



KNOWLEDGE-BASED HARMONISATION OF EUROPEAN ASYLUM PRACTICES

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Case Summary

Country of Decision/Jurisdiction	United Kingdom
Case Name/Title	R (Bagdanavicius) v Secretary of State for the Home Department
Court Name	Court of Appeal
Neutral Citation Number	[2005] EWCA Civ 1605
Other Citation Number	[2004] Imm AR 36, [2004] 1 WLR 1207, [2004] ACD 6, [2003] EWCA , [2004] INLR 163
Date Decision Delivered	11/11/03
Country of Applicant/Claimant	Lithuania
Keywords	Actor of Protection, Actor of Persecution, Non-state actor of persecution, Persecution, State protection
Head Note (Summary of Summary)	The Court of Appeal gave guidance on the relevant factors to consider in assessing claims for protection against persecution from non-state actors under the Refugee Convention and Article 3 of the ECHR.
Case Summary (150-500)	
Facts	The applicants were Lithuanian nationals. They were married and had a 3-year-old son. The husband was of Roma ethnic origin; the wife was not. Because of this they were subjected to persistent harassment and violence, particularly at the hands of the wife's brother and a variety of his associates. They left Lithuania in 2002 and claimed asylum immediately on arrival in the UK. Their claims were refused and certified as being "clearly unfounded". They challenged the certification by Judicial Review.
Decision & Reasoning	<p>The applicants argued, amongst other matters, that the Secretary of State had applied the wrong legal test in assessing their claim for protection against removal under Article 3 of the ECHR. They argued that in order to succeed they need to establish only a real risk of harm on return to Lithuania. The Court of Appeal dismissed the appeal and gave guidance. The applicants subsequently unsuccessfully appealed to the House of Lords (see separate summary). An edited version of the Court of Appeal's guidance is set out below.</p> <p><i>The common threshold of risk for Article 3 of the ECHR and asylum claims</i></p> <p>1) The threshold of risk is the same in both categories of claim;</p> <p><i>Asylum claims</i></p> <p>2) An asylum seeker who claims to be in fear of persecution is entitled to asylum if he can show a well-founded fear of persecution for a Refugee</p>



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Convention reason *and* that there would be insufficiency of state protection to meet it;

3) Fear of persecution is well-founded if there is a "reasonable degree of likelihood" that it will materialise;

4) Sufficiency of state protection, whether from state agents or non-state actors, means a willingness *and* ability on the part of the receiving state to provide through its legal system a reasonable level of protection from ill-treatment of which the claimant for asylum has a well-founded fear;

5) The effectiveness of the system provided is to be judged normally by its systemic ability to deter and/or to prevent the form of persecution of which there is a risk, not just punishment of it after the event;

6) Notwithstanding systemic sufficiency of state protection in the receiving state, a claimant may still have a well-founded fear of persecution if he can show that its authorities know or ought to know of circumstances particular to his case giving rise to his fear, but are unlikely to provide the additional protection his particular circumstances reasonably require;

Article 3 claims

7) The same principles apply to claims in removal cases of risk of exposure to ill-treatment as defined in Article 3 in the receiving state, and are, in general, unaffected by the approach of the Strasbourg Court in *Soering*; which, on its facts, was, not only a state-agency case at the highest institutional level, but also an unusual and exceptional case on its facts;

8) The basis of an Article 3 entitlement in a removal case is that the claimant, if sent to the country in question, would be at risk *there* of Article 3 ill-treatment.

9) In most, if not all, Article 3 cases in this context the concept of risk has the same or closely similar meaning to that in the Refugee Convention of "a well-founded fear of persecution", save that it is confined to a risk of Article 3 forms of ill-treatment and is not restricted to conduct with any particular motivation or by reference to the conduct of the claimant;

10) The threshold of risk required to engage Article 3 depends on the circumstances of each case, including the magnitude of the risk, the nature and severity of the ill-treatment risked and whether the risk emanates from a state agency or non-state actor;

11) In most, but not necessarily all, cases of ill-treatment which, but for state protection, would engage Article 3, a risk of such ill-treatment will be more readily established in state-agency cases than in non-state actor cases – there is a spectrum of circumstances giving rise to such risk spanning the two categories, ranging from breach of a duty by the state of a negative duty not to inflict article 3 ill-treatment to a breach of a duty to take positive protective



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	<p>action against such ill-treatment by non-state actors;</p> <p>12) An assessment of the threshold of risk appropriate in the circumstances to engage Article 3 necessarily involves an assessment of the sufficiency of state protection to meet the threat of which there is a such risk - one cannot be considered without the other whether or not the exercise is regarded as "holistic" or to be conducted in two stages;</p> <p>13) Sufficiency of state protection is not a guarantee of protection from Article 3 ill-treatment any more than it is a guarantee of protection from an otherwise well-founded fear of persecution in asylum cases - nor, if and to the extent that there is any difference, is it eradication or removal of risk of exposure to Article 3 ill-treatment;</p> <p>14) Where the risk falls to be judged by the sufficiency of state protection, that sufficiency is judged, not according to whether it would eradicate the real risk of the relevant harm, but according to whether it is a reasonable provision in the circumstances;</p> <p>15) Notwithstanding such systemic sufficiency of state protection in the receiving state, a claimant may still be able to establish an Article 3 claim if he can show that the authorities there know or ought to know of particular circumstances likely to expose him to risk of Article 3 ill-treatment;</p> <p>16) The approach is the same whether the receiving country is or is not a party to the ECHR, but, in determining whether it would be contrary to Article 3 to remove a person to that country, our courts should decide the factual issue as to risk as if ECHR standards apply there.</p>
Outcome	The appeal was dismissed.
Subsequent Proceedings	
EU Legal Provisions Applicable	
Qualification Directive	Yes
Asylum Procedures Directive	
Reception Conditions Directive	
Dublin II Regulation	
Returns Directive	
Legal Provisions Cited	
1951 Refugee Convention	Article 1A(2)



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Qualification Directive	
Asylum Procedures Directive	
Reception Conditions Directive	
Dublin II Regulation	
Returns Directive	
ECHR European Convention on Human Rights	Article 3
CFREU Charter of Fundamental Rights of the European Union	
TFEU Treaty on the Functioning of the European Union	
ICCPR	
CRC	
CAT	
ICESCR	
CEDAW	
ICERD	
UNHCR Handbook	
Geneva Conventions & Additional Protocols	
European Social Charter	
ICC Statute	
Case Law Cited	
CJEU Cases Cited	
ECtHR Cases Cited	Soering v. UK (1989) 11 EHRR 439; Chahal v. United Kingdom (1996) 23 EHRR 413; Vilvarajah v. UK (1991) 14 EHRR 248 Osman v. UK (1988) 29 EHRR 245; D v. UK (1997) 24 EHRR 423; HLR v. France (1997) 26 EHRR 29
Other Cases Cited	Thangarasa v. Secretary of State [2002] UKHL, 36; Horvath v Secretary of State for the Home Department [2001] 1 AC 489; R (Pretty) v. DPP [2002] 1



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	AC 800; R v. BBC, ex p. Prolife Alliance (2003) UKHL 23; Banomova v. SSHD [2001] EWCA Civ 807; Svazas v. SSHD [2002] 1 WLR 1891; McPherson v. SSHD [2002] INLR 139; N v. SSHD [2003] EWCA Civ 1369; Kinuthia v. SSHD [2002] INLR 133; R (Razgar) v. Secretary of State [2002] EWHC 2554 Admin; R (ZL & VL) v. SSHD [2003] 1 All ER 1062; R (A) v. Lord Saville of Newdigate [2002] 1 WLR 1249; R (Ullah) v. Special Adjudicator [2003] 1 WLR 770; Svazas v. SSHD [2002] 1 WLR 1891; R (Dhima) v. IAT [2002] Imm AR 394; Krepel v. SSHD [2002] EWCA Civ 165; R (Q) v. SSHD [2003] 2 All ER 905; A v. SSHD [2003] EWCA Civ 175; Turgut v. SSHD [2000] Imm AR 306; Haile v. IAT [2002] Imm AR 170; and Khan v. SSHD [2003] EWCA Civ 530; SSHD v. Sirviene [2002] UKIAT 02843; Tumarevic v. SSHD [2002] UKIAT 07407; SSHD v. Semetiene [2002] UKIAT 08370.
Other sources cited	
Observations/Comments	The Court of Appeal's guidance has been subsequently applied in IM (Sufficiency of Protection) Malawi [2007] UKAIT 00071 and AW (sufficiency of protection) Pakistan [2011] UKUT 31(IAC) (see separate summary).