AH-LK-V4

In the Immigration Appellate Authority

JB (Protection – Roma – Well founded fear) Czech Republic [2004] UKIAT 00187

THE IMMIGRATION ACTS

Heard at
On 12th March 2004

Determination Promulgated

19 May 2004

Before

MR D K ALLEN (CHAIRMAN)
MR A R MACKEY
MR P R LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Respondent

Representation:

For the Appellant: Mr D W Saville
For the Respondent: Mr S S Symonds, Refugee Legal Centre

DETERMINATION AND REASONS

1. The Secretary of State appeals to the Tribunal with permission against the determination of an Adjudicator, Mr Andrew Wilson, in which he allowed the appeal of the Respondent (hereafter referred to as the Claimant) against the Secretary of State's decision of 6th August 2001 issuing directions for his removal from the United Kingdom and refusing asylum.

2. The hearing before us took place on 12th March 2004. Mr D W Saville appeared on behalf of the Secretary of State, and Mr S S Symonds of the Refugee Legal Centre appeared on behalf of the Claimant.

3. This appeal was heard together with the appeal of the Claimant's brother Milan Bihar (HX/33821/2001), and their claims have essentially the same factual basis. We heard separate submissions however, and as a consequence it is clearly appropriate for us to produce two separate determinations. Mr Saville appeared for the Secretary of State in both appeals but Mr Symonds appeared only in the appeal of Jan Bihari, Mr M Henderson of Counsel appearing for Milan Bihari.

4. Both appeals concern the issue of risk on return to the Czech Republic of Czech Roma. This issue was considered in detail by the Tribunal in **Puzova** (01/TH/0416) in which the Tribunal concluded that any claim that Czech Roma will, by reason of their ethnicity alone, be entitled to refugee status was unsustainable, and that it was likely that those who could succeed in showing a well-founded fear of persecution for a Refugee Convention reason on the basis of the actions of non state actors in the Czech Republic would be the exception, since there was currently in place in the Czech Republic a system of criminal law which offers effective protection to Czech citizens generally, including Czech Roma. As was stated by the Court of Appeal in **ZL and VL v SSHD and LCD [2003] EWCA Civ 25** at paragraph 65, the Court of Appeal has subsequently attached considerable weight to the Tribunal's decision in **Puzova**, and rightly so as was stated there. We do not understand the submissions before us to comprise a challenge to the general conclusions of the Tribunal in **Puzova** which we have set out above, but rather to be based on the contention that they comprise exceptional cases as described there since they raise issues of specific rather than generalised risks for the reasons that we shall set out below.

5. We turn to the facts of the particular appeal before us and the submissions of Mr Saville and Mr Symonds. The particular event which gives rise ultimately to the specific fear of the Claimant concerns the murder of his sister Helena Bihariova in 1998. There had been a previous incident in 1997 when the Claimant's wife was attacked by skinheads but this was not reported to the police. The attack on the Claimant's sister took place on 15th February 1998. She was beaten by a gang of three skinheads and thrown into the River Elbe where she drowned. A passing journalist tried to assist her but was unable to save her from drowning. The skinheads were arrested upon the evidence of the journalist and prosecuted. It seems that one was discharged but two were convicted and sentenced to six and a half years and eight and a half years imprisonment respectively. In September 1998 the sentence of one of the youths was reduced from six and a half years to fifteen months but the sentence upon the other one was upheld. The President's wife attended the funeral and it is clearly the case that it was a matter that received nationwide publicity. The Prime Minister indicated that matters would improve and that they were aware of the problems for the Roma.

6. It is said however at paragraph 13 of the Adjudicator's determination that matters did not improve and in particular the Claimant and his wife were attacked at the beginning of 2001 when he wished to gain admission to a bar. It is said that the police were involved but it seems he did not complain to them about what had happened, and there was another incident earlier in 2001 when he and a group of his friends were attacked in a bar by a group of skinheads and there was a fight during which he was severely assaulted and required stitches to his ear. The police attended but did not appear to carry out any action.

7. The specific matter which triggered the Claimant's departure from the Czech Republic was that he started to receive telephone calls containing threats either from the skinhead who was imprisoned for murdering his sister or from that person's friends giving precise threats that they would be killed. The Claimant did not report these threats to the police, though his brother did. The Claimant contended that the police would not "stand behind us" and the police would "not protect him". As regards whether the police took any action as a consequence of his brother reporting the threats, the Claimant said at interview that the police said they were not able to do anything until something happened to them in this sense and he did not know what that might be.

8. The Adjudicator found the Claimant to be credible. He noted the fact that the Claimant had effectively not sought to engage state protection within the Czech Republic. He considered the appeal to be similar in relevant respects to that in **Harakel [2001] EWCA Civ 884**, and concluded that though the Claimant could, indeed as he found it, and should have reported the incidents to the police, he was satisfied that within the context of the objective evidence it was unlikely (here we paraphrase the Adjudicator) that anything effective would have been done.

9. At paragraph 36 of his determination the Adjudicator, noting that he found the Claimant credible, mentioning in particular the physical attacks upon the Claimant and his wife and that to some extent they had suffered discrimination in relation to such matters as housing and education of their child, was satisfied that there had been breach of rights within the second and third classification of Professor Hathaway and that these were a consequence of widespread institutionalised racist beliefs, attitudes and actions within the Czech population and echoed failures to implement actions within the Czech Government. Curiously he did not refer to the murder of the Claimant's sister and the subsequent threats in this paragraph of his determination, concluding as he did that the claim was made out.

10. In his submissions Mr Saville reminded us of the weight that had been attached by the Court of Appeal to **Puzova**. He suggested that **Harakel** was *per incuriam* since it did not refer to **Puzova**. He took us to **Puzova** and argued that paragraph 154 of that determination in particular was crucial. There among other things the Tribunal noted that regard had to be had to the operational limitations applicable to any system of law enforcement. Whatever the perception of the Roma minority that there was little prospect of any positive action being taken by the police, there was ample evidence that prosecutions were mounted by the state when they had appropriate evidence and if a claimed offence was not reported then the state could do nothing. He referred us also to paragraph 155 and the summary at paragraph 165 in **Puzova**.

11. Mr Saville also referred us to a determination in the Tribunal in **Byharova (HX/33740/00)** in which the Claimant was an aunt of Helena Bihariova who had received numerous threats including threats from skinheads who were supporters of her niece's murderer and her appeal was unsuccessful.

12. Mr Saville also mentioned the fact that, with reference to paragraph 151 of **Puzova** racially motivated crime became an aggravated form of general criminal acts

already proscribed by the Czech Criminal Code in 1996; however this did not become a factor in the United Kingdom until 1998. It was a serious criminal offence under Czech law and the malefactors had been arrested and imprisoned. A democratic state had a degree of discretion as to how it enforced the criminal law and the state's actions in this case had not shown that it was unwilling to provide protection.

13. As regards the meaning of the term "protection" in Refugee Convention Law, Mr Saville referred us to the decision of the Court of Appeal in **Bagdanavicius [2003] EWCA Civ 1605**. It was clear that there was no requirement of an absolute guarantee against attacks or even an obligation to reduce the risk of harm below that of a real risk. What was required was a reasonable standard of protection as could be seen in the summary at paragraph 55(4). It was true that, as was pointed out in paragraph 55(5), the effectiveness of the system provided was to be judged normally by its systemic ability to deter and/or prevent the form of persecution of which there was a risk, and not just punishment of it after the event, but the fact of punishment together with the likelihood of being caught was an important aspect of the deterrent effect. A criminal justice mechanism for apprehension and punishment of offenders would suffice and the deterrent effect met the protection criteria. The fact of the death of the Claimant's sister did not demonstrate an unwillingness or inability to protect to the required standard.

14. Mr Saville pointed out that the other attacks on the Claimant and his wife had not been reported to the police although they had been involved on the two occasions of attacks in a bar. Neither of these incidents could be taken to show a lack of state protection. The point had been made in **Puzova** at paragraph 154 about the inability of the authorities to do anything when offences were not reported to them. As regards the third incident it was not clear what the Claimant had told the police and whether he was able to identify the attackers and there was nothing significant in his dealings with the police in that case. Their response to the individual attacks on him did not show that they were unwilling or unable to protect him.

15. With regard to the threatening telephone calls, these had been reported to the police by his brother but not by the Claimant. Mr Saville reminded us that it had been said at paragraph 154 in **Puzova** that a subjective perception that it was not worthwhile reporting offences did not show a lack of protection given the fact that there had been arrests and prosecutions when there was evidence. There was no objective basis for this perception. Also he had not exhausted all the steps reasonably open to him in his home state. As regards the risk on return there had been no failure of protection to the required standard while he was in the Czech Republic and no evidence of significant deterioration since they left. The decision in **Bagdanavicius** did not change the general situation.

16. Mr Saville also took us to paragraph 18 in **Bagdanavicius** which quoted a paragraph 116 of the decision of the Court of Human Rights in **Osman v UK [1998] 29 EHRR 245**, where it was said that the positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual has to be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities and that therefore not every claimed risk to life can entail for the authorities a

Convention requirement to take operational measures to prevent that risk from materialising. Mr Saville argued that this case came nowhere near the **Osman** test, as there was no real and immediate risk as referred to elsewhere at paragraph 116. The authorities would not know of the threats to the Claimant as he had not told them. His brother had, but threatening telephone calls could not be taken per se as showing a real and immediate risk of the threats being carried out. It was a common form of criminal intimidation. The point was made at paragraph 49 of **Bagdanavicius** that even where there were unusual circumstances requiring additional protective measures for a claimant, the test should not be taken as a tailor-made guarantee of safety in human rights or asylum claims. All that was required were reasonable steps.

17. As regards the specifics of the Adjudicator's determination, Mr Saville adopted the Grounds of Appeal. The Adjudicator had quoted but then in effect ignored **Puzova**. The key error by the Adjudicator was at paragraph 34 of the determination where he had noted that the Claimant had not reported the threats to the police but found this excusable in the light of the evidence, and this was clearly incompatible with **Puzova**.

18. In his submissions Mr Symonds argued that it was a novel notion to suggest that **Harakel** was *per incuriam* as it did not refer to **Puzova**. He argued that **Harakel** was sound. **Puzova** had made it clear that it was a general case. **Harakel** dealt with the kind of case left over in **Puzova** concerning the particular and not the generalised risk. The Adjudicator clearly considered **Puzova** but his findings were not inconsistent with Mr Symonds argument that this was a specific **Harakel** type case and that **Puzova** was relevant generally but this was a case to be considered as exceptional in comparison to the general situation discussed in **Puzova**.

19. Mr Symonds argued that the starting point in this regard was paragraphs 11-13 of Dr Chirico's report concerning the murder of the Claimant's sister and how that had been dealt with by the authorities. It was the link between that killing and the threats which led the Claimant to flee the Czech Republic. Mr Saville had acknowledged that the Claimant's brother Milan had sought protection and there was further detail in Milan's witness statement. It was inconceivable given the detail in the fuller statement that could be seen at page 170 in Milan's bundle, given that the family were by that time living together, that the police would not have been aware of the threats generally. Milan had not given up on the police and the police were therefore aware of the threats. It therefore did not matter who had told them.

20. It was of relevance that the authorities had not used the racially motivated crime provision in respect of the murder of the Claimant's sister. Dr Chirico dealt with this point at paragraph 13 of his report. He quoted his sources and authorities. It was not just a failure of state protection but also by in effect saying to the perpetrators of this very serious crime that they would not use the full force of the available law it could only encourage such people in persisting in the way that they had in this case with the threats to harm the Claimant. Mr Symonds referred us to his skeleton argument which was before the Tribunal. It was not a necessary requirement to seek state protection. That could be so in a general case such as **Puzova** but where there was a specific threat it was not a requirement to exhaust all remedies. In such a case it might be too late if one had to go through every arm of the state

where there was a particularised risk that the risk would materialise before anything had been done. He referred us to the decision of the Court of Appeal in **Skenderaj [2002] EWCA Civ 567** in this regard. The family were entitled as they had done to see how the protection went and to make an assessment.

21. Mr Symonds took us to the Minority Protection in the Czech Republic Report from the Open Society Institute dated 2001. In particular he referred us to pages 213 onwards, and suggested that it was a helpful commentary which showed that many of the factors designed to provide protection from racially motivated violence are not operating as they should. He referred us to Dr Chirico's report on this also. He argued that **Byharova** did not set a precedent. Weight had been attached in that determination to the effectiveness of the Ombudsman, but this was effectively challenged by Dr Chirico in his report. Referring the matter to the Ombudsman would not have made any difference at all.

22. Mr Symonds also referred us to his short skeleton argument on the Article 3 point. He contended that this was of particular relevance to the ability of citizens of the Czech Republic as from 1st May 2004 to come and seek work in the United Kingdom. Initially the Human Rights Convention was not intended to apply to immigration control but decisions of the Court of Human Rights such as **Soering** and **Chahal** noted the importance of Article 3 and had brought it into the ambit of immigration control because of the positive obligation to protect that right, and this had been explained in cases such as **Osman**. It was subject to broad principles of proportionality and reasonableness. That ordinarily was by reference to the surrogacy principle accepted by EU states and hence states did not have to negate the real risk as this would impose an excessive obligation on them. But on 1st May that changed as the real ambit of Article 3 was to do with the United Kingdom not the Czech Republic and the principle of extraterritoriality. If the United Kingdom was shortly to rescind its power of immigration control on right of entry on citizens of the Czech Republic among others then it was no longer enough to rely on the surrogacy principle. If the risk was real then there was no need for the United Kingdom Authorities to take the risk. Hence the sufficiency of protection test had changed. Mr Symonds referred us to the decision in **B** in this regard.

23. We raised with Mr Symonds whether it could properly be said that the Adjudicator had found real risk on return in connection with the threats uttered bearing in mind how he expressed himself in paragraph 34 of his determination and that it was unclear whether he said that the threats raised an imminent risk to the Claimant. Mr Symonds argued that it was by reference to how the Adjudicator had set out the claim earlier in his determination at paragraphs 13 and 14, though he accepted that he would have done better to come back to it in the later paragraph.

24. By way of reply Mr Saville argued that if **Harakel** were not strictly *per incuriam* then it should be restricted to its particular facts and especially at paragraph 8 and it should be found that the Claimant there had exhausted his options for redress before fleeing the Czech Republic.

25. As regard the police knowledge, Mr Saville was happy to assume that they probably were aware of the threats. The authorities were however entitled to make a judgment as how to investigate an offence and the circumstances in which they had

decided to do what they had done were not known. What the Claimant's brother Milan said was credible from his point of view. He argued also that **Byharova** was quite relevant as it had also concerned a relative of Helena Bihariova. The appeal there had been dismissed on the question of whether any complaints were made about the lack of police activity and this was a key point. It seemed that no complaints had been made in this case to the Ombudsman or the Ministry of Interior concerning the lack of police response. The points made in **Byharova** concerning the Ombudsman concerned the ability to use the existing complaints system and this was crucial and was relevant to this case also. The criticism of Dr Chirico made by the Tribunal in **Puzova** should be borne in mind, though Mr Saville was not criticising Dr Chirico's good faith. Even if **Byharova** were incorrect on the facts as Dr Chirico contended, it was right on the broader points of complaint to a higher authority and they would have been likely to have had a degree of success. The Claimant had not exhausted the options in his own state.

26. As regards the Article 3 point, in **N** the Court of Appeal had explained that extending Article 3 to immigration and deportation cases was exceptional. Proportionality did not qualify the Article 3 principle at all, Mr Saville contended. Leeway was given to the authorities in a democratic state as a fundamental part of Article 3. Reasonable protection in an Article 3 case was fundamental given the exceptional nature of the jurisdiction. As regards the point made concerning the Adjudicator's conclusion at paragraph 36 of his determination, his approach was erroneous and it could not properly be concluded that the objective situation for the Roma in the Czech Republic meant that there would be no point in complaining to the police.

27. The essential issue in this case as we see it is whether this case can be properly found to comprise an exception to the general principle stated by the Tribunal in **Puzova** at paragraph 165 that 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, cases where it can be shown that there is a well-founded fear on the basis of feared actions of non state actors will be the exception. Clearly none of the conjoined appeals in **Puzova** gave rise to the kind of specific fears that the Claimant and the appeal before us has. The attacks and other incidents in those cases involved random unconnected events rather than as in the appeal before us threats which are linked to a specific event and which are specific to the Claimant (and his brother).

28. The specific nature of the threats as described in the Claimant's statement at page 55 of the bundle is that a few months ago they started to get threatening phone calls and he did not know who exactly it was but thought it was the skinhead who was in prison for killing his sister or else his family or friends. He said that he would kill them, that he had to kill them and on each call he repeated that he was not going to leave it as it was but was going to get his revenge. As we have noted above, he did not report these threats to the police because he did not think that it would do any good. The threats were however reported by his brother Milan, and Milan in his interview stated that the police first said "nothing like it was a normal standard thing it was all the same to them" and they were not prepared to give them any help. At paragraph 14 of his statement at pages 17-18 in his appeal bundle he stated that the police wrote a report with them and that was it. Bearing in mind that the families were by then living together, it is clearly right, and Mr Saville accepted

this point, that the police would have known about the threats concerning Jan the Claimant before us as they would concerning Milan.

29. We have before us a report of Dr Chirico which is dated 10th January 2003. It is right that we raise the point that we put to Mr Henderson in Milan's appeal concerning Dr Chirico that it appears that by the time he produced this report he had been called to the Bar and was at that time in pupillage. It seemed to us right to raise with Mr Henderson the question of the extent to which Dr Chirico's report would necessarily be as expert or up-to-date as might otherwise have been the case given his circumstances at that time. However we accept that at least at that stage when the report was produced Dr Chirico had only relatively recently completed a three year British Academy post doctoral fellowship at the School of Slovanic and East European Studies at University College, London and that his contacts with people in the Czech Republic and the degree of expertise that he had previously had remained at that level at the time when the report was prepared.

30. Among other things Dr Chirico notes that Roma leaders complained of the inconsistency in the fact that the Ministry of the Interior in the case of the murder of Helena Bihariova listed the case as racially motivated yet it was concluded by the Court which heard the case and also the Supreme Court, supporting the view of Minister of Justice, there was no evidence of racial motivation. We note the point at paragraph 155 in **Puzova** that in the Bihariova case other reports quoted above showed that it was claimed that there was some personal difference between the victims and the accused which was not referable to race. We have been unable to find in **Puzova** any more specific reference to the point made there. It seems from paragraph 14.5 of the Adjudicator's determination in the case of Milan Bihari that one of the youths who killed Helena Bihariova claimed that the attack was provoked by the deceased owing money to one of the parties. We cannot take the matter any further. We do not have any transcript of the case before us, and it is impossible for us to say what the basis was upon which the authorities did not charge the accused with racially motivated offences, nor why the charge of murder was replaced by one of aggravated coercion. As a consequence we do not think that we are in a position to agree with Mr Symonds' contention that the decision not to charge with racially motivated offences gave a clear signal to the accused and other likeminded people of a climate of relative impunity and in effect gave the go ahead to the making of the threats to the Claimant and his brother. It is quite possible that that is the implication which was drawn from it, but whether it was an implication that can properly be drawn as a consequence of any improper motive on the part of the prosecutors or the court is conclusion to which it is quite impossible for us to come. It is not irrelevant however to note the point made by the Tribunal in **Puzova** at paragraph 155 which reinforces the points which we have made about the difficulty of our coming to any conclusions in this regard. The point is there emphasised that those immediately responsible were convicted and the principal actor received a substantial sentence, and the fact that the Ministry of Justice took the same view as the prosecutor as to the proper charges to be brought suggests, in view of the general government concern in relation to such types of crime, that there was sound reasoning in that case for the view which was taken.

31. With regard to the evidence of Dr Chirico generally, we note the comments made by the Tribunal at paragraph 138 in **Puzova**. The Tribunal concluded that some caution was necessary in considering the conclusions which he sought to draw from his selection of the facts which he considered relevant. The Tribunal saw force in counsel for the Secretary of State's observation that Dr Chirico's focus was that of someone from a non governmental organisation whose specific purpose was to provide support to the Czech Roma and that he was approaching issues on a "counsel of perfection" basis. In that case it became very clear that he had little or no knowledge of the workings of the Czech legal system but was nevertheless prepared to comment on its efficacy, that some of his information was based on unattributed anecdotal material from the Czech Roma which perhaps received more emphasis than it was strictly entitled to in the face of lack of independent statistics, and perhaps most importantly of all that he made clear in the course of his oral evidence that he did not understand what was meant by the concept of a sufficiency of protection in asylum law and yet felt able to assert in his report that he was not convinced that the legal system of the Czech Republic provided protection of the kind envisaged in the House of Lords' judgment in **Horvath**, with which he claimed to be familiar. With regard to the latter point, it is to be hoped that, bearing in mind that by the time Dr Chirico wrote his report in this case he had been called to the Bar and was in pupillage, he would have by then acquired a much clearer understanding of the concept of sufficiency of protection in asylum law and that reservation at least can in our view be removed. In this context however we bear in mind the comments by the Court of Appeal in **ZL and VL [2003] EWCA Civ 25**, concerning Dr Chirico's evidence in that case. By that time Dr Chirico had been called to the Bar. His evidence is summarised at paragraph 71 as being in effect a challenge to the conclusion of the Tribunal in **Puzova** that there is in general in the Czech Republic a sufficiency of protection from state agents against ill-treatment of Roma by skinheads. Comment was made at paragraph 72 with regard to three cases of serious crimes against Roma in relation to which we think it is probably proper to infer that one of them is the case of Helena Bihariova, that in relation to two of them the perpetrators were ultimately tried and convicted and that the Ministry of the Interior has been vigorous in castigating local shortcomings. It is noted that indeed much of the material relied upon by Dr Chirico emanates from the Ministry. At paragraph 74 the Court of Appeal stated that it did not find that Dr Chirico's evidence shakes the conclusion of the IAT that the Czech Republic provides in general a sufficiency of protection against racial crime and attacks on Roma in particular. While the skinhead movement appears to be growing in strength, so does the determination of the central authorities to crack down on racial crime. The Court of Appeal made the point however that Dr Chirico described a volatile situation and one in which there was cause for concern at the possibility of localised complicity or sympathy between skinheads and the police.

32. With regard to that last point, we do not understand it to be contended that there is any complicity between the police and the skinheads in this case. It may however by implication be argued that the evidence of the Claimant's brother Milan that the police did no more than take a report is indicative of sympathy between the police and the skinheads.

33. In this regard however, it is relevant to consider what more the police might be expected to do. On this we know very little other than the fact that Milan stated that

"they made a report with them". We do not know what investigations the police carried out with regard to the threats that were made. We do not know whether they sought to interview the skinhead (if by that time he had been released) and/or his family and friends in order to investigate the threats. It may be simply that they took the view that Mr Saville expressed that such types of threats are often made as a form of intimidation without it being necessary to assume that they will ever be carried out. Certainly there is no indication that there was any increased police presence at their home to provide protection or any attempt to tap their telephones in order to identify the malefactors.

34. In **Byharova**, to which we have referred above, the Tribunal concluded that the reaction of the police to complaints by the Appellant and members of her family was mixed but on the whole unsatisfactory. After the death of Helena Bihariova the Claimant's niece, the police promised to provide protection but on most occasions when called they did not come. Following a serious attack and repeated complaint by the Claimant policemen in a police car came and sat outside the house on two occasions. There were other refusals of help but on another occasion the police came to the home without appearing to take any action against skinheads who were throwing stones at the house. It seems that the Claimant made a complaint to the Chief of Police but there is no suggestion that she or any member of her family complained to any higher authority.

35. The Tribunal went on to consider what else might have been done by the family. It seems clear that the Human Rights Commissioner, established in September 1998, had no mandate to deal with individual complaints. The first Ombudsman was elected in December 2000. The Tribunal referred to the Country Assessment which amongst other things noted that the Ombudsman was empowered to deal with complaints from individuals concerning the police, prison services and medical facilities in addition to government ministries, district offices and other state bodies. Although the Ombudsman had no direct power to sanction the authorities his power has been limited to notifying a superior organ or the government, he might propose the instigation of disciplinary action or criminal proceedings about police or public officials and the payment of damages (compensation) to aggrieved individuals. The Tribunal concluded that in the light of this assessment the Adjudicator was correct to conclude that the Ombudsman was empowered to deal with complaints concerning the police though the Ombudsman did not have powers to direct the police to take action in a particular case. The Tribunal considered that the powers given to the Ombudsman were such that effective although not necessarily direct action could and was likely to be taken.

36. On the facts of that appeal the Tribunal found that if the Claimant had taken her complaints to higher authority including the Ombudsman it was likely that there would have been a reaction to the notoriety of the case and regional or central government, probably aided or galvanised by the Ombudsman, would have taken steps to ensure that the local police provided more consistent and effective protection for the Claimant and her family. The Tribunal noted objective evidence which led it to conclude that the situation for the Roma in the Czech Republic was improving albeit slowly and that on return if the Claimant found herself in a position where police protection were needed it would either be given by the local

police or if they displayed any reluctance, complaint to higher authority including if necessary the Ombudsman would be likely to ensure the provision of effective protection.

37. Dr Chirico deals with the question of complaints to the Ombudsman and other authorities in some detail in his report. He describes the police complaints procedure in the Czech Republic as follows. Firstly a complaint has to be made to the police complaints department at the appropriate police station which is of course the police station within whose area the alleged offending incident occurred. The local complaints department is then obliged to reach a written decision on the complaint, although in the majority of cases that Dr Chirico has followed in the Czech Republic this has not happened. An appeal against a complaints department decision lies to the regional Police Authority and a further appeal lies to the Minister of the Interior. To the best of Dr Chirico's knowledge there has been no case of which a Romany complaint has been successful at first instance and he is unaware of any subsequent appeal by a Romany applicant having been heard. He is however aware of a handful of cases in which disciplinary measures have resulted against offending police officers as a result of internal inquires. Given his regular contact with NGOs in the Czech Republic and with the Czech Human Rights Commission he would be very surprised if any such complaint had been successful without his knowledge. Criminal investigations against individual police officers are carried out directly by the Ministry of the Interior. The Human Rights Commission has criticised the procedures as lacking objectivity and credibility. It is said that it would seem to facilitate impunity for police officers involved in human rights violations.

38. As regard the Ombudsman, Dr Chirico emphasises the point that we refer to above that the Ombudsman has no direct power to sanction the authorities, his powers being limited to notifying a superior organ or the government. Monitoring bodies have pointed out that the Ombudsman is no substitute for a properly functioning independent complaint procedure. The criminal justice process from the moment of the opening of an investigation until the final determination of the charge by a Court is removed from the Ombudsman's jurisdiction. Dr Chirico describes this as quite a normal limitation of an Ombudsman's sphere of activities and that complaints about the conduct of investigation, prosecution and trial are provided for in theory at least by the criminal procedure code.

39. Dr Chirico spoke on 19th November 2002 with a Mr Vojta who is a person working in the Ombudsman's office though the level at which he is working is not clear. Mr Vojta was not sure what the position would be if a complaint were made that the police had failed to open an investigation, and Dr Chirico concludes that that is the likely category into which the applicant's complaint about the police failing to take action would fall. It is unclear whether as regards the death threats an investigation had been opened or not. If it had been then it would seem from Mr Vojta's remarks that the Ombudsman would not have jurisdiction but the evidence in Dr Chirico's view was equivocal. Dr Chirico concludes that if the Ombudsman did consider that he had a jurisdiction to consider any of the Claimant's complaints then his role would be confined to proposing the instigation as appropriate of a complaint procedure by the police complaints department or a Ministry of the

Interior internal investigation and it could oblige neither of these bodies to open such a procedure nor could it directly influence them in carrying it out.

40. Elsewhere in his report Dr Chirico concludes that levels of discrimination and racial motivated violence remain unacceptably high in the Czech Republic despite some clear signs of good intention from the last two governments. He points to such matters as the establishment of the Commission for Human Rights and the continuing function of the Inter-Ministerial Commission for the affairs of the Romany Community as being positive developments and ones that have resulted in some legislative changes regarding citizenship, education and employment, and the recent appointment of the Ombudsman is another positive step. He concludes however that in most areas of day-to-day life there has been little or no practical improvement in the position of Roma and considers that with regard to housing, discrimination and racially motivated violence have continued to worsen. He attributes this in part to the persistence of discriminatory attitudes and practices at the level of local authorities including courts and the police. The new government which took office in June 2002 has stated its commitment to human rights and to the continuation of the bodies instituted by its predecessor including the Human Rights Committee and the Ombudsman. Dr Chirico considers that its effectiveness will be limited by its failure to acquire an overall majority in Parliament and by the opposition of local authorities. Elsewhere Dr Chirico refers to Roma fears of police violence which he considers is relevant to the likelihood of obtaining protection for the Claimant on return. Dr Chirico cites the OSI Report on the Czech Republic and the ECRI Report in this regard. We note and adopt the comment of the Tribunal at paragraph 139 in **Puzova** that the stated purpose of reports such as specifically referred to these the ECRI and CERD Reports of 21st March and 14th August 2000 that they are very much concerned to consider what steps are necessary from the human rights point of view to achieve the elimination of the discrimination which the Czech Roma in common with the Roma communities in many parts of Europe suffer, so that their focus is very much fixed on that long term goal. The Tribunal also makes the comment that even in these reports there is no suggestion that the actions of the actions of the Czech Government are seen as other than seeking genuinely to address the long term position of the Czech Roma in Czech society and that the proposals are welcomed as being positive and constructive and with some discernable progress already.

41. From the State Department report for 2001 at page 41 of the bundle we find the comment that the government generally respects the human rights of its citizens in the Czech Republic but problems remained in some areas. Discrimination and occasional skinhead violence against the Romany community remained problems. Various examples are given at page 54-55 of the bundle of skinhead violence against Roma and members of other ethnic minorities. In all of the cases cited it appears that charges were brought, and we note the two instances of convictions involving charges of murder on the one hand and damage to property on the other hand with racist motives.

42. Dr Chirico goes on to refer to the skinhead movement and concludes that it must be considered to be an organised one. It is said that police vigilance and monitoring in controlling large skinhead gatherings has increased, and the police

do not have powers to break up demonstrations or concerts until racist activities take place at such events.

43. As we have stated above, we see the essential issue in this case as being whether there is a particular risk to this Claimant on return that sets him apart from the lack of generalised real risk identified by the Tribunal in **Puzova** and, as we understand the position, this conclusion is not challenged before us. Our assessment of the objective evidence taken as a whole is that there has been no significant difference in the position for the Czech Roma in the Czech Republic since the very detailed and extremely helpful determination by the Tribunal in **Puzova**. We agree entirely with the conclusions of the Tribunal in that determination and associate ourselves with and adopt the reasoning and conclusions contained therein. Though the matter was not considered in detail by the Court of Appeal in **ZL** and **VL**, we note the point at paragraph 74 there to which we have referred above that while the skinhead movement appears to be growing in strength, so does the determination of the central authorities to crack down on racial crime. This is borne out by the examples we have given above from the State Department report concerning cases of racial violence and subsequent prosecutions. We do not read the report to which we were referred by Mr Symonds from the Open Society Institute concerning minority protection in the Czech Republic as indicative of any deterioration. The report comments on a lack of more than a few indications that conditions for the Roma are improving significantly, and we see that as consistent with our conclusions in this regard.

44. We should say something about the decision of the Court of Appeal in **Harakel [2001] EWCA CIV 884**. Certainly we do not consider that it can properly be said that this decision is *per incuriam* due to its lack of any mention of the Tribunal determination in **Puzova**. Clearly the Court of Appeal is not bound by any decisions of the Tribunal, and it is necessary for us to consider whether it can properly as described by Mr Symonds be said to be a case that falls within the general range of exceptions envisaged in **Puzova**.

45. The Claimant in that case had suffered various problems over a number of years including wrongful arrest, detention and ill-treatment in 1971 when he was imprisoned for causing actual bodily harm to a policeman when he came to the defence of a female cousin who had been the subject of an unprovoked attack by police. In 1984 he was detained by a police officer, severely assaulted and as he described it “left for dead”. Generally he and his family had been subjected to abuse and discrimination. The particular incidents which caused him to leave the Czech Republic occurred at the end of 1998. In the summer of that year a skinhead was sent by the Job Centre to apply for a vacancy at the Claimant’s business. The skinhead did not wish to work for the Claimant and simply wished to be given a certificate stating that the Claimant had refused to employ him. On the Claimant declining to provide such a certificate the man became aggressive, damaging furniture and attacking the Claimant. The incident was reported to the police but he heard nothing and thereafter had real difficulties in employing people and he received two threatening letters, one directed to this partner and also threatening and abusive anonymous telephone calls threatening to steal his car and set his house alight. In November of that year he was attacked and beaten by two skinheads but he did not report this incident to the police because he

believed that some of the policemen were skinheads or skinhead supporters. Not long thereafter he received a further letter threatening to take his son or his car and again did not report this. His car was subsequently stolen and found completely destroyed. He reported the disappearance and the destruction of the car to the police but heard nothing other than being provided with an appropriate form to fill in. At the beginning of December his house was broken into by skinheads one of whom had taken part in the attack in November but he managed to frighten them off but again they threatened to abduct his son. The police took some details but they provided him with no report nor was he advised what action was being taken. Accordingly he and his partner and son left the Czech Republic and came to the United Kingdom.

46. The Court of Appeal considered that the Tribunal which dismissed the appeal of the Claimant was in error in concentrating on the incidents which occurred in the latter part of 1998 and failing to take account of the objective material available including a report of Dr Chirico. The Court of Appeal noted the fact that the Claimant had a non-Romany wife and a child who was therefore of mixed-race and that as a consequence of the attitude of the authorities he found it difficult to register his residence and as a consequence it was impossible for him to marry because the authorities would not permit registration of any marriage. This the Court of Appeal considered meant that he was liable to be exposed to the activities of those who for envy or whatever other reason given his business success had feelings of antipathy towards the Romanies. The Tribunal was criticised for not recognising that the attack on the car and the threats to the Claimant's wife and in particular to his son were of particular significance in relation to feelings of fear that he would have, and the background facts were relevant to determining the extent to which it could properly be said that the reaction of the police was an adequate reaction in all the circumstances to show willingness or readiness to provide the protection to which he was entitled. Thereafter the Court of Appeal went on to criticise the Tribunal's approach to the Adjudicator's findings and concluded that the decision of the Adjudicator was one that was open to him on the facts and that therefore the Tribunal was in error in allowing the Secretary of State's appeal against the Adjudicator's decision.

47. It is impossible to say what if any difference it would have made to the Court of Appeal's reasoning and conclusions had it had the determination of the Tribunal in **Puzova** before it. However we do see force in Mr Symonds' contention that the nature of the threats and therefore the risk to the Claimant in that case arose out of specific problems experienced by him and not simply as a consequence of being a Roma who from time to time happened to be in the wrong place at the wrong time. We do not therefore see any inconsistency, in so far as we have the right to identify one in any event, between **Harakel** and **Puzova**.

48. Clearly the Tribunal in **Puzova** left open the possibility of there being cases of Czech Roma whose particular histories give rise to a real risk on return on account of their history and the particularised risk that they therefore face. The question before us is whether this case is one of those. We have to be careful to ensure that we are not simply substituting our own decision for that of the Adjudicator without identifying any point of law in relation to which he has erred. We bear in mind the points we have made above about the lack as we find it of

any significant difference in the situation for the Czech Roma generally as of today and at the time when the Tribunal produced its determination in **Puzova**. We do not read the Tribunal in **Byharova** as suggesting that the Ombudsman is in any sense a panacea for problems of the kind that arose in that case, but rather that the Ombudsman is part of the package of higher authorities to which complaints can be made. It is unclear in our view as to whether the Ombudsman has jurisdiction or not, but it is in any event clear, as set out in paragraph 23 of Dr Chirico's report, that there is quite an elaborate appeals procedure that exists with regard to police complaints in the Czech Republic. We note the criticisms of lack of objectivity and credibility of that system, and the absence of at least Dr Chirico's awareness of any case where a Romany complaint has been successful at first instance. Dr Chirico's evidence in this regard is purely anecdotal and not based upon any statistical information but rather on the basis that he considers that he would have been told if there were any cases involving Romany complaints being successful and we do not consider that that is evidence of particular substance. We also bear in mind the point made at paragraph 14 in **Byharova** that given the high profile nature of the murder of Helena Bihariova there would be a good degree of likelihood that taking the complaint to the authorities and emphasising the background against which the problems arose would be likely to give rise to a more energetic response than as so far occurred. The police so far have made a report, and as we have stated above, we know of no other action that they may have taken in order to seek to identify the makers of the threats. We are far from saying that a person would have to wait for threats to be carried out in order for there to be action taken by the authorities, but we do consider that there is force in Mr Saville's point that the making of threats is unfortunately a common tactic of the bully and the fact that the intimidation exists by no means entails that it is going to be followed up. It is not irrelevant to note that in the period of some 2¾ years between the convictions and the departure from the Czech Republic of the appellant and his brother there has been a single occasion when in an attack on them mention was made of Helena Bihariova, and there was no follow-up to any of the threats made which began in March 2001.

49. In conclusion therefore we consider, adopting the conclusions in **Puzova**, that there is in the Czech Republic a system of criminal law which offers effective protection to Czech citizens generally including Czech Roma. On the particular facts of this case, bearing in mind the Appellant's history and the objective evidence concerning the availability of complaints procedures in the Czech Republic and the general attitude of the Czech Authorities identified by the Court of Appeal in **ZL** and **VL** at paragraph 74, that the Claimant does not face a real risk of persecution on return to the Czech Republic. We consider that the Adjudicator was in error, as identified by Mr Saville, in concluding as he did at paragraph 34:

> "I am satisfied however that within the context of the objective and country material that it is unlikely that any consequential difference would have occurred to the Appellant's history and his ability to subject to discrimination of the Czech Republic".

As can be seen, that sentence is not very clearly expressed, and we do not consider that it was a proper conclusion to which the Adjudicator was entitled to

come to on an assessment of the objective evidence and we therefore consider that he erred in law.

50. We therefore allow the Secretary of State's appeal.

51. As regards Mr Symonds's separate point concerning Article 3 and the changes as from May 1st in enabling citizens of the Czech Republic to come to the United Kingdom to seek work under the Accession Agreement, we see no merit in this point. There is either a real risk of Article 3 ill-treatment on return or there is not, and we see no merit to the suggestion that the surrogacy principle is no longer applicable. The reasons why there has to be a real risk as identified by Mr Symonds, in order for an Article 3 claim to be made out are not in our view changed in any respect by the changes in the situation on 1st May which in any event have not yet occurred. We therefore, as we have noted above, see no merit in this point and specifically we regard B as being at best of peripheral significance. In any event, taking into consideration forthcoming European-based rights is one thing, basing a decision on them is quite another. The Adjudicator made no specific findings under the European Convention by virtue of his decision under the Refugee Convention, which we do not consider was appropriate. If there is an appeal there must be a decision on it. The Tribunal is empowered by statute to make any determination which the Adjudicator could have made. In the light of our findings on the Refugee Convention appeal and on Mr Symonds' point on Article 3, we dismiss the claimant's Article 3 appeal.

D K Allen
Vice President