the time. The assault in February 2000 was upon a group of which she and the appellant were part. There were nine of them in the group (we refer to paragraph 27 of her witness statement). All nine were assaulted by the skinheads in the manner set out in that paragraph. The assault was not brought about by the fact that the skinheads perceived a couple of mixed ethnicity amongst the group of nine but presumably because they were all perceived to be Roma."

9) In addition they said this in paragraph 9:

> "We come to the conclusion that the assaults by skinheads were part of the regular and extremely regrettable pattern of assaults upon Roma by skinheads in that country. We cannot see that these assaults were targeted at the appellant particularly because of his relationship with Miss Rejchova."

10) Although Mr Scannell complains about the way in which the IAT dealt or failed to deal with the appellant's relationship with Miss Rejchova, he does not, and in my judgment could not, seek to assault the entitlement of the Tribunal to arrive at the view of the facts they formed in these paragraphs.

11) In light of the way in which the case is put I should read these following further extracts from the IAT determination:

> "13. The evidence indicates that the assault of October was reported to the police. We accept that when this was done Miss Rejchova was brushed aside by the police and told that none of this would have arisen if she was not associated with a Roma, but this does not indicate an unwillingness by the police to carry out their duty of investigating the assault. We accept that no arrest arose from the complaint, but again that is not necessarily evidence that no action was taken. The police started with the disadvantage of not knowing who the assailants were.
>
> 14. The objective evidence before us clearly shows that there is an Inter-Ministerial Commission for the affairs of the Roma within the country and that an Inter-Departmental Commission was established in 1997, chaired by the

Commissioner for Human Rights of the Czech Republic, and includes representatives of various government departments and twelve representatives of the Roma community. The Commission apparently takes an active role in resolving disputes between Romany communities and non-Romanies, and there are various non-governmental organisations and community associations providing legal or social support for Roma. We are referring to the Home Office Country Assessment Report. It is quite clear that the government or the Czech Republic has put in place a body which gives active support to Roma. Its function is to supervise the Roma community and further their interests. There is therefore no reason why, however, if the appellant and his girlfriend considered that no action had been taken by the police with regard to the first assault, they should not have taken their complaint to one or other of the NGOs or government bodies concerned with the furtherance and protection of Roma rights and the Roma Community.

15. So far as the question of adequacy of protection against skinheads is concerned, this matter has been reviewed extensively in the case of Horvath and it is now established that the government of the Czech Republic does provide sufficient protection, though each case must be considered upon its own merits.

16. In the circumstances of this case the adjudicator finds them to be, and as we have found in this determination, we are not satisfied that the police have been unwilling to act although there is no means of making them do their duty. We are satisfied that there is a sufficiency of protection, that there is in place a legal system which does provide protection for the Roma populus, and that in the circumstances of this particular case it cannot be shown that the authorities have been unable or unwilling to provide the protection to which he is entitled."

12) In the skeleton argument put in to support this appeal Mr Scannell's junior essentially crystallised his complaints against this decision into four propositions. Mr Scannell, however, in making his oral submissions before us today, has put his principal case thus. He submits that the Tribunal's approach to the question - was there here sufficiency of protection? was legally flawed, and he seeks to support that overall case by five specific submissions. First, he adopts an observation by Sedley LJ granting permission as to an apparent self-contradiction in one sentence of the IAT determination, to which I will return. Second, he says that there is an overemphasis in the Tribunal on what he calls the past motivation of those who attacked the appellant. The point there being taken is that the Tribunal have, so it is said, placed too much emphasis on their finding that the appellant when in the Czech Republic had not been singled out by skinheads because of his mixed relationship. Thirdly, it is said that there was a complete failure to consider written objective evidence about the state of affairs relating to the Roma in the Czech Republic; in particular two relatively recent documents are relied on. Fourthly, he submits that the Tribunal failed to consider the appellant's own evidence. Finally, the Tribunal's reference to NGOs (non-government organisations) is fragile, because it appears to suggest that the Tribunal may have regarded some form of civil alternative as a recourse open to this appellant such as might excuse or mitigate the failure, as he would have it, of the criminal justice system to offer proper protection.

13) In considerable measure, although he has disavowed it, Mr Scannell's submissions might be said to suggest that the Roma people as a class are systematically persecuted in the Czech Republic. Whether it goes so far or not Mr Scannell's argument gives no weight, in my view, to the important decision of the Immigration Appeal Tribunal given on 9th March 2001 in Puzova and Others. This

was a case in which the IAT sought to give an authoritative view of the sufficiency of protection for Roma generally in the Czech Republic. Accordingly, they took expert evidence and considered a very extensive range of material relating to the Czech Republic. The material included all of the written material now relied on by Mr Scannell, save for the last two recent documents to which I have so far referred only in passing. This process of arriving at a factually authoritative determination intended by the Tribunal to guide future decisions which engage questions concerning the same state and like problems relating to asylum, though in some ways perhaps unorthodox as a means of arriving at decisions in the common law world, is nevertheless a process which was recently approved in the particular context of the IAT by this court in S and Others.

14) The determination in Puzova is very long, very detailed and very thorough. I propose only to cite two passages. Paragraph 154 contains this:

> "It is immediately apparent on the evidence that there is under-reporting of incidents to the police. That there are estimates that this is to a very great extent and is based upon the perception of the Roma minority that there is little prospect of any positive action being taken by the police. It cannot be said, however, whatever may be the general perception by Czech Roma, that reporting matters of which they complain is futile. There is ample evidence that prosecutions are mounted by the state when they have appropriate evidence. If a claimed offence is not reported then the state can do nothing and the victims in question have failed to take all appropriate steps within their home country to seek protection from the harm which they confess to fear. In this respect their perception... is subjective. Objectively it is not on the evidence justified and it is a fundamental part of the principle of the right to surrogate protection that a claimant must first exhaust all steps reasonably open to him in his home state. It is only when this demonstrates the lack of provision of relevant protection that the claimant's specific circumstances may give rise to entitlement to seek surrogate protection when there is a general compliance with the home state's duty to its citizens in this respect. Similarly, if a complainant cannot give information which will enable the police to identify his attackers, there is little that any police force anywhere can do. It has been said that Roma have lost confidence because prosecutions alleging racial motivation will not be taken unless there is evidence that the accused has expressed a racial motivation for his actions. That does not seem to us to imply any unwillingness on the part of the state to classify crimes as racially motivated. Any prosecution system requires at least that it is more likely than not that a conviction can be secured on the evidence available. Racial motivation, however obvious it may be to the victim, has to be proved."
>
> 165. In summary, we are satisfied that any claim that Czech Roma are by reason of their ethnicity alone entitled to refugee status is unsustainable and that each case must be looked at on its own facts to see whether those facts show to the relevant standard that the specific claimant has a well founded fear of persecution for a Convention reason. Following Horvath it is likely that those who can succeed in showing such a fear on the basis of feared actions of non state actors will be the exception since there is currently in place in the Czech Republic a system of criminal law which offers effective protection to Czech citizens generally, including Czech Roma. Applying the appropriate test, none of the Appellant's succeeds in discharging the burden upon them and each of the appeals before us is dismissed."

15) Before addressing Mr Scannell's arguments there are one or two observations I should make about the Puzova decision. First, it contains at paragraphs 138 and 139 trenchant criticisms of some of the material that was put before it in support of the appeals and which Mr Scannell has relied upon before us. It is not necessary to go into the detail; I will say only that the criticism concerns a witness, Dr Chirico, who is the author of a document upon which Mr Scannell relied, and the European Commission against Racism and Intolerance and the Committee on the Elimination of Racial Discrimination.

16) Next it is to be noted that three of the appellants in Puzova sought permission to appeal the determination to this court. Refusing permission on the papers Simon Brown LJ had described the "IAT's enormously thorough and conscientious determination" as "entirely convincing". The application for permission was renewed before Simon Brown and Schiemann LJJ and again refused sub norm Cikos v The Home Office [2001] EWCA Civ 1716. At the oral hearing of the permission application Schiemann LJ echoed what had been said by Brooke LJ in Koller v Secretary of State for the Home Department [2001] EWCA Civ 1267 as follows:

> "In a branch of jurisprudence which is fact-rich, it was very much a matter for this expert tribunal (which must be receiving many applications from unhappy Roma people of central Europe) to apply the principles they have been told to apply by the House of Lords in Horvath."

17) I turn, then, to Mr Scannell's particular criticisms. The first engaged an observation by Sedley LJ in granting permission. The learned Lord Justice said this:

> "What matters is whether there was a sufficient failure of state protection. As to this, it is arguable that the Tribunal has made a self-contradictory finding on a key point in the second sentence para 13..."

18) It will be recalled that that sentence was in these terms:

> "We accept that when this was done [that was to report the October incident to the police] Miss Rejchova was brushed aside by the police and told that none of this would have arisen if she was not associated with a Roma, but this does not indicate an unwillingness by the police to carry out their duty of investigating the assault."

19) Without in any way wishing to condone what the police officer said, there is, with respect to Sedley LJ, no self-contradiction as such. The comment, however unacceptable, may have been made by an officer without there being any intention not to do his duty. But the broader point is in my view that very little weight can be put upon a single individual incident of this kind, given the overall nature of the case.

20) Secondly, it is said that the Tribunal placed too much emphasis upon the circumstance that previous attacks upon the appellant were not in the Tribunal's view motivated by his association with his non-Roma partner. This can take Mr Scannell nowhere. The degree of emphasis which the Tribunal place upon any dimension of the facts was for it to judge. No legal error is disclosed in this submission. I might add that on the facts it seems to me that the fact that the previous assaults were not motivated by his association with Miss Rejchova may be a matter of some importance.

21) Thirdly - and this was a major feature of Mr Scannell's argument - complaint is made that there

was a complete failure to consider the objective written evidence. As regards all but the last two of the documents relied on this in my judgment is entirely unsustainable given the terms of the Puzova decision. It is also to be noted that none of the documentation, as Mr Scannell acknowledges concerns any particular question that arises as to the treatment of a Roma who has as a partner a non-Roma woman. The material simply does not go to any special concerns in that regard.

22) In relation to the last two documents relied on it is plainly the case that the Tribunal made no express reference to them. Mr Scannell took us to them. The earlier, dated May 2001, is a report called an "Intervention" by a body named ONCT, the World Organisation against Torture. The second is a short document dated 29th June 2001 from a body called "The European Roma Rights Centre". We have looked at both of these document with some care. I do not mean to diminish the problems to which they plainly refer by saying that they are cast in general terms, and so far as I can see add nothing that would change the picture as it was perceived in the Puzova decision. While no doubt it would have been desirable for the Tribunal to refer to these documents expressly, this is not a case in which their failure to do so can be said to constitute either a failure to have regard to relevant material or a want of proper reasons.

23) It is then said that the Tribunal failed to consider the appellant's own evidence. The appellant's own evidence was set out extensively by the adjudicator in large measure in passages which I have read. The Tribunal manifestly had all that was said by the adjudicator very much in mind. I see no basis for this submission on the face of the documents before us.

24) The last complaint under this general head went to the Tribunal's treatment of the so-called "civil alternatives". That arose in paragraph 14 of the determination and concerns an Inter-Ministerial Commission for the affairs of the Roma and also an Inter-Departmental Commission. I repeat for convenience the last sentence of paragraph 14:

> "There is therefore no reason why, however, if the appellant and his girlfriend considered that no action had been taken by the police with regard to the first assault, they should not have taken their complaint to one or other of the NGOs or governmental bodies concerned with the furtherance and protection of Roma rights and the Roma community."

25) If I considered that the Tribunal were in some way implicitly seeking to exonerate the home State from its duty to protect its own citizens, as necessary by a proper criminal justice system, I would see strength in this complaint. But in my judgment it is plain that that is not what the passage means. Elsewhere reference is made to the duty of the police. Reference is also made to the Horvath decision though the reference is factually at fault. It is not an available submission in my judgment to say that the Tribunal were in some way misdirecting themselves as to the nature of the state protection that is required under the surrogacy principle. Indeed, for my part I would think that it was not only proper but possibly obligatory for the Tribunal to have in mind such recourse as is available within the State in question to bodies of the kind referred to in that paragraph.

26) Those points deal with the general raft of Mr Scannell's submissions. He made two other submissions. The first was that the Tribunal's approach to the Horvath case was flawed; the second was that the Tribunal failed to consider the appellant's history of ill-treatment before the three incidents principally relied upon. As regards Horvath the reference is to the opening of paragraph 15 (again for convenience I will just give a few words):

> "So far as the question of adequacy of protection against skinheads is concerned, this matter has been reviewed extensively in the case of Horvath and it is now established that the government of the Czech Republic does provide sufficient protection, though each case must be considered upon its own merits."

27) Mr Scannell rightly makes the point that Horvath was in fact concerned with Roma in Slovakia; and the factual position as between Slovakia and the Czech Republic is by no means identical in relation to the problems faced by the Roma. The other point he makes is that in his submission it would appear that the Tribunal are seeking to deploy the Horvath reasoning as if it closed the result against his client as a matter of legal determination. If it were not for the case of Puzova again I would be troubled by what the Tribunal say here. If the sentence in question indicates an understanding on their part that Horvath was in fact concerned with the Czech Republic that was wrong, and if the mistake were material or relevant to their decision or its legal reliability then that might well form a basis for allowing this appeal. But given the material in Puzova that cannot in my judgment be the case. In fact I wonder - and I use that verb, for I acknowledge at once that the question is speculative - whether the reference to Horvath there was actually intended to be a reference to Puzova to which the adjudicator had expressly referred; but I make no finding to that effect. There is, with respect to Mr Scannell, nothing in the point as to any mistreatment of Horvath as a legal authority.

28) As regards the alleged failure to consider the appellant's past history I see nothing in that. It is not said that the statement in the second sentence of paragraph 2 of the IAT determination "the basis of his claim is that in 1999 the appellant was attacked on two occasions by skinheads and again in February 2000" was in any way inaccurate. Of course the Tribunal must look at the whole background. I see no reason to suppose that they failed to do so.

29) In the end it seems to me that this appeal should only have any reasonable chance of success if it could be shown that the Tribunal have failed to grapple with the appellant's case (if this is how it was put) that he was in a special position because of his association with a non-Roma girl. I see no such failure on the Tribunal's part. I should add for completeness that there is a complaint in the skeleton argument briefly adverted to by Mr Scannell that the Tribunal failed to engage with a decision of this court in Harakel v Secretary of State for the Home Office 21st May 2001, in which the court overturned the decision of the IAT an facts very similar to those of this case. As regards that I am content merely to replicate this passage from the skeleton argument of Miss Richards for the Secretary of State, dealing with Harakel at paragraph 19:

> "Firstly, it was the Court of Appeal's view in the subsequent case of Cikos and others [that is the application for permission to appeal in Puzova], that Harakel turned on its own facts (in particular it was a case in which the appellant's assailant was readily identifiable and in which the Court of Appeal found that the Tribunal had seriously mis-stated the true position as to the appellant's conduct). Secondly, the Court of Appeal in Harakel expressly approved the observations of Mr Justice Collins in the earlier case of Havlicek which included the following statement: 'The fact that the protection available has not proved effective in individual cases cannot of itself establish a claim for asylum. The fact that individual police officers are lazy or incompetent or unwilling to carry out their duty does not establish that the state is unable to provide the necessary protection. Furthermore, it must be recognised that a prosecution can only be based on evidence and it may in many cases be very difficult to obtain sufficient evidence to launch prosecutions.'"

30) That of course echoes what had been said in Puzova in March 2001.

31) I conclude, accordingly, that there is no inconsistency between Harakel and the present case, and the case of Harakel cannot offer any foundation for a successful assault upon the Tribunal. In all these circumstances in my judgment this appeal has no force and I would dismiss it.

32) LORD JUSTICE MANCE: I agree.

33) SIR MARTIN NOURSE: I also agree.

(Appeal dismissed; Appellants costs be assessed in accordance with the Community Legal Service (Costs) Regulations; costs to be subject to detailed assessment).