In The House of Lords

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)
CIVIL DIVISION

BETWEEN:

THE EUROPEAN ROMA RIGHTS CENTRE (1)
HM (2)
RG (3)
MZ (4)
AK (5)
IB (6)
AKu (7)

Appellants

- and –

THE IMMIGRATION OFFICER AT PRAGUE AIRPORT (1)
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT (2)

Respondents

- and -

THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

WRITTEN CASE ON BEHALF OF THE INTERVENER[1]

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1 The Office of the United Nations High Commissioner for Refugees ('UNHCR'), which has its Headquarters in Geneva, Switzerland, intervenes in the present appeal with the leave of your Lordships'

[1] The Written Case has been amended to reflect the withdrawal of certain submissions during oral argument.

House. UNHCR has been entrusted by the United Nations General Assembly with the responsibility of providing international protection to refugees within its mandate and of seeking permanent solutions to the problems of refugees. The Statute of the Office, annexed to General Assembly Resolution 428 (V) of 14 December 1950, specifies that the High Commissioner shall provide for the protection of refugees falling under the competence of the Office by, among others:

> 'Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto...'
>
> Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res. 428(V), 14 December 1950, Annex, paragraph 8.

2 States have recognised and accepted this supervisory responsibility of the UNHCR in Article 35 of the 1951 Convention relating to the Status of Refugees ('the 1951 Convention'), to which the United Kingdom became a party on 11 March 1954.

> *'Article 35 – Co-operation of the national authorities with the United Nations*
> 1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.'

3 The question of concern to the UNHCR in the present appeal is identified in the Statement of Facts and Issues, as follows:

> '…[W]hether a decision by an immigration officer at Prague Airport (and/or any decision by the Secretary of State that such officers should make such decisions there) is invalid if that decision is incompatible with any obligations of the United Kingdom as a matter of international law under (a) any

relevant conventions and instruments and (b) any relevant rule of customary international law ("the issue relating to the domestic effect of conventional and customary international law").
Statement of Facts and Issues, paragraph 14(1)

4 The present case raises important questions concerning the implementation of the 1951 Convention and the lawfulness of measures which a State party may take to avoid certain provisions of that treaty being activated. It thus involves the essential interests of refugees and asylum seekers within the mandate of the High Commissioner and the international protection function of the Office.

5 In light of its supervisory responsibilities and mandate to provide international protection, UNHCR's submissions focus on the relevant questions of international law, in so far as these relate to the protection of refugees and asylum seekers under United Kingdom law. As UNHCR argued in the Court of Appeal, the subject-matter of the present case involves obligations arising under both treaty and customary international law.

Summary of case

6 In the judgments of the Court of Appeal and of Burton J at first instance, considerable reliance was placed on the limited scope of application of Articles 1 and 33 of the 1951 Convention; and on what was held to be the limited incorporation of that treaty in English law. UNHCR respectfully submits:

6.1 that the Court of Appeal erroneously characterised the case as solely one of *admission* to the United Kingdom, whereas it is properly to be seen as involving the lawfulness of extraterritorial measures of control, irrespective of admission;

6.2 that the Court of Appeal erroneously limited its analysis to the terms of the 1951 Convention, in particular, Article 1 (refugee definition) and Article 33 (*non-refoulement*), so far as these provisions were understood to be incorporated into United Kingdom law, whereas it ought also to have taken account of the broader legal context;

6.3 that the Courts below failed to recognise and apply the distinction between obligations imposed by customary international law and obligations imposed by treaty, and that they therefore failed to recognise and give due weight to the principles of good faith, *non-refoulement*/non-rejection at the frontier, and non-discrimination, in so far as they are also part of English law;

6.4 that the Court of Appeal failed to apply the customary international law principle of good faith which, correctly interpreted and so far as relevant to the present proceedings, obliges the United Kingdom (a) to refrain from actions incompatible with the object and purpose of treaties to which it is party; and (b) to exercise its rights consistently with its other obligations under international law.

7 UNHCR bases its submissions on the long-established principle of English law that,

> 'The law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be part of the law of the land.'
> Blackstone, *Commentaries on the Laws of England*, (1769), Bk. IV, Ch. 5, p. 66; recently cited by the Court of Appeal in *Jones & Milling, Olditch & Pritchard, and Richards v. Gloucestershire Crown Prosecution Service* [2004] EWCA Crim 1981, §19.

A **Earlier authorities from which your Lordships' House is requested to depart**

8 **UNHCR will humbly suggest that, in so far as its decisions in the *International Tin Council* case (*J. H. Rayner v. Department of Trade* [1990] 2 AC 418), *R v. Home Secretary, ex parte Brind* [1991] 1 AC 696, and *R v. Lyons* [2003] 1 AC 976 are inconsistent with the case now presented, your Lordships's House may wish to consider departing from those rulings.**

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1. Characterisation of the issues

9 The Court of Appeal (and indeed the Administrative Court at first instance) misconstrued the basic issues involved in this case, so far as the courts assumed that it is necessarily about the *admission* of asylum seekers to the United Kingdom (see Court of Appeal, §1).

App Pt I pp 122-123 and 161

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10 The Court (§22) was of the view that Article 33 of the 1951 Convention (the *non-refoulement* provision) lay at the heart of this appeal, and then found (at paragraphs 31 and 37) that it had no direct application, so far as it applies only to refugees outside their country of origin, and to return to 'frontiers'.

App Pt I p 166

App Pt I pp 169 and 171

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> '31. ... and whatever precise meaning is given to [*refoulement*], it cannot comprehend action which causes someone to remain on the same side of the frontier as they began; nor indeed could such a person be said to have been returned to any frontier...

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> '37. ... It cannot be suggested that on any construction of article 33, however generous, a right of access to this or any other country to claim asylum can be found within it.'

11 UNHCR submits that Article 33's formulation of the *non-refoulement* principle is only one issue in the practice of pre-

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clearance. It does not follow, as a matter of international law, that compliance with applicable international legal obligations requires in all cases 'a right of access' to the United Kingdom

12 In this sense also, it is respectfully submitted that the Court's reliance on quotations from the judgment of Lord Mustill in *T v. Secretary of State for the Home Department* is misplaced ([1996] AC 742, 754, 758), so far as His Lordship referred to the notion that what is at issue is a right 'to insist on being received' or 'on being admitted' (Court of Appeal, §39).

App Pt I p 172

13 In UNHCR's submission, once the Court had accepted the premise that the sole issue in the case was the (non)-existence of an obligation to admit, it then proceeded to make the following unnecessary elision, in the words of Simon Brown LJ:

> 'How then can there be an obligation not to impede but rather to admit someone so that he can become a refugee?' (§43)

App Pt I p 174

14 UNHCR emphasises that there is no *necessary* link between legal restraints on measures to impede travel, and any question of admission.[2] Contrary to what is suggested (Court of Appeal, §47), UNHCR did not argue at any time that 'no individual State can impede the flow of prospective asylum seekers to its shores'. UNHCR argued then and argues now that whatever a State chooses to do to obstruct the flight of persons in search of refuge must be accomplished *within* the law, and not in arbitrary disregard of the law. While there may well be a distinction between *preventing* an aspiring asylum seeker from gaining access and *returning* such a person to his or her country, this is not the *only* distinction; for one must also distinguish between what is done lawfully and what is

App Pt I p 175

[2] Even the principle of *non-refoulement* does not itself require admission, although admission may be required by force of circumstance, for example, if no other non-persecuting State is willing to accept the refugee. In practice, the quality of that 'Admission' may vary from temporary residence to confinement in camps and settlements.

done unlawfully.

15 In the Court of Appeal and on the basis of earlier authorities, Laws LJ confined the 'Convention challenge' and the issue of justiciability within a context defined by 'the extent to which any given international treaty has by municipal legislation become part of our law' (Court of Appeal, §§97, 98). Having accepted that the challenge was limited by the framework of the 1951 Convention, and that the Convention itself had only been partially incorporated, Laws LJ concluded that the Appellants were, App Pt I pp 191-192

> 'driven to assert that the 1951 Convention had distinct and enforceable effects in the domestic law of England which transcend the reach of its incorporation by Parliament. But that is a constitutional solecism' (Court of Appeal, §99). App Pt I pp 192-193

16 UNHCR, however, adopts the cogent arguments for incorporation of the 1951 Convention into English law presented in paragraphs 20-27 of the Appellants' Written Case.

17 UNHCR submits in addition that the issue of legality is not limited to the 1951 Convention and the extent of its incorporation in English law, and that your Lordships' House can and should have regard to the broader legal context, to the rules set out below, and to the object and purpose of the 1951 Convention, when interpreting relevant legislation and when reviewing the exercise of discretionary powers.

18 In this regard, also, UNHCR adopts the Appellants' argument that UK Courts are competent to take account of treaties, whether incorporated or not, for the purpose of reviewing the legality of practices and decisions, set out in paragraphs 28-36 of the Appellants' Written Case; save that UNHCR will further submit that your Lordships' House may wish to reconsider such earlier authorities as may limit the effectiveness of such review (see

section 3 below).

2. Applicable principles and rules of international law

19 In UNHCR's submission, three principles of international law, in particular, are relevant to the determination of this appeal, namely, the principles of good faith, *non-refoulement*/non-rejection at the frontier, and non-discrimination. These three principles meet the English law (and international law) standard of proof for the purposes of incorporation. They are therefore part of English law and properly justiciable before your Lordships' House, as any rule of the Common Law.

Proof of international law

20 In *West Rand Central Gold Mining Company v. R.* Lord Alverstone CJ considered that,

> 'the international law sought to be applied, must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature and has been so widely and generally accepted, that it can hardly be supposed that any civilised state would repudiate it.'
> *West Rand Central Gold Mining Company v. R.* [1905] 2 KB 391, 406 (Lord Alverstone CJ); see also Article 38, Statute of the International Court of Justice.

21 In *Trendtex* , Stephenson LJ put the issue in the following terms:

> '[R]ules of international law, whether they be a part of our law or a source of our law... are "proved" by taking judicial notice of "international treaties and conventions, authoritative textbooks, practice and judicial decisions" of other courts in other countries which show that they have "attained the position of general acceptance by civilised nations": *The Cristina* [1938] AC 485, 497, per Lord MacMillan; and those sources

> come seldom if ever from every civilised nation or agree upon a universal rule; they move from one generally accepted rule towards another.'
> *Trendtex Trading v. Bank of Nigeria* [1977] 1 QB 529, 569F, G.

22 More recently, Latham LJ confirmed that no act of 'transformation' was necessary, whether 'by statute, judicial decision or ancient custom', for that would emasculate the principle,

> 'that a rule of international law is capable of being incorporated into English law if it is an established rule derived from one or more of the recognised sources, that is a clear consensus, evidenced by the writings of scholars or otherwise, or by treaty... In our view, the question as to whether or not a rule of international law forms part of English law is governed by the principle of certainty...'
> *Jones & Milling, Olditch & Pritchard, and Richards v. Gloucestershire Crown Prosecution Service* [2004] EWCA Crim 1981, §24.

23 While the three principles of international law now set out below are properly to be considered part of English law, their precise effect will depend, among others, on the legislative context. This is examined more fully below in paragraphs 87-88.

2.1 The fundamental principle of good faith in customary international law

24 The different aspects to 'good faith' as a *general* principle of international law must be distinguished. These include the obligations of States, (1) to settle disputes in good faith; (2) to negotiate in good faith; (3) having signed a treaty, not to frustrate the achievement of its object and purpose prior to ratification: Article 18, 1969 Vienna Convention on the Law of Treaties (VCLT69); (4) having ratified a treaty, to apply and perform it in

good faith and not to frustrate the achievement of its object and purpose: Article 26 VCLT69; (5) to interpret treaties in good faith, in accordance with their ordinary meaning considered in context and in the light of their object and purpose (the principle *pacta sunt servanda*): Article 31 VCLT69; (6) to fulfil in good faith obligations arising from other sources of international law: Article 2(2), UN Charter; and (7) to exercise rights in good faith.

25 In earlier proceedings, UNHCR argued that the measures introduced under the pre-clearance scheme were incompatible with the good faith obligation not to frustrate the object and purpose of the 1951 Convention (the fourth aspect listed in the above paragraph), and that they also infringed the fifth, sixth, and seventh elements of the good faith obligation. UNHCR's submissions in the present appeal focus on the sixth and seventh elements, taking account of the fact that good faith in international law requires specifically that States shall exercise their rights consistently with their other obligations under international law.

26 Nonetheless, it is to be noted that the principle of good faith, as a legal principle, forms an integral part, not only of the rule *pacta sunt servanda*, but generally and throughout international law. As the International Court of Justice stated in the *Nuclear Tests* Case:

> 'One of the basic principles governing the creation and performance of legal obligations, *whatever their source*, is the principle of good faith...'
> *Nuclear Tests (Australia v. France) Case*, ICJ Reports, 1974, 253, 268, para. 46; see also *Case Concerning Border and Transborder Armed Actions*, ICJ Reports, 1988, 105, para. 94.

27 Article 2(2) of the United Nations Charter places the principle in the forefront of those which are to govern the conduct of Members:

> 'The Organization and its Members, in pursuit of the Purposes stated in Article 1,

> shall act in accordance with the following Principles...
>
> 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the Charter.'[3]

28 That Article 2(2) applies to all obligations that are in accordance with the Charter has been confirmed in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by consensus in UN General Assembly Resolution 2625 (XXV), 24 October 1970).

29 Sir Gerald Fitzmaurice, a former Special Rapporteur on the Law of Treaties and Judge of the International Court of Justice, defined the principle as follows:

> 'The essence of the doctrine is that although a State may have a strict right to act in a particular way, it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have bona fide reasons for what it does, and not act arbitrarily and capriciously.'
> Fitzmaurice, G., 'The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law', 27 *British Yearbook of International Law* 1, 12-13 (1950)

30 The need to respect the meaning and purpose of a treaty emphasises the *objective* function of the principle and the fact that, in applying the good faith standard, it is *not* necessary to prove bad

[3] The Preamble of the Charter affirms the intention, 'to establish conditions under which justice and respect for *the obligations arising from treaties and other sources of international law* can be maintained'. (United Nations Charter, Preamble; emphasis supplied).

faith.

> I. Brownlie, Principles of Public *International Law*, Oxford: Clarendon Press, 6th edn., 2003, 423-7.
> See also J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge: Cambridge University Press, 2002, 84.

31 Thus, good faith requires conduct which is objectively compatible with meaning, object and purpose. The present appeal, however, is not about the interpretation or application of one or more specific articles of the 1951 Convention;[4] rather, it concerns the lawfulness of measures taken to prevent Convention protection ever being triggered. In accordance with established doctrine, this requires an assessment of the conduct of the State and its consequences in fact, rather than its intentions.

> Cf. *North Atlantic Coast Fisheries Case* (Great Britain–United States of America), in which it was recognised that Great Britain, as the local sovereign, had the right and duty to legislate in regulation of fisheries. However, '... treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate *at will* concerning the subject-matter of the treaty, and limiting the exercise of sovereignty of the State bound by a treaty with respect to that subject-matter to such acts as are consistent with the treaty.' UNRIAA, vol. XI, 167, 188 (1910), emphasis in original.
> See also Judge Azevodo, Separate Opinion, *Conditions of Admission to the United Nations Case*, Advisory Opinion, ICJ Reports, 1947-8, 80.

[4] At first instance, Burton J found that, while Article 31(1) VCLT69 requires treaty terms to be interpreted in good faith in the light of the object and purpose of the treaty and in accordance with its ordinary meaning, there was no obligation, '... actually expressed within the [1951] Convention which could be read in accordance with its ordinary meaning but purposively, so as to create a wider obligation in the light of the Convention's object and purpose which had then to be performed in good faith by reference to Article 26 of the Vienna Convention.' *European Roma Rights Center & Others v Immigration Officer at Prague Airport and Secretary of State for the Home Department* [2002] EWHC 1989, paragraph 43(ii). See also per Simon Brown LJ in the Court of Appeal at § 45, and below, paragraph 32.

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32 Lack of good faith in the implementation of a treaty must also be distinguished from a violation of the treaty itself. A State lacks good faith in the application of a treaty, not only when it openly refuses to implement its undertakings, but more precisely, when it seeks to avoid or to 'divert' the obligation which it has accepted, or to do indirectly what it is not permitted to do directly.

33 As Lord McNair has observed, 'A State may take certain action or be responsible for certain inaction, which, though not in form a breach of a treaty, is such that its effect will be equivalent to a breach of treaty; in such cases, a tribunal demands good faith and seeks for the reality rather than the appearance.'

> Lord McNair, *The Law of Treaties*, Oxford: Clarendon Press, 1961, 540.

34 Before the Court of Appeal, UNHCR explained (at some length) the principle of good faith as a general principle of international law. The Court itself, however, chose to rely on one dictum only of the International Court of Justice, to the effect that good faith is 'not in itself a source of obligation' (Court of Appeal, §45). It is respectfully submitted that the Court failed to recognise that good faith nevertheless *is* an obligation in itself, which requires, among others, that a State refrain from actions incompatible with the object and purpose of treaties to which it is party; and exercise its rights consistently with its other obligations under international law.

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35 Writing in 1953 on the general principles of international law, Bin Cheng concluded:

> 'The principle of good faith which governs international relations controls also the exercise of rights by States...Good faith in the exercise of rights... means that a State's rights must be exercised in a manner compatible with its various obligations

> arising either from treaties or from the general law. It follows from this interdependence of rights and obligations that rights must be reasonably exercised...'
> Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals,* London: Stevens & Son, 1953, 121, 131.

36 The requirement that a State's actions be consistent with its international obligations at large is a well established principle, applicable in times of emergency as much as in normal times.

> Cf. Article 15, 1950 European Convention on Human Rights; Article 4, 1966 International Covenant on Civil and Political Rights.

37 Besides the 1951 Convention, the United Kingdom's actions with regard to the introduction of pre-clearance are subject to its obligations under general or customary international law, as well as to those which it has expressly accepted in ratifying, among others, the 1950 European Convention on Human Rights, and the 1965 International Convention for the Elimination of All Forms of Racial Discrimination.

2.1.1 Conclusion

38 For these reasons, the Intervener respectfully submits that the options available to a State wishing to obstruct the movement of those who seek asylum are thus limited by specific rules of international law and by the State's obligation to fulfil its international commitments in good faith; and that in pursuing the 'legitimate purpose' of immigration control, the United Kingdom must act within the law.

A

2.2 The principle of *non-refoulement*/non-rejection at the frontier in customary international law

39 Article 33 of the 1951 Convention prohibits the State from returning a refugee, in any manner whatsoever, 'to the frontiers of territories' where his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.

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40 As a principle of customary international law, *non-refoulement* prohibits both the return of refugees to the frontiers of territories in which they may face persecution, *and* the rejection of persons at the frontiers of the country in which they fear persecution (the principle of non-rejection at the frontier).

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41 The need to protect those seeking refuge even at the frontiers of their own State was recognised over seventy years ago. Under Article 3 of the 1933 Convention relating to the International Status of Refugees (159 *LNTS* No. 3663), the parties agreed not to remove resident refugees or keep them from their territory, 'by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*)', and 'in any case not to refuse entry to refugees at the frontiers of their countries of origin'.

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42 In 1950, the *Ad hoc* Committee on Statelessness and Related Problems, which prepared the draft convention for consideration by the 1951 Conference of Plenipotentiaries in Geneva, drew up the following fundamental provision:

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> 'No contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or political opinion.' See *Report* of the Ad Hoc Committee on Refugees and Stateless

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> Persons, UN doc. E/1850, 25 August 1950, Annex I, Revised Draft Convention, Article 28; see also Ch. III, Decisions and Comments of the Committee, para. 30.

43 The United States delegate, Louis Henkin, stated:

> 'Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same... Whatever the case might be... he must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp': *Ad hoc* Committee on Statelessness and Related Problems: UN doc. E/AC.32/SR.20, paras. 54-5 (1950).

44 Over many decades, the linkage between *non-refoulement* and non-rejection at the frontier has established itself in the practice of States, which have allowed large numbers of asylum seekers not only to cross their frontiers, for example, in Africa, Europe and South East Asia, but also to remain pending a solution.

45 This practice has been confirmed in instruments adopted in various international fora. Article 3(1) of the 1967 Declaration on Territorial Asylum, adopted unanimously by the General Assembly, recommends that States be guided by the principle that no one entitled to seek asylum,

> 'shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution'.

46 Article III(3) of the Principles concerning Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee in Bangkok in 1966, contains very similar language.

> *Report of the Eighth Session of the Asian-African Legal Consultative Committee*, Bangkok, 8-17 Aug. 1966, 355.

47 Article II(3) of the 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa declares that,

> 'No person shall be subjected... to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened.'

48 A 1967 resolution adopted by the Committee of Ministers of the Council of Europe, including the United Kingdom, acknowledged that member States should 'ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution ...'

> Res. (67) 14 on Asylum to Persons in Danger of Persecution, adopted 29 June 1967.

49 The Committee of Ministers reiterated this principle in 1984, 'regardless of whether [the] person has been recognised as a refugee...'

> Rec. No. R (84) 1, Recommendation on the Protection of Persons satisfying the Criteria in the Geneva Convention who are not Formally Recognised as Refugees.

50 The 1984 Cartagena Declaration is equally categoric, not only endorsing a broader, regional-specific refugee definition, but also

reiterating the importance of *non-refoulement* and non-rejection at the frontier as a 'corner-stone' of international protection, having the status of *jus cogens*.

> 1984 Cartagena Declaration on Refugees, Conclusions and Recommendations, III, 5.

51 The UNHCR Executive Committee, of which the United Kingdom has long been a member, has repeatedly confirmed the fundamental nature of the principle of *non-refoulement* and its non-derogable character. In 1977, for example, it noted that the principle was 'generally accepted by States', expressed concern at its disregard in certain cases, and reaffirmed,

> 'the fundamental importance of the observance of the principle of *non-refoulement*—both at the border and within the territory of a State—of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognised as refugees.' UNHCR Executive Committee Conclusion No. 6 (XXVIII), 1977: *Report* of the 28th Session: UN doc. A/AC.96/549, para. 53.4.

52 It should be noted, in particular, that this Conclusion was adopted in October 1977, *after* the failure of the 1977 Conference on Territorial Asylum which attracted the attention of Counsel and the Court of Appeal (§44). The 1977 Draft Convention, it was hoped, would establish an individual right to the grant of (territorial) asylum. In so far as it would have dealt with the issue of *non-refoulement*, it was proposed that the Convention should codify the by then established principle of customary international law which incorporates the rule of non-rejection at the frontier. Conventions serve not only the purpose of progressively developing the law, but also of committing existing customary rules of general international law to paper (and thus often of clarifying their scope). The 1977 Conference failed, not because of any doubt as to the

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scope of the *non-refoulement* principle, but because States were not then prepared to accept an individual right to asylum. The implication in paragraph 44 of the judgment of the Court of Appeal that the Conference rejected the customary international law rule of *non-refoulement*/non-rejection at the frontier is therefore incorrect.

Cf. Grahl-Madsen, A., *Territorial Asylum*, Stockholm: Almquist & Wiksell International, 1980, 61-66.

53 In its 1981 Conclusion on the Protection of Asylum Seekers in Situations of Large-Scale Influx, the UNHCR Executive Committee declared as follows:

'**II. Measures of protection**

A. Admission and non-refoulement

1. In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection according to the principles set out below. They should be admitted without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity.

2. In all cases the fundamental principle of *non-refoulement* – including non-rejection at the frontier – must be scrupulously observed.' UNHCR Executive Committee Conclusion No. 22 (XXXII), 1981; *Report* of the 32nd Session: UN doc. A/AC.96/601, para. 57(2).

See also 'Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees', adopted at the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol, Geneva, 12-13 December 2001, doc. HCR/MMSP/2001/09, 16 January 2002.

54 In an Opinion prepared for UNHCR in 2001, the authors, Sir Elihu Lauterpacht QC and Daniel Bethlehem, undertook a comprehensive review of instruments and State practice. They concluded as follows with regard to Article 33 of the Convention:

> '76. As regards rejection, or non-admittance at the frontier, the 1951 Convention and international law generally do not contain a right of asylum. This does not mean, however, that States are free to reject at the frontier, without constraint, those who have a well-founded fear of persecution. What it does mean is that, where States are not prepared to grant asylum to persons who have a well-founded fear of persecution, they must adopt a course that does not amount to *refoulement*. This may involve removal to a safe third country or some other solution such as temporary protection or refuge. No other analysis, in our view, is consistent with the terms of Article 33(1)...'
> Sir Elihu Lauterpacht QC and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', published in Feller, E., Türk, V., & Nicholson, F., *Refugee Protection in International Law*, Cambridge: Cambridge University Press, 2003, 87-179.

55 With regard to *non-refoulement* as a principle of customary international law, they found that the main elements were as follows:

> '218. ... (a) the principle binds all States, including all sub-divisions and organs thereof and other persons exercising governmental authority and will engage the responsibility of States in circumstances in which the conduct in question is attributable to the State wherever this occurs;
>
> (b) it precludes any act of *refoulement*, of whatever form, including non-admittance at the frontier, that would have the effect of exposing refugees or asylum-seekers to:
> (i) a threat of persecution;
> (ii) a real risk of torture, cruel,

> inhuman or degrading treatment or punishment; or
> (iii) a threat to life, physical integrity or liberty...'.

56 The 70th Conference of the International Law Association held in New Delhi, India, from 2-6 April 2002, adopted a 'Declaration on International Minimum Standards for Refugee Procedures', paragraphs 2 and 5 of which provide:

> '2. Access to refugee status procedures and the benefit of refugee status should be granted without discrimination as to racial or ethnic origin, religion or belief, disability, sex, status, or country of origin...
>
> '5. No one who seeks asylum at the border or in the territory of a State shall be rejected at the frontier, expelled or returned in any manner whatsoever to any country in which he or she may be tortured or subjected to inhuman, cruel or degrading treatment or punishment or in which his or her life or freedom may be endangered for reasons of race, ethnic origin, religion, nationality, membership of a particular social group, association with a national minority, sex, language, political or other opinion, birth or other status.'
> International Law Association, Resolution 6/2002, Refugee Procedures. Declaration on International Minimum Standards for Refugee Procedures.

2.2.1 Conclusion

57 In light of the above, an illustrative but by no means exhaustive summary of the practice of States, international organisations, juridical associations, and the views of jurists, UNHCR submits that the principle of *non-refoulement*/non-rejection at the frontier is part of customary international law, and thus also of English law.

2.3 The principle of customary international law prohibiting discrimination on the grounds of race

58 UNHCR notes the present appeal is based in part on the argument that pre-clearance was introduced in Prague with the expressed intention of stemming the movement of Czech citizens of Roma ethnic origin who might claim asylum in the United Kingdom, and that it is argued that in its application the scheme was characterised by discrimination on racial grounds.

59 As a matter of customary international law, the United Kingdom is bound not to discriminate on grounds of race; it has also expressly accepted treaty obligations in this regard, through its ratification of the 1965 International Convention for the Elimination of All Forms of Racial Discrimination (ICERD65: 660 *UNTS* 276; 1350 *UNTS* 386).

60 Non-discrimination on the grounds of race is a central principle of the United Nations Organisation, of which the United Kingdom is a founding member. Thus, Article 1.3 of the UN Charter includes among the purposes of the UN, 'To achieve international co-operation... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...' also Article 55.

61 The principle of non-discrimination was included as a fundamental principle of the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948; Articles 1, 2, 7.

62 Article 3 of the 1951 Convention itself provides that, 'The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.'

63 The *erga omnes* nature of the customary international law obligation not to discriminate on grounds of race was acknowledged by the International Court of Justice in its judgment in the *Barcelona Traction Case* in 1970:

> '33. ... [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> '34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.' *Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgment, I.C.J. Reports 1970, p. 32, para. 33.

64 The customary and non-derogable character of the principle of non-discrimination on grounds of race was examined at length by Judge Tanaka in the *South West Africa Cases (Second Phase)*, I.C.J. Reports, 1966, 284-316

> Text in Brownlie, I. & Goodwin-Gill, G. S., *Basic Documents on Human Rights*, Oxford: Oxford University Press, 4th edn., 2001, pp 782-808.

65 One recent commentator, Ragazzi, suggests that, 'Each of the four obligations *erga omnes* listed by the International Court reflects an exceptionless moral norm (or moral absolute) prohibiting an act which, in moral terms, is intrinsically evil (*malum in se*).'

> Ragazzi, M., 'International Obligations *Erga Omnes*: Their Moral Foundation and Criteria of Identification in Light of Two Japanese Contributions', in Goodwin-Gill, G. S. & Talmon, S., eds., *The Reality of International Law: Essays in Honour of Ian Brownlie,* Oxford: Oxford University Press, (1999), pp 455-477.

66 In the words of the United Nations Human Rights Committee, 'Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.'

> Human Rights Committee, Thirty-seventh session (1989), General comment No. 18: Non-discrimination: UN doc. HRI/GEN/1/Rev.7 pp. 146-7.

67 The status of the principle prohibiting racial discrimination in customary international law is reinforced by the terms of successive General Assembly resolutions, either adopted without a vote (by consensus) or with large majorities.

68 For example, in Resolution 56/267 on measures to combat contemporary forms of racism and racial discrimination, xenophobia and related intolerance, adopted without a vote on 27 March 2002, the General Assembly urged States,

> 'to adopt and implement or strengthen national legislation and administrative measures that expressly and specifically... prohibit racial discrimination... whether direct or indirect, in all spheres of public life, in accordance with their obligations under the International Convention on the

Elimination of All Forms of Racial Discrimination' (Paragraph 5).

69 The General Assembly further urged States,

> 'to design, implement and enforce effective measures to eliminate the phenomenon popularly known as *"racial profiling"*, consisting in the practice by police and other law enforcement officers of relying to any degree on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities...' (Paragraph 21, emphasis supplied).

70 Simultaneously, it expressed its,

> 'deep concern at the ongoing manifestations of... racial discrimination... xenophobia and related intolerance... against Roma/Gypsies/ Sinti/Travellers, and [urged] States to develop effective policies and implementation mechanisms for their full achievement of equality' (Paragraph 24).

71 In Resolution 57/195 on the fight against racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action, adopted on 18 December 2002 on a recorded vote of 173 votes to 3 (Israel, Palau, United States of America) with 2 abstentions (Australia, Canada), the General Assembly acknowledged, among others, the following basic principles:

> '... that *no derogation from the prohibition of racial discrimination,* genocide, the crime of apartheid or slavery *is permitted*, as defined in the obligations under the relevant human rights instruments...'
> UNGA Resolution 57/195, 18 December 2002, Part I, Basic general principles, para. 1.

72 The General Assembly further urged all States,

> '... to review and, where necessary, revise their immigration laws, policies and practices so that they are free of racial discrimination and compatible with their obligations under international human rights instruments...'
> UNGA Res. 57/195, Part I, Basic general principles, paras. 1, 4, 6. The basic principles are reiterated in UNGA Res. 58/160, adopted on 22 December 2003 by a recorded vote of 174 votes to 2 (Israel, USA), with 2 abstentions (Australia, Canada); also UNGA Res. 58/159 on the incompatibility between democracy and racism, adopted without a vote on 22 December 2003.

2.3.1 The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD65) as evidence of customary international law

73 The United Kingdom ratified ICERD65 on 7 March 1969;[5] the Convention has not been specifically incorporated by statute, although race relations legislation has been on the statute book since the 1970s. On ratification, the United Kingdom made the following interpretative statement:

> '... the United Kingdom does not regard the Commonwealth Immigrants Acts, 1962 and 1968, or their application, as involving any racial discrimination within the meaning of paragraph 1 of article 1, or any other provision of the Convention, and fully reserves its right to continue to apply those Acts.'

74 The Commonwealth Immigrants Acts are no longer in force and did not apply to non-Commonwealth citizens. An 'interpretative statement' is not equivalent to a reservation to a treaty, does not

[5] The Czech Republic ratified ICERD65 on 22 February 1993, following on the earlier ratification by Czechoslovakia on 29 December 1966 with reservations (subsequently withdrawn in 1991).

affect the international meaning of the terms of a treaty, and cannot change the content of any pre-existing customary international law obligation. Moreover, it is not open to the United Kingdom, following the expression of its consent to be bound, to 'revise' its position on the compatibility of UK law and practice with the provisions of the Convention. In the circumstances, the United Kingdom's position in relation to the Commonwealth Immigrants Acts is incapable of extension to later legislation.

75 Article 1 ICERD65 provides:

> '1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

76 The Convention does not apply to 'distinctions, exclusions, restrictions or preferences made by a State Party... between citizens and non-citizens': Article 1(2). However, the Convention does *not* permit distinctions among non-citizens on racial grounds, as defined.

77 Specifically with regard to State obligations, Article 2 ICERD65 provides:

> '2.1 *States Parties condemn racial discrimination* and *undertake to pursue* by all appropriate means and without delay *a policy of eliminating racial discrimination in all its forms* and promoting understanding among all races, and, to this end:
>
> (a) Each State Party *undertakes to engage in no act or practice of racial discrimination* against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national

and local, shall act in conformity with this obligation...

(c) *Each State Party shall take effective measures* to review governmental, national and local policies, and *to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists...*' (Emphasis supplied)

78 Article 5 ICERD65 provides:

'In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake *to prohibit and to eliminate racial discrimination in all its forms* and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(d) Other civil rights, in particular:

...

(ii) The right to leave any country, including one's own, and to return to one's country...' (Emphasis supplied).

79 In its 2003 Concluding Observations on the Report submitted by the United Kingdom, the Committee on the Elimination of Racial Discrimination expressed its concern at,

'... the application of section 19 D of the Race Relations Amendment Act of 2000, which makes it lawful for immigration officers to "discriminate" on the basis of nationality or ethnic origin provided that it is authorized by a minister. *This would be incompatible with the very principle of non-discrimination.* The Committee recommends that the State party consider re-formulating or repealing section 19 D of the Race Relations Amendment Act in order to ensure full compliance with the Convention.' UN doc. CERD/C/63/CO/11, 10 December 2003, para. 16 (emphasis supplied); also

para. 14 on asylum seekers.
In 2000, the Committee on the Elimination of Racial Discrimination recommended that States parties to the Convention 'take all necessary measures in order to avoid any form of discrimination against immigrants or asylum-seekers of Roma origin': Fifty-seventh session (2000), General recommendation XXVII on discrimination against Roma, UN doc. HRI/GEN/1/Rev.7 p. 219, para. 5. Also General Recommendation 30, 'Discrimination against non-citizens', UN doc. CERD/C/64/Misc.11/rev.3, adopted 5 August 2004.

2.3.2 Conclusion

80 The Intervener submits that the prohibition of discrimination on grounds of race is a rule of customary international law, that the meaning of discrimination on grounds of race in customary international law encompasses the terms of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, and that as a matter of customary international law, States are obliged to pursue by all appropriate means and without delay a policy of eliminating racial discrimination, to engage in no act or practice of racial discrimination, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists. This obligation is binding on the United Kingdom as a matter of customary international law, and in virtue of the United Kingdom's ratification of the 1965 Convention.

3. International law as part of English law

81 The authorities on justiciability and the extent to which the courts are able to take account of or apply rules of international law support the following eleven propositions, among others:

81.1 International law is part of the law of England

[*Trendtex Trading v. Bank of Nigeria* [1977] 1 QB 529: authorities cited by Lord Denning MR at 553-4]

81.2 The courts should give effect to clearly established rules of international law as a matter of public policy [*Oppenheimer v Cattermole* [1976] AC 249, 278; *Kuwait Airways Corporation v. Iraqi Airways Company and Others* [2002] UKHL 19, §§29, 114, 139]

81.3 The international law to be applied must be proved by satisfactory evidence showing either that the particular proposition has been recognised and acted upon by the United Kingdom or that it is of such a nature and has been so widely and generally accepted that it can hardly be supposed that any civilised state would repudiate it [*West Rand Central Gold Mining Company v. R.* [1905] 2 KB 391, per Lord Alverstone CJ at 406-8]

81.4 The Crown's power to conclude treaties is an exercise of the Royal prerogative, the validity of which cannot be challenged in municipal courts [*Rustomjee v The Queen* (1876) 2 QBD 69, 74; *J. H. Rayner v. Department of Trade* [1990] 2 AC 418, 499-500; *Blackburn v Attorney General* [1971] 1 WLR 1037]

81.5 The royal prerogative does not extend to altering domestic law or the rights of individuals without the intervention of Parliament [*J. H. Rayner v. Department of Trade* [1990] 2 AC 418, 496-7 , 476-7]

81.6 It is presumed that Parliament intends to legislate in conformity with treaties to which the United Kingdom is party [*R v. Home Secretary, ex parte Brind* [1991] 1 AC 696]

81.7 A treaty is not part of English law unless and until incorporated by legislation [*J. H. Rayner v. Department of Trade* [1990] 2 AC 418; *R v. Home Secretary, ex parte Brind* [1991] 1 AC 696; *R v. Lyons* [2003] 1 AC 976]

81.8 Resort may be had to an unincorporated treaty in order to resolve ambiguity or uncertainty in a statutory provision [*R v. Home Secretary, ex parte Brind* [1991] 1 AC 696]

81.9 Where there is an express and applicable provision of domestic statutory law it is the duty of the courts to apply it even if that would involve the Crown in a breach of an international treaty (sc. or of an obligation arising under customary international law) [*R v. Lyons* [2003] 1 AC 976, 992E, 995G, 1000]

81.10 United Kingdom courts have no power, on behalf of any individual, to enforce rights granted by treaty or obligations imposed in respect of a treaty by international law [*J. H. Rayner v. Department of Trade* [1990] 2 AC 418, 481, 500]

81.11 There is no presumption that Ministerial discretion is to be exercised in accordance with an unincorporated treaty [*R v. Home Secretary, ex parte Brind* [1991] 1 AC 696]

3.1 The authorities to be reviewed

82 In order to give full effect and meaning to the first (81.1) and second (81.2) propositions above, UNHCR submits that certain revisions may be required with respect to propositions supported by earlier authority. In particular, limitations must be placed upon the rule that, where there is an express and applicable provision of domestic statutory law it is the duty of the courts to apply it even if that would involve the United Kingdom in breach of an international treaty or violation of an obligation arising under customary international law (81.9). This would entail consequential revision of the rule that a treaty is not part of English law unless and until it is incorporated by legislation (81.7).

83 Moreover, the presumption that Parliament intends to legislate in conformity with treaties to which the United Kingdom is a party (81.6) ought in principle to entail qualification of the following rules: that exercise of the treaty-making power (the Royal prerogative) does not effect changes in the rights of individuals (81.5); that the courts have no power to enforce, at the behest of an individual, rights granted by treaty or under customary international law (81.10); and that there is no presumption that ministerial discretion is to be exercised in accordance with an unincorporated treaty or with rules of customary international law (81.11).

84 UNHCR therefore humbly submits that:

84.1 So far as the *International Tin Council* case (*J. H. Rayner v. Department of Trade* [1990] 2 AC 418) is authority for the proposition that a cause of action based on an alleged breach of treaty (or violation of customary international law) is not justiciable in the English courts, your Lordships' House may wish now to decline to follow that authority and, subject

to the doctrine of Parliamentary sovereignty, to provide an appropriate remedy with respect to such individual right as may be granted by treaty or customary international law.

84.2 So far as the *International Tin Council* case (*J. H. Rayner v. Department of Trade* [1990] 2 AC 418), *R v. Home Secretary, ex parte Brind* [1991] 1 AC 696, and *R v. Lyons* [2003] 1 AC 976 are authority for the proposition that a treaty is not part of English law unless and until it has been incorporated into it by legislation, your Lordships' House may wish now to decline to follow those authorities in the case of unincorporated treaty rules which are also rules of customary international law binding on the United Kingdom, and to limit the rule of non-incorporation to treaty provisions which do not reflect rules of customary international law.

84.3 So far as *R v. Lyons* [2003] 1 AC 976, 992E, 995G, 1000, is authority for the proposition that, where there is an express and applicable provision of domestic law it is the duty of the courts to apply it even if that would involve the United Kingdom in breach of an international treaty or of a rule of customary international law, your Lordships's House may wish to consider declaring any such provision to be incompatible with the United Kingdom's obligations.

84.4 So far as *R v. Home Secretary, ex parte Brind* [1991] 1 AC 696 is authority for the proposition that there is no obligation (as a matter of English law) on the government to act in conformity with the

> United Kingdom's treaty obligations in exercising a statutory discretion, your Lordships' House may wish now to decline to follow that authority in the case of unincorporated treaty rules which are also rules of customary international law binding on the United Kingdom.

85 In approaching the relation of international law to English law, UNHCR humbly submits that your Lordships' House should consider the extent to which treaties contain rules nevertheless binding on the United Kingdom as a matter of customary international law.

3.2 Customary international law in English law

86 The principles described above in paragraphs 19-80 are part of customary international law and therefore also to be recognised as incorporated in English law. Their justiciability and their effects are thus appropriate matters for the Courts, particularly as Parliament has legislated in a related field to authorise discrimination on grounds of race; that it has conferred on the Secretary of State the authority to initiate pre-clearance operations; that such a scheme has been implemented and is operated by United Kingdom officials abroad; and that both legislation and practice engage the international obligations of the United Kingdom, with respect to the rights and interests of individuals.

3.3 Justiciability and effects

87 In UNHCR's submission, the 1951 Convention provides context (particularly in the form of its object and purpose), while the customary international law principles of good faith, *non-refoulement*/non-rejection at the frontier and non-discrimination on grounds of race serve to characterise the legislation and the practice of pre-clearance, in the particular circumstances of the

A case, as contrary to the United Kingdom's international obligations.

88 The approach to be adopted to rules of customary international law will depend upon the precise legislative and administrative context. It is a constitutional truism that Parliament may change the
B Common Law and that the Court cannot invalidate legislation having this effect. Adopting, for the sake of its simplicity, Blackstone's dictum that the law of nations is 'adopted in its full extent by the common law, and is held to be part of the law of the land', it might seem to follow that Parliament also may 'change'
C international law. As a statement of general application, however, this is incorrect, for neither Parliament nor the Government, acting unilaterally, is competent to change international law, which requires the agreement of States. Parliament may only legislate to interfere with the application of international law in the domestic sphere; and it may equally legislate to authorise or require agents
D of the State, acting extraterritorially, to violate the United Kingdom's international obligations.

> For an example of legislation contrary to international law (sc. the correct interpretation of Article 31 CSR51 as determined by the Divisional Court in
E *Regina v Uxbridge Magistrates' Court and another, Ex p Adimi* [2001] Q.B. 667), *The Queen (On the Application of Gjovalin Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin), paras. 26, 31, 34 (per Thomas, LJ).

3.4 Remedies

F

89 One question for your Lordships' House, in applying customary international law as the law of the land, is how to frame the appropriate remedy. UNHCR respectfully submits that the Common Law may provide such remedy as is consistent with the constitutional position of the courts.

G

90 UNHCR humbly submits that your Lordships' House should pronounce, for the benefit of Parliament and Government, on the compatibility of the United Kingdom's actions with applicable international law.

91 The courts possess such a statutory right in relation to the European Convention on Human Rights (under section 4 Human Rights Act 1998). In UNHCR's submission, your Lordships' House at least possesses an equivalent competence at Common Law, particularly given the long-recognised standing of international law in English law.

92 In *In re McKerr*, Lord Steyn drew attention to the 'narrowness' of the decision in the *International Tin Council* case, and referred to growing support for the view that human rights treaties enjoy a special status: [2004] 1 WLR 807, 822, §49C, G. He suggested that 'international human rights treaties which created fundamental rights for individuals against the state and its agencies' might require a 'critical re-examination' of the law, and particularly the 'rationale of the dualist theory, which underpins the *International Tin Council* case'. [2001] 1 WLR 807, 823-4, §§50-52.

93 In *Pepushi,* Thomas LJ noted,

> 'the cogent arguments advanced that, in the field of human rights treaties, there may be a limitation, whether by estoppel or otherwise, on the ability of the Executive to act against an individual where that action is in breach of the obligations undertaken under by the Executive under international human rights treaties. However, no argument was addressed to us on this important issue, as clearly that argument is not open in this Court in view of the decisions binding on us.'
> *The Queen (On the Application of Gjovalin Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin), para. 29.

94 That argument is now before your Lordships's House. A determination of the unlawfulness in international law of the legislation, policy or practice of the United Kingdom is constitutionally compatible with the doctrine of Parliamentary sovereignty and with practice in relation to the prerogative. UNHCR respectfully submits that your Lordships' House may wish to consider exercising this Common Law competence to make such a declaration of incompatibility in order, amongst others, that Her Majesty in Parliament and the Government shall be apprised of the international legal implications of legislation, policy and practice.

95 In appropriate cases, such as that now under review, UNHCR humbly submits that your Lordships' House should review the lawfulness of delegated legislation, and/or the implementation of extraterritorial schemes such as the present pre-clearance scheme, in the light of the United Kingdom's international obligations.

3.5 Conclusion

96 In UNHCR's submission, the juridical foundation of this competence lies in the Common Law. So far as it may also encompass the provisions of human rights treaties to which the United Kingdom is party, the rules in question would be 'part of the common law by virtue of being rules of general international law'.

> Higgins, R., 'The Relationship between International and Regional Human Rights Norms and Domestic Law', in *Developing Human Rights Jurisprudence* (1993), vol 5, pp 16-23, at p. 20, cited by Lord Steyn in *In re McKerr* [2004] 1 WLR 807, 822, §49.

4. Application of the law in the present appeal

97 As noted above, UNHCR submits that the customary international law principle of good faith, correctly interpreted and so far as

relevant to the present proceedings, obliges the United Kingdom, (a) to refrain from actions incompatible with the object and purpose of treaties to which it is party; and (b) to exercise its rights consistently with its other obligations under international law.

98 UNHCR humbly submits further that it is open to your Lordships' House to consider the compatibility of United Kingdom legislation with the United Kingdom's international obligations; and to review the lawfulness of the practice of pre-clearance and its application in Prague Airport in the light of, among others, the principle of good faith described above, the principle of *non-refoulement*/non-rejection at the frontier; and the principle prohibiting racial discrimination. UNHCR further submits that the measures themselves are unreasonable and disproportionate, due account being taken of the international obligations referred to and the availability of alternative measures compatible with international law.

4.1 Failure to comply with the customary international law principle of good faith and to exercise rights reasonably and proportionately

99 In determining the reasonableness and proportionality of the United Kingdom's exercise of powers within the 'sovereign' area of immigration control, regard must also be had to the availability of alternative measures commensurate with international standards. Thus, in so far as it has been argued that pre-clearance was driven by 'asylum overload', the deficiencies of national asylum procedures in contributing to that situation cannot be ignored.

100 In the 2004 Report of the House of Commons Home Affairs Committee on 'Asylum Applications', the Committee found that, notwithstanding certain positive initiatives,

> '...there are still grounds for concern about the poor quality of much initial decision-

> making by immigration officers and caseworkers. This is indicated not only by the near-unanimous view of our witnesses, but by the disturbing rise in the number of initial decisions successfully appealed against, from 4% in 1994 to 22% in 2002... We support the calls for greater "front loading" of the applications system, that is, putting greater resources into achieving fair and sustainable decisions at an early stage...' House of Commons, Home Affairs Committee, 'Asylum Applications, Second Report of Session 2003-2004, Volume 1, HC 218-1, 26 January 2004, pp. 44-51, §§143, 144.

101 In its 2004 Report, 'Handling EU asylum claims: new approaches examined', the House of Lords European Union Committee concluded, 'that the quality of initial decision-making is the single most important component of an effective asylum system.'

> House of Lords, European Union Committee, 'Handling EU asylum claims: new approaches examined', HL Paper 74, 30 April 2004, Ch. 6, 'Improving the Asylum Process', §§107-110.

102 Moreover, as the European Court of Human Rights found in the case of *Conka v. Belgium* (Application no. 51564/99), 5 February 2002, with particular reference to the principle of effectiveness of remedies (paragraph 75):

> 'As to the overloading of the *Conseil d'Etat*'s lists and the risks of abuse of process, the Court considers that, as with Article 6 of the Convention, Article 13 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet its requirements.' (Paragraph 84). [6]

[6] The case arose out of a Belgian Government proposal for the 'collective repatriation' of asylum seekers from Slovakia, following a sharp increase in numbers (paragraphs 30, 31). The Court cited reports on the situation of Roma in Slovakia which indicated that they were disadvantaged, often the victims of skinhead violence and regularly subjected to ill-treatment and discrimination by the authorities (paragraphs 32, 33). The Government claimed that its measures were justified, *inter alia*, by the numbers

4.2 Violation of the customary international law principle of *non-refoulement*/non-rejection at the frontier

103 In UNHCR's submission, the pre-clearance operation implemented in Prague also offends the customary international law rule of *non-refoulement*/non-rejection at the frontier. No steps were taken to determine whether those seeking to leave the Czech Republic might have a credible basis on which to claim international protection, notwithstanding that numbers of refugee claims by Czech Roma had been upheld in the United Kingdom **(Statement of Facts and Issues, paragraph 6)**; and that the available information on country conditions provided substantial evidence of 'severe and institutionalised discrimination and violence' **(Statement of Facts and Issues, paragraph 6)**.

104 Having effectively extended its frontier into the Czech Republic, the United Kingdom nonetheless remains bound by its international obligations. *Bankovic v. Belgium and 16 Other Contracting States*, (Application no. 52207/99), European Court of Human Rights, 12 December 2001, paragraphs 71, 73; cited by the Court of Appeal in *The Queen on the application of Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department* [2002] EWCA 1598, paras. 75, 76.

105 In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice stated with regard to the 1966 International Covenant on Civil and Political Rights (to which the United Kingdom is also party):

> '109. The Court would observe that, while

and 'major abuses of process which undermined [the] effectiveness' of the *Conseil D'Etat* (paragraph 74). The Court found that the Applicants did not have a remedy available that satisfied the requirements of Article 13 to air their complaint under Article 4 of Protocol No. 4 (paragraph 85).

> the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions...
>
> The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory...
>
> 111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.'
> Advisory Opinion, [2004] ICJ *Reports*, 9th July 2004.

106 Especially close scrutiny is required of extra-territorial measures impinging on human rights, where regular access to the courts may be restricted for practical or jurisdictional reasons. Any scheme for pre-clearance therefore requires to be designed with those obligations in mind. Contrary to what was assumed by the Court of Appeal, this does *not* require the admission of every passenger who is or might be seeking asylum. It does require, however, (a) a procedure which is not based, formally or effectively, on unlawful criteria; (b) a good faith examination of the credible basis for any claim to protection; (c) an informal review at least of any such claim; and (d) in appropriate credible cases, the provision of temporary protection pending a final decision.

4.3 Violation of the customary international law prohibition of discrimination on grounds of race

107 Section 19D of the Race Relations (Amendment) Act 2000 is clearly inconsistent with the United Kingdom's international obligations *in abstracto,* and in so far as that section and the measures taken under it (even if not implemented) have set the context or otherwise had an impact on the implementation of pre-clearance in Prague, they also engage the responsibility of the United Kingdom *in concreto.*

108 UNHCR has noted the statement that no express instruction was ever given to Immigration Officers stationed at Prague Airport to discriminate on grounds of race, and that the 'authorisation' to discriminate was later withdrawn. In UNHCR's view, however, the existence of the law and the action taken will likely have contributed to the creation of a climate in which racial discrimination was understood to be acceptable, contrary to international law **(Statement of Facts and Issues, paragraphs 9-11).** Even in the absence of official or formal instructions, a State may be responsible for violations of human rights which arise from the actual or presumed existence of *administrative practices*.[7]

109 In UNHCR's humble submission, the very formulation of the legal basis for pre-clearance in the case of Czech Roma likely offends the prohibition of discrimination on grounds of race, as prescribed by customary international law and by treaties to which the United Kingdom is party. The violation of international obligations will be compounded if there is a finding of discrimination in particular cases; it may also be inferred from the existence of delegated legislation and administrative practices developed within a particular statutory and policy context, whether or not there was

[7] The *Greek Case*, Report of the European Commission on Human Rights, (Cases no 3321–3323, 3344/67) (1969) 12 YB, E Com HR paras. 28-29; also *Ireland v United Kingdom*, European Court of Human Rights, (1979-80) 2 E.H.R.R. 25, §159.

A ever any express authorisation or instruction to discriminate on grounds of race.

5. Conclusions

110 UNHCR humbly submits that, for all the reasons set out above, this appeal should be allowed

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28 September 2004

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