Case No: C1/2003/1007(A), C1/2003/1007(B) & C3/2003/1007

Neutral Citation No: [2003] EWCA Civ 1605
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR. JUSTICE MAURICE KAY

Royal Courts of Justice
Strand,
London, WC2A 2LL

Tuesday 11th November 2003

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE AULD
and
LADY JUSTICE ARDEN

- -

Between :

THE QUEEN ON THE APPLICATION OF 1) RUSLANAS BAGDANAVICIUS 2) RENATA BAGDANAVICIENE	Appellant
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	Respondent

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr. A. Nicol QC & Mr. R. Husain (instructed by the Refugee Legal Centre) for the Appellants
Miss M. Carss-Frisk QC & Miss S. Broadfoot (instructed by the Treasury Solicitor) for the Respondent

- -

Judgment
As Approved by the Court

The Queen on the application of Bagdanavicius v Secretary of State for the Home Department

Summary of conclusions on the main issue - "real risk/sufficiency of state protection

The common threshold of risk for Article 3 ECHR and asylum claims

1) The threshold of risk is the same in both categories of claim*;* the main reason for introducing section 65 to the 1999 Act was not to provide an alternative, lower threshold of risk and/or a higher level of protection against such risk through the medium of human rights claims, but to widen the reach of protection regardless of the motive giving rise to the persecution.

Asylum claims

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

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

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; *Osman, Horvath, Dhima.*

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; *Horvath; Banomova. McPherson* and *Kinuthia*.

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; *Osman.*

Article 3 claims

7) The same principles apply to claims in removal cases of risk of exposure to Article 3 ill-treatment 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; *Dhima, Krepel* and *Ullah.*

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; *Dhima, Krepel; Chahal.*

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; *Horvath.*

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 action against such ill-treatment by non-state actors; *Svazas*.

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; *Dhima, Krepel, Svazas*.

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; *Dhima; McPherson; Krepel*.

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; *Osman*.

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; *Osman*.

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 - and the same applies to the certification process under section 115(1) and/or (2) of the 2002 Act.

Contents

Lord Justice Auld:

1. This is an appeal from a decision of Mr. Justice Maurice Kay, given on 16th April 2003, in which he dismissed the claims of Mr. Ruslanas Bagdanavicius and his wife, Mrs. Renata. Bagdanaviciene, for judicial review of the Secretary of State for the Home Department's certification under section 115(1) and (2) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") of their claims for asylum and under Articles 3 and 8 of the European Convention of Human Rights ["ECHR"] as "clearly unfounded".

The main issue

2. The appeal, which is by permission of the Judge, concerns the meaning and relationship of the concepts of a "well-founded fear of persecution" and "sufficiency of state protection" under the Geneva Convention, as amended by the New York Protocol of 31st January 1967, ("the Refugee Convention") and a "real risk" of inhuman or degrading treatment under Article 3 ECHR, and their relationship, one with the other. The Refugee Convention provides a right of asylum where there is well-founded fear of persecution for a Convention reason, and Article 3 ECHR provides that "[n]o one shall be subjected to torture or inhuman or degrading treatment or punishment". The Court has also given permission to Mr. and Mrs, Bagdanavicius to appeal the Judge's decision on three other related grounds in respect of which he refused permission.

The facts

3. Mr. and Mrs. Bagdanavicius are citizens of Lithuania, a recent signatory to the ECHR, who arrived in the United Kingdom with their son on 7th December 2002 and claimed asylum. Mr. Bagdanavicus is of Roma origin and claimed that he and his family were persecuted because of that. However, the central feature of their case was that they had been subjected to persistent harassment and violence at the hands of Mrs. Bagdanavicene's brother, Zilvanis and his associates, who, they claimed, were members of the Lithuanian Mafia, all stemming from the fact that Zilvanis had objected to his sister having married a person of Roma origin.

4. Mr. Bagdanavicius said that Zilvanis had beaten him with a metal stick every time he saw him with Mrs. Bagdanavicius and had threatened to kill their son. He said that he had reported these incidents to the police and that they had done nothing about them, suggesting that that they were ineffective as protection because of corruption, complicity or sheer inertia. He added that the Lithuanian police hated gypsies and that on one occasion traffic police had beaten him. He claimed that he had been turned away from hospitals and health centres when, in seeking medical attention for the injuries caused, he had reported these incidents of violence. He also claimed that he had been unable to find work because of his Roma origin.

5. Mrs. Bagdanavicius made similar allegations of harassment and violence as a result of her husband being a Roma. She claimed that she too had suffered persecution at the hands of Zilvanis and other members of her family and that he had also beaten her.

6. In formulating their asylum claim Mr. and Mrs. Bagdanavicus sought the assistance of the Refugee Legal Centre and an expert instructed by the Centre, Dr. Galeotti, whose report was submitted to the Secretary of State. In his report, Dr. Galeotti wrote of prejudice and discrimination in Lithuania against persons of Roma origin and those who marry them. He also wrote of a serious problem of organised crime in the country, particularly in Alytus, the

home-town of Mr. and Mrs. Bagdanavicius, and of links between criminal gangs and corrupt police officers. For those reasons, he expressed serious concern as to whether the criminal justice system in Lithuania could provide adequate protection to those who became targets of organised criminal gangs. He suggested that internal relocation would be of limited effectiveness.

7. On the basis of Mr. and Mrs. Bagdanavicius' complaints, made in written statements and in interviews, and of a report from Dr. Galeotti, the Legal Refugee Centre put their claim for asylum to the Secretary of State on two bases: first, that they had a well-founded fear of persecution on account of his Roma origin and their mixed marriage if they were returned to Lithuania; and, second, that such return would put the United Kingdom in breach, in particular, of Article 3 ECHR. By decision letters of 14th December 2002 the Secretary of State refused the claims. He also certified them as "clearly unfounded" pursuant to section 115 of the 2002 Act, which provides that a person the subject of such a certificate may not, while in the United Kingdom, appeal under sections 69 or 65 of the Immigration and Asylum Act 1999, which provide respectively for appeals on asylum and human rights grounds. As the Judge indicated in his judgment, the Secretary of State considered that there was no breach of Article 3 because the alleged conduct did not reach the required threshold of seriousness and because there was sufficiency of state protection in Lithuania.

8. In expressing his decision, the Secretary of State rejected the claim that Mr. Bagdanavicus had been persecuted by his wife's family because of his Roma origin. He said that the matters complained of appeared to have fluctuated and to have depended on other factors at any given time rather than his Roma origin, which was a constant. He expressed the view that, if fear of his wife's family had been genuine, it would have been reasonable for them to have avoided contact with the family and to have moved elsewhere. He also observed that they could have attempted to seek redress through the Lithuanian authorities before seeking international protection since, although there were reports of unlawful violence by Lithuanian police officers, such incidents "were not knowingly tolerated by the Lithuanian authorities". He added that the incidents of official misbehaviour of which they had complained were random in nature and the result of individuals abusing their position, conduct in respect of which the Lithuanian Government was able and willing to provide protection. As to Dr. Galeotti's report, the Secretary of State dismissed it as reflecting his "own personal judgments on the general situation", and stated that it added no weight to their case.

9. On 16th December 2002 Mrs Bagdanaviciene submitted a further statement, and 24th December 2002 she and her husband issued claims for judicial review. On 6th January 2003 the Secretary of State issued second decision-letters, which he served with an acknowledgment of service, maintaining his certification. In those letters he returned to Dr. Galeotti's first report, criticising it as not being sufficiently up to date in its presentation of the objective evidence. And he referred to more recent information indicating a much more reassuring picture than Dr. Galeotti had painted of the level of protection that could be expected in Lithuania.

10. There then followed the submission of a third statement from Mrs. Bagdanavicius, a statement from her cousin and a further report from Dr. Galeotti. On 17th February 2003 the Treasury Solicitor enquired by fax whether there would be any further submissions or material, to which there was no reply. And, on 25th February 2003, following the grant by the Judge of partial permission to apply for judicial review on 16th January 2003, the Secretary of State issued a third decision-letter maintaining the certifications. In his letter he

stated that he had reconsidered the matter in the light of the further material and gave further reasons for his decision. He stated that the new material revealed further inconsistencies in their accounts that adversely affected their credibility, and that he could not rule out the option of internal relocation since Zilvanis' attacks on Mr. and Mrs. Bagdanavicius were sporadic and opportunistic. He also stated that the evidence showed that the Lithuanian authorities were willing and able to protect all their citizens from such conduct and that there was no reason why they could not avail themselves of that protection. On 26th February 2003, two days before the start of the substantive judicial review hearing, the Refugee Legal Centre responded by letter to those points, enclosing a number of witness statements the general thrust of which was to rebut a claimed error of fact of the Secretary of State resulting from, it was said, a selective reading of Mr. and Mrs. Bagdanavicius' statements, namely as to how many times, according to Mr. Bagdanavicius, Zilvanis had beaten him up.

11. The judicial review hearing took place over two days, on 27th February and 28th March 2003. The post-decision material submitted to the Secretary of State on 26th February was tendered to the Judge, but it is not known whether he considered it and took it into account in reaching his decision.

12. In a reserved judgment on 16th April 2002 the Judge dismissed the claim for judicial review. He held:

1) that the Secretary of State had correctly identified and applied the concept of sufficiency of state protection in asylum cases as laid down by the House of Lords in *Horvath v. SSHD* [2001] AC 489, and had, in accordance with the reasoning of the Administrative Court in *R (Dhima) v. IAT* [2002] Imm AR 394, DC, correctly applied it to Article 3 ECHR and the circumstances of this case; in particular, he rejected the proposition advanced on behalf of Mr. and Mrs. Bagdanavicus that:

> "protection is sufficient, but only if, it rules out the reality of a risk of Article 3 ill-treatment and that, consequently, protection is not sufficient if there remains a real risk [of it], even if there exists a criminal justice system which punishes wrongdoers in a manner commensurate to their wrongdoing and which is operated by the authorities with reasonable efficiency"

2) that the Secretary of State had not erred in his eventual treatment of Dr. Galeotti's' reports and that his views, when considered with Mr. and Mrs. Bagdanavicius' own accounts, did not persuade him that an adjudicator might have come to any other conclusion than that the Lithuanian authorities were willing and able to protect them from persecution and any breaches of their human rights;
3) that an adjudicator could not legitimately conclude that Mr. and Mrs. Bagdanavicius had established to a reasonable degree of likelihood that the threshold of severity would be crossed under the Refugee Convention or Article 3 ECHR;
4) that, putting Mr. and Mrs. Bagdanavicius' accounts at their highest, that is disregarding their inherent inconsistencies, vagueness and implausibility, an adjudicator could not legitimately be satisfied that internal relocation was not an option; and
5) that the Secretary of State's certification of the claims under section 115 was adequately reasoned.

13. The Secretary of State, in a fourth decision letter issued on 30th April 2003 responded to the further evidence that the Refugee Legal Centre had submitted on behalf of Mr. and Mrs. Bagdanavicius on 26th February 2003, saying that it had not led him to alter his view that

Mr. and Mrs. Bagdanavicius' claims were clearly unfounded within section 115 of the 2002 Act. The letter stated:

> "The Secretary of State remains of the view that your clients' accounts lack credibility, and that (even allowing for anxiety and for any problems with memory that Mr. Bagdanavicius may suffer) they have been so vague and inconsistent about matters at the very heart of their claims that an Adjudicator could not reasonably conclude that they had established their claims to the requisite standard.
>
> However, even leaving that to one side and taking their claims at their highest, the Secretary of State is satisfied that they have not demonstrated that they would be at risk throughout Lithuania and that they could not avail themselves of the protection of the Lithuanian authorities if they relocated internally. Mrs. Bagdanavicius accepts that she was not beaten up by Zilvanis after 1997/98 … It is also apparent that after your clients moved within their hometown, any attacks on Mr. Bagdanavicius were essentially opportunistic and took place when Zilvanis saw him in town. The Secretary of State remains of the view that an Adjudicator could not properly or reasonably be satisfied that the Lithuanian authorities would be unable or unwilling to provide your clients with sufficient protection in Lithuania generally, nor that your clients would face a real risk of persecution and/or serious ill treatment were they to return to Lithuania in a location other than their home town
>
> … For the sake of completeness, I should add that having given careful consideration to all the material available, the Secretary of State takes the view that your clients' claims would be clearly unfounded, even on the test for sufficiency of protection advanced on their behalf."

14. The Judge gave Mr. and Mrs. Bagdanavicius partial permission to appeal on the ECHR "real risk" and asylum "sufficiency of state protection" concepts and their relationship one with another. The three related grounds in respect of which he refused and this Court has given permission to appeal are:

1) that the Secretary of State and the Judge wrongly certified Mr. and Mrs. Bagdanavicius' claims as "clearly unfounded" within the meaning of those words in section 115 of the 2002 Act;
2) that the Judge wrongly failed to receive and/or consider the further evidence of Mr. and Mrs. Bagdanavicius submitted after the Secretary of State's third decision letter of 25th February 2003;
and
3) that the Judge wrongly decided that the Secretary of State's certificate was adequately reasoned.
They also seek to adduce "fresh evidence" in support of ground 2.

1) "Real risk"/Sufficiency of state protection

15. The central issue in the appeal is the meaning of the concept of a "real risk" of Article 3 ill-treatment when a person threatened with removal from this country to another state alleges that, if returned, he will be at such risk there from non-state actors. On the case of Mr. and

Mrs. Bagdanavicius, integral to that question - and on the Secretary of State's case, the primary question - is the meaning and application of the concept of "sufficiency of state protection". Considering the two concepts together, the question is whether a person facing return to his home or another state is entitled to resist it on Article 3 grounds because, however good a system of protection provided by the other state, there is still a real risk to him, if returned there, of Article 3 ill-treatment from lawbreakers. Resolution of this issue is largely determinative of the other grounds of appeal.

The law so far

16. Before I turn to the competing submissions, I should set the legal scene.

17. Article 1A(2) of the Refugee Convention provides, so far as material, that the term "refugee" applies to any person who:

> "… owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; … "

And Article 3 ECHR provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

18. The starting point for consideration of Article 3 ill-treatment in non-state actor cases and of the response of the state to it is *Osman v. UK* (1988) 29 EHRR 245, in which the European Court absolved the United Kingdom from liability under Article 2 for failure of police to prevent an offence of manslaughter, because it had not been shown that the police authorities knew or ought to have known at the time of "a real and immediate risk" to the life of the victim. In this, the most important of the absolute human rights protected by the ECHR, the European Court acknowledged the member states could not be expected to guarantee such protection – there were obvious practical limitations that had to be recognised – a recognition, in my view, equally applicable to Article 3 cases. In paragraphs 115 and 116, the Court, in the context of a state's duty to prevent offences against the person, set, as the threshold of engagement of a state's duty positively to protect the right to life, the existence of "a real and immediate risk" to life:

> "115. … Article 2 of the Convention may also imply in certain well-defined circumstances a 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. The scope of this obligation is a matter of dispute between the parties.
>
> 116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for

> the authorities a Convention requirement to take operational measures to prevent that risk from materialising. ….
>
> In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of *a real and immediate risk* to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk." [my emphasis]

19. In *Horvath* similar questions arose in the asylum field as to persecution by non-state actors as to those raised in the Article 3 context by this appeal. Lord Hope of Craighead, in an early passage in his speech, at 494, identified two of them in the following terms:

> "(1) does the word persecution denote merely sufficiently severe ill-treatment, or does it denote sufficiently severe ill-treatment against which the state fails to afford protection? … (3) what is the test for determining whether there is sufficient protection against persecution in the person's country of origin – is it sufficient, to meet the standard required by the Convention, that there is in that country a system of criminal law which makes violent attacks by the persecutors punishable and a reasonable willingness to enforce that law on the part of the law enforcement agencies? Or must the protection by the state be such that it cannot be said that the person has a well-founded fear?"

20. The House of Lords held in *Horvath* that that an asylum applicant's well-founded fear of violence by non-state actors did not amount to persecution within the Refugee Convention where he could not show that the state was unwilling or unable to provide him with a reasonable level of protection from it. Whilst their Lordships did not express themselves in identical terms, the reasoning of the majority on this issue was in substance the same, namely that the well-founded fear – the risk – of persecution cannot be considered on its own – but must be evaluated in the light of the measures provided by the state to meet it. As the Administrative Court said in *Dhima*, at paragraph 16,

> "… The reasoning of Lords Hope, Clyde, Browne-Wilkinson and Hobhouse, put at its broadest, was that when the conduct claimed to give rise to a well-founded fear of persecution emanates from non-state agents, the question whether it amounts to 'persecution' for asylum purposes, depends, not only [on] the risk and nature of the conduct, but also on the sufficiency of state protection against it. Lord Lloyd considered that the question whether there is a well-founded fear of persecution is separate from the question of insufficiency of state protection from it. However, he agreed that, though the asylum seeker had satisfied the 'fear' test, he had not satisfied the 'protection' test. Whatever the correct analysis, all their Lordships were of the view that sufficiency of protection meant a system of criminal law rendering violence punishable *and* a *reasonable* willingness *and ability on the part of the authorities to enforce it*." [my emphasis]

21. Thus, their Lordships fixed on a notion of "systemic" sufficiency of state protection, namely a reasonable level of protection to meet risks of the sort of which complaint is made. In doing so, all of them were guided by the principle of "surrogacy" articulated by Lord Hope, at 500F-H, namely that it is something less than a guarantee of safety against the risk of persecution by non-state actors, since the protection provided by a host state under the Refugee Convention is that of a surrogate or substitute for the claimant's home state applying the same standards of protection that the host state does for its own nationals. As Lord Hope put it, at 500G-H:

> "… the application of the surrogacy principle rests upon the assumption that, just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard, which takes proper account of the duty which the state owes to its own nationals. … it is axiomatic that we live in an imperfect world. Certain levels of ill-treatment may still occur even if steps to prevent this are taken by the state to which we look for our protection. …"

Lord Clyde adopted substantially the same reasoning in the following passage, at 510 E-H, in which he also drew on the reasoning of the European Court in *Osman*:

> ."… I do not believe that any complete or comprehensive exposition can be devised which would precisely and comprehensively define the relevant level of protection. The use of words like 'sufficiency' or 'effectiveness', both of which may be seen as relative, does not provide a precise solution. Certainly no one would be entitled to an absolutely guaranteed immunity. That would go beyond any realistic practical expectation. Moreover it is relevant to note that in *Osman* … the European Court of Human Rights recognised that account should be taken of the operational responsibilities and the constraints on the provision of police protection and accordingly the obligation to protect must not be so interpreted as to impose an impossible or disproportionate burden upon the authorities. … There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected. More importantly there must be an ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case."

22. In *Banomova v. SSHD* [2001] EWCA Civ 807, an asylum case decided before *Dhima*, Clarke LJ, with whom Thorpe LJ and Butterfield J. agreed, clearly took the view, at paragraph 28 of his judgment, that the effect of *Horwath* was that "the adequacy or otherwise of protection is to be judged on a systemic basis". He said, at paragraph 29:

> "The system must provide for a criminal law which makes it a criminal offence to persecute individuals for a Convention reason and there must be appropriate penalties imposed upon those who commit such crimes. The system must also be operated in such a way that

> victims of a particular class are not exempted from the protection of the law and there must be a reasonable willingness on the part of the police and law enforcement agencies to investigate, detect and prosecute. …"

23. The Court in *Dhima* adopted the same approach in the context of Article 3, holding that, subject to the important qualification that asylum cases are concerned only with risk of persecution for a Refugee Convention reason, the threshold of risk in both regimes is much the same. And, as the House of Lords in *Horvath and* other courts have done, it focused on the systemic provision for prevention of ill-treatment, not just punishment of it after the event, as an element in the assessment of that risk. At paragraphs 30 – 35 of the judgment, the Court said:

> "30. … there is a fallacy in Mr. Nicol's argument in separating, to the extent that he does, the concept of a real risk of harm from article 3 conduct from the consideration of the availability and sufficiency of state protection *to remove it*. Although article 3 has a wider application than article 1(A) of the Geneva Convention, and is absolute in its terms and effect, it clearly allows for the home state, by providing suitable protection, *to remove the real risk at which it is directed*. As Mr. Nicol acknowledged, availability of protection is, therefore, relevant to an article 3 enquiry.
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> 31. Mr. Nicol's premise that, in non-state agent asylum cases, the factor of state protection goes beyond the assessment of a real risk of harm flows … from a misreading of the *ratio* in *Horvath.* … it is that the level of risk posed by non-state agents depends, not only on their motivation and conduct, but also on the level of protection against it that the state provides. One cannot be considered without the other. …
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> 33. *The broad symmetry of the two* [i.e. asylum and human rights] *tests is also to be found in the extent of state protection that may serve to remove the real risk of harm*. *The sufficiency test in Horvath falls short of a guarantee of safety from harm, as does the factor of protection in removal of a real risk of harm*, as distinct from the possibility of harm, in article 3 cases."
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> 34. The symmetry between the two tests may not always be exact, but this should not cause problems in practice. …
>
> 35. … what is critical is a combination of a willingness and ability to provide protection to the level that can reasonably be expected to meet and overcome the real risk of harm from non-state agents. What is reasonable protection in any case depends, therefore, on the level of the risk, without that protection, for which it has to provide. Such reasoning … reflects the ratio in Horvath" [my emphases]

24. I anticipate here one of the contentions of Mr. Andrew Nicol, QC, counsel for Mr. and Mrs. Bagdanavicius, as to the ratio in *Dhima*. I do so because both parties pray that authority in aid, albeit to contrary effect, in its interpretation and application of the ratio in *Horvath.* In addition to questioning the ratio of *Horvath* on the sufficiency of state protection point in the asylum context and, in any event, its relevance to Article 3 claims, he also sought to rely on

Dhima by interpreting it in such a way as to support his argument that state protection is only sufficient if it removes the risk of Article 3 ill-treatment in the sense of ruling out all real risk of it. I am surprised that Mr. Nicol felt able to extract that proposition from *Dhima*, given the Court's interpretation of the qualified meaning of sufficiency of state protection in *Horvath*, its equation of the test of well-founded fear of persecution (risk) considered in the light of such protection in that case with risk/state protection in Article 3 cases, and the express rejection of any notion of guarantee in the use of the expression, removal of risk. So much, I would have hoped, is evident from the above passages in the judgment, which, as I read them now, plainly indicate the expression "removal of risk" is simply a form of shorthand for provision of a reasonable level of systemic protection before the event.

25. To similar effect was the reasoning of this Court in *McPherson v. SSHD* [2002] INLR 139 (decided shortly before *Dhima*), in which a Jamaican woman claimed that her return to Jamaica would be contrary to Article 3 because she feared violence from her former partner. The Court held: 1) that a state had a positive obligation under Article 3 to take reasonable measures to make the necessary protection available; 2) that, depending on the circumstances, these could take the form of civil remedies and did not necessarily require criminal sanctions; and 3) that such protection would have to be "effective", by way of likely deterrent or otherwise. However, observations of Sedley and Arden LJJ, with whom Aldous LJ agreed, indicate that "effective" does not mean guaranteed to succeed. And I agree with their view that the use by the European Court in *HLR v. France* (1997) 26 EHRR 29, of the word "obviate" in the following passage at paragraph 40 equating, in non-state actor cases, the provision of "appropriate protection" with obviation of risk, cannot mean that:

> "40. …it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection."

Sedley LJ, referring to this passage, said at para. 22:

> "On the face of it, this appears to require the State to obviate risks which fall within Art 3, but this cannot be right. What the State is expected to do is take reasonable measures to make the necessary protection available. It is not, as counsel agree, a guarantor of safety or non-violation. To the extent that a State can be shown to be unable or unwilling to take such measures, the positive obligation will not be met. I respectfully adopt the judgment of Arden LJ as amplifying my reasoning on this question."

26. Arden LJ's fuller consideration of the point, at paragraphs 36–39 drawing on the observations of the European Court in *Osman*, at para. 115, on the right to life under Article 2, merits reproduction, both on the role of deterrence as effective protection and on the need to identify, having regard to the burden of proof on an applicant, "effective" or "sufficiency" of state protection:

> 36. … Art 3 requires a State to provide machinery to deter a violation of that article which attains a satisfactory degree of effectiveness. …
>
> "37 … the provisions of the law required to safeguard the right to life must be 'effective". … The right to life under Art 2 and the right to freedom from torture and inhuman and degrading treatment under Art 3 are both non-derogable rights.

> 38 …to be 'effective', measures for the purpose of Art 3 must be those which attain an adequate degree of efficacy in practice as well as exist in theory. If the appellant were able to show to the requisite standard of proof that the remedies provided under the law of Jamaica against domestic violence are unlikely to be an effective deterrent, in my judgment she would have to show that her removal from the UK to Jamaica would violate her rights under Art 3 …
>
> 39 It is accepted that Art 3 does not require a State to guarantee the appellant's safety. Argument was not, however, addressed to the question of what the appellant would have to show to establish (to the requisite standard of proof) that the measures were not 'effective' in practice. Accordingly, final resolution of this issue will have to await another case."

27. In *Krepel* v. *SSHD* [2002] EWCA Civ 165 this Court followed and applied the same reasoning as that in *Horvath, Banomova, McPherson* and *Dhima*. Though it was a decision on a permission application, it was a fully reasoned judgment by the full Court after hearing oral argument by senior counsel experienced in this field, and one that the Court said in *Britton v. SSHD* [2003] EWCA Civ 227, at para. 24, "should obviously be considered by any court having to decide this point". Krepel was an asylum and Article 3 non-state actor case, in which Buxton LJ, who gave the leading judgment, and with whom Schiemann and Longmore LJJ agreed, reviewed and followed the judgments in *Horvath*, *McPherson* and *Dhima*. He said that those authorities clearly established in non-state actor cases: 1) that integral to the determination of risk where an issue of state protection is raised is the sufficiency of action taken by the state to meet that risk; 2) that the same threshold of risk of harm applied to asylum and human rights claims; and 3) that it falls short in both claims of requiring a guarantee of safety against the relevant harm. I cite, in particular, passages in paragraphs 13 and 25 of his judgment:

> "13. Before turning to the arguments addressed to us in this case I would take the liberty by way of background of making two points that are on any view trite in this area of the law. The first is that an obligation under Article 3 is an obligation of the State. A breach of Article 3 is therefore only established if the ill-treatment complained of is attributable to the State. In a case such the present, therefore, where the actual acts have been ones not of State agents but of third parties, the question is whether the State has taken sufficient action to protect the citizen against such acts. Secondly, it is not surprising that the standard or test for State involvement in breach of Article 3 is likely to be the same as the standard or the test for the attribution to the State of persecution under the Refugee Convention: because, there again, the State is only implicated in the acts of third parties that produce a situation that qualifies as persecution under the Refugee Convention if it has failed to take appropriate steps to protect its citizens against those acts.
>
> 25 …[Auld LJ in *Dhima*] … accepted that, despite his reference to removal of the real risk of harm, no guarantee of safety could be required. …The question was whether, in the terms used by Lord Clyde in *Horvath*, steps to produce sufficiency of protection had been taken by the State. If the test were truly 'removal of a real risk, I see no way in which that could be regarded as anything other than a

> guarantee of safety in the sense of a guarantee of there being no infringement of the individual's Convention rights: because the phrase 'real risk of ill-treatment' is a description of the condition threatening harm to the citizen under Article 3, from which he is entitled to be protected."

The submissions

28. As I have said, the Secretary of State, in his decision-letter of 25th February 2003, expressed the view that the authorities in Lithuania were both willing and able to protect all their citizens from Refugee Convention persecution and Article 3 ECHR treatment.

29. Before Mr. Justice Maurice Kay and before this Court, both parties have relied on the reasoning of the Administrative Court in *Dhima*, but, as I have said, to contrary effect. Mr. Nicol, who also appeared for the claimants in *Dhima* and *Krepel*, has advanced arguments strongly reminiscent of his unsuccessful arguments in those cases. He submitted that, whilst state protection in the *Horvath* sense may be a sufficient answer to an asylum claim, it is not for an Article 3 claim unless it removes in the sense of eradicates a real risk of such ill-treatment, a contention that the Judge, rejected when put to him by Mr. Raza Husain on behalf of Mr. and Mrs. Bagdanavicius. Miss Monica Carss-Frisk, QC, for the Secretary of State, nailed her flag to the mast of sufficiency of state protection in the *Horvath* sense of the provision of a reasonable level of systemic protection to meet risks of the sort in question, which, she maintained, also applied in Article 3 cases, but should be considered separately from the issue of a "real risk".

30. The difference between Mr. Nicol and Miss Carss-Frisk as to whether in non-state actor cases the concept of sufficiency of state protection is a tool to be used in assessing whether there is a real risk of Article 3 ill-treatment or is separate from it – that is, to be considered as a sufficient response to the risk where it exists - does not really matter. As Lord Lloyd of Berwick acknowledged in *Horvath*, at 502 G-H, in dissenting from the majority on this issue, "in the end there is only one question, namely, whether the applicant has brought himself within the definition of refugee in article 1A(2) of the Convention", but that, "in order to answer that question, … it … [is] permissible as a matter of language, and helpful as a matter of analysis, to divide the question into two". The two concepts are referred to expressly and separately in Article 1A(2), but have only become part of Article 3 as a result of jurisprudential overlay in the form of the "real risk" test. If risk – real or otherwise - of Article 3 ill-treatment in non-state actor cases is the touchstone, I do not see how it can be considered or assessed without regard to the sufficiency of state protection provided to meet it. The critical question in determining the reality of the risk is, therefore, what level of state protection is required in Article 3 cases, as well as in asylum cases, to meet the threat or possibility of conduct, which, without such provision, would constitute Article 3 ill-treatment. That is the real issue between the parties on this appeal.

31. Mr. Nicol sought to distinguish between the two regimes in the level of provision of state protection required in non-state actor cases, by two related arguments. The first was that the ratio in *Horvath* was confined to asylum cases and could have no application to human rights claims: first, because it had required a close reading of the definition of a "refugee" in Article 1(A) of the Refugee Convention, a reading that could not be carried over to Article 3 ECHR, which contained no similar or even comparable language. He submitted that the governing ECHR principle is one of *effective* protection, that is, of removing the real risk of such ill-treatment. However, he disavowed any suggestion that Article 3 rights carried with them a *guarantee* of safety from such ill-treatment.

32. Mr. Nicol's second and related argument was that in the human rights context, the removing state is not to be treated as a surrogate for the home state. He said that the principle of surrogacy relied on by House of Lords in *Horvath* has no application to the absolute duty imposed on ECHR contracting states not to expose anyone to Article 3 ill-treatment. A removing state, he submitted, has a higher – an absolute and negative duty not to expose a person to a real risk of article 3 treatment by sending him back to his home state if there is a real risk of it there, even if the system of state protection provided by that state would pass muster for asylum purposes. On that approach, as he acknowledged, the removing state may owe a higher duty to asylum claimants under its human rights obligations than that owed to them under the Refugee Convention, and also higher than that owed by the receiving state under its human rights obligations in the system of protection that, in accordance with *Osman*, it provides, or should provide, for its own resident citizens. He acknowledged that there is no direct authority for such a proposition. He also acknowledged that it conflicted with a state's right to refuse entry to persons who have no right to live there, unless their entry is required by some international obligation.

33. Mr. Nicol put, as the source of the two tier system of obligation to those threatened with removal for which he contended, the case of *Soering v. UK* (1989) 11 EHRR 439, in which the European Court held that it would violate the Article 3 rights of the applicant to extradite him to the United States to face trial in Virginia on a charge of capital murder of which he was at significant risk of conviction. The Court found that there were substantial grounds for believing that he would, if extradited to the United States, face a real risk of Article 3 treatment. It held that the matter was not be determined according to the practices and arrangements in Virginia and the United Kingdom's inability to influence them, but according to ECHR standards governing the United Kingdom, and concluded in paragraph 91 of its unanimous judgment:

> "… the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving [requesting] country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment."

34. The European Court respectively adopted and recognised the *Soering* approach in two other cases. In *D v. UK* (1997) 24 EHRR 423, at para. 49, it held that the removal of a terminally ill person to St. Kitts would violate Article 3 because of lack of medical facilities and support for him there, that is, that the very act of removal would itself have amounted to the treatment proscribed by Article 3. That was, as Laws LJ observed in *N v. SSHD* [2003] EWCA Civ 1369, at paras 18 and 40, a case in which the facts "were very stark indeed" and which "should be very strictly confined". And, in *HLR v. France* (1997) 26 EHRR 29, a deportation case in which the Court considered whether Article 3 would be violated where the person concerned feared violence from non-state actors, it seemingly equated, as I have

mentioned, the provision of "appropriate protection" with "obviation" of the risk. The Court went on to hold, however, that applicant had not established that the risk he faced was real.

35. Mr. Nicol also mentioned as a support for his two tier Article 3 argument the following obiter comment of Lord Phillips of Worth Maltravers MR, at paragraph 61 of his judgment of the Court in *R (Q) v. SSHD* [2003] 2 All ER 905, CA, a case concerning the Secretary of State's responsibility to provide accommodation and other support in this country to an asylum seeker. He said, at paragraph 61:

> "The 'real risk' test is one that Strasbourg has applied in the case of removal to a country in circumstances where the removing State will no longer be in a position to influence events."

36. Thus, Mr. Nicol urged on the Court "the fundamental nature" of the ruling in *Soering*, one which, he said, was part of the "constant jurisprudence" of the European Court. He suggested that it made *Osman* an unreliable guide in circumstances such as these, which give rise to a negative obligation on the state not to remove a person to his home state if there would be a real risk of Article 3 ill-treatment to him there, regardless of the willingness and ability of the receiving state to meet the *Osman* test and to match the protection provided by the removing state. The key for this – on the face of it – startling proposition is, he said, to be found in the focus of the European Court in *Soering*, not on the Article 3 responsibility of the receiving state, but on the action of the removing state in exposing the applicant to ill-treatment engaging its own liability under the Convention.

37. Mr. Nicol sought further domestic support for this contention in the ruling of the Court of Appeal in the Article 2 case of *R (A) v. Lord Saville of Newdigate* [2002] 1 WLR 1249, at para. 28, that there is higher obligation on the state to protect a person from harm from non-state actors where the risk of such harm flows from a positive action of the state itself than that where the risk of third party violence is not so prompted. Thus, he equated the action of the state in the *Lord Saville* case in compelling soldiers to give evidence in Londonderry with the proposed return by the Secretary of State of Mr. and Mrs. Bagdanavicius to Lithuania. Put in the context of this case, his argument was that their exposure to the risk of Article 3 ill-treatment would result from the United Kingdom's positive act of expulsion and that, therefore, Lithuania's own responsibility under the ECHR Convention to protect them is an unreliable guide to the United Kingdom' responsibility under Article 3. In short, he submitted that, although the surrogacy principle as expounded in *Horvath* may underlie the concept of sufficiency of state protection in asylum cases, it has nothing to do with human rights claims.

38. I can deal more briefly with Miss Monica Carss-Frisk's submissions on behalf of the Secretary of State. They did not strain against Strasbourg or our jurisprudence, save as to whether the concept of risk is separate from, or to be assessed in the light of, the level of protection provided to meet it. She submitted that the threshold of risk to engage Article 3 is the same as that in asylum cases, adding that ECHR rights are designed primarily to protect people in their own states, not to control immigration. Although *Soering* was an exceptional case on its facts, she acknowledged it as an illustration of a more general principle that the threshold of risk should be the same whether or not the receiving state is a signatory to the ECHR. Accordingly, she submitted that the ECHR cannot give greater rights to someone in a removing state than those, *if* the ECHR applied to his own country, he should receive there.

39. As I have indicated, Miss Carss-Frisk submitted that risk and protection in human rights claims are separate considerations and that there can be a real risk of Article 3 ill-treatment,

yet still be an answer to it in the sufficiency of state protection. Thus, her argument focused on the concept of sufficiency of state protection in the *Horvath* sense of the provision of a reasonable level of systemic protection to meet risks of the sort in question. However, she acknowledged that, if a claimant can establish that the system or protection provided in the receiving state is likely to be ineffective protection against Article 3 ill-treatment *in his particular circumstances*, he could succeed in an Article 3 claim. To that extent, she observed, sufficiency of state protection is relevant, but not necessarily determinative.

40. Accordingly, Miss Carss-Frisk defined sufficiency of state protection less absolutely than did Mr. Nicol, relying in particular on the reasoning of Lord Clyde in *Horvath*, at 510 E-H, and on that of the Administrative Court in *Dhima*, at para. 36. On her approach, it followed that whether there is a sufficiency of state protection does not depend on whether it removes the risk of Article 3 ill-treatment but on whether there is available a system for protection and a reasonable willingness of the state to operate it. Accordingly, she argued on the strength of *Horvath* and *Dhima* that in both asylum or a human rights claims there is no entitlement to a guarantee of safety from the relevant conduct, and that such claims should fail where there is sufficiency of state protection, even if there is respectively a well-founded fear or persecution for a Convention reason or, notwithstanding that provision of protection, a real risk of Article 3 treatment. Here, she submitted that the claims of Mr. and Mrs. Bagdanavicus were bound to fail because there was sufficiency of state protection in Lithuania and there were no circumstances to show that it would not be sufficient in their particular case.

Conclusions (for summary, see paragraph 55)

41. I adhere to and re-emphasise three points that the Administrative Court made in *Dhima*, at paras. 33 and 29: first, the broad symmetry between the asylum test of a well-founded fear of persecution for an Asylum Convention reason and the Article 3 test of a real risk of exposure to ill-treatment that it proscribes; second, a caution against fine analysis and over-sophisticated construction of wording of international instruments to the possible detriment of meeting the purpose of the instrument in question; and, third, the importance, particularly for those advising the Secretary of State, adjudicators and higher tribunals and those who have recourse to them, of keeping it simple. The first of those points, the broad symmetry of the two tests, has since been given authoritative support by this Court in *R (Ullah) v. Special Adjudicator* [2003] 1 WLR 770, CA, a case in which there were related claims for asylum and under Article 9 ECHR. Lord Phillips, giving the judgment of the Court, pointed out, at paragraphs 21 and 22, that most signatories to the ECHR also subscribed to the Refugee Convention, and that it was not designed to affect the right of states to refuse entry to aliens or to remove them, but to govern the treatment of those living within the territorial jurisdiction of the contracting states. He illustrated that proposition in paragraph 24 by noting that the Strasbourg jurisprudence indicates:

> "… that the Strasbourg Court does not consider that the Convention will be engaged simply because the effect of the exercise of immigration control will be to remove an individual to a country where the Convention rights are not fully respected. Equally, where the Strasbourg Court finds that removal or refusal of entry engages the Convention, the court will often treat the right to control immigration as one that outweighs, or trumps, the Convention right"

42. Although Lord Phillips acknowledged in *Ullah*, at paras 30, 31 and 39 that the underlying rationale in *Soering* (and also in *Chahal v. United Kingdom* 23 EHRR 413) was that Article 3 may in exceptional cases be engaged where the Refugee Convention is not, the key-note of

such exceptionality is the severity of the foreseeable consequences of removal. Looked at in that way, S*oering* was simply an extreme example of Sir Murray Stuart-Smith's common-sense rationalisation in *Svazas v. SSHD* [2002] 1 WLR 1891, at para. 48, that the worse the ill-treatment, the more will be required to demonstrate the adequacy of state protection. Accordingly, I do not consider that *Soering* dents the proposition of a broad symmetry between the asylum and Article 3 tests in the sense of evaluation of the risk and, as part of that exercise, the sufficiency of state protection.

43. Although Mr. Nicol disavowed any suggestion that an Article 3 right amounted to a guarantee of freedom from the treatment it describes, his arguments, as they did in *Dhima*, came very close to such a suggestion. He said that it was not the case of Mr. and Mrs. Bagdanavicius that they were entitled to "an (absolute) guarantee of safety" in Lithuania. Their case was that they should not be exposed to a real risk of Article 3 treatment and that, to the extent that Lithuania has a system of protection, it is only relevant if it reduces the risk of their Article 3 ill-treatment below the "real risk" threshold.

44. Mr. Nicol's reliance on the dicta of Sedley and Arden LJJ in *McPherson* as to a state's positive obligations under Article 3 to take reasonable measures to provide "effective" protection is, for the reasons I have given, no support for his argument of a duty barely distinguishable from a guarantee of protection from a risk of Article 3 ill-treatment. It is plain from the extracts from those judgments that I have set out at paragraphs 25 and 26 above that the Court had in mind a duty significantly short of such a guarantee.

45. Mr. Nicol's reliance on *Soering* and *D v. UK* as support for the near guarantee of protection for which he contended was equally misconceived. It is common ground that *Soering* was not only a state agency case, but was also an unusual and extreme case on its facts. Both those aspects are important, if anything, the latter more so. I say that because there is a developing recognition that in both state agency cases and non-state actor cases there is a spectrum of circumstances giving rise to different intensities of risk, a recognition that is of a piece with the Strasbourg Court's essentially practical approach in both types of case to what in any particular circumstances is required to secure "effective" protection of the rights and freedoms for which it provides, including those in Articles 2 and 3. The need for such a flexible approach was adumbrated in judgements given within a few weeks of each other in this Court at the turn of 2001 and 2002.

46. In the first in time, the *Lord Saville* case – an Article 2 non-state actor case - Lord Phillips adopted a lower threshold, or, put another way, a higher obligation on the state than one of "a real and immediate risk" because, there, the risk from non-state actors flowed from a proposed positive action of the state itself. But that does not seem to me establish a separate rule for such a circumstance so as automatically to put it in a "*Soering* category", if such exists. As Lord Phillips reasoned, at paragraphs 28-31 of the Court's judgment, where the threshold lies is a matter of degree and common-sense in the circumstances of each case. (See also for an example of such approach in the context of a prison's responsibility to especially vulnerable prisoners, the Article 2 case of *R (Bloggs 61) v. SSHD* [2003] EWCA Civ 686, at paras.56 and 60 –62.)

47. In the second of the two Court of Appeal cases, *Svazas* v. SSHD [2002] 1 WLR 1891 – an asylum state agency case - the Court, consisting of Simon Brown & Sedley LJJ and Sir Murray Stuart-Smith, recognised that here too there was a spectrum of circumstances to which, depending mostly on the juniority of the offending state agents and the level of ill-treatment, the *Horvath* principle may equally apply. Sedley LJ, who gave the leading judgment, recognised, at paras. 15-22 and 29-30, the logic of an argument for applying the *Horvath* principle to state agency cases given the continuum of circumstances of abuse by

state officials to be considered alongside the effectiveness of protective measures to prevent it. However, in the interest of simplicity, he appears to have taken the view that the *Horvath* test should, in name at any rate, not be applied to state agency cases:

> "16. … The concept of 'non-conforming behaviour by official agents which is not subject to a timely and effective rectification by the state' seems to me [to] give a precise edge to the Convention scheme in the present context, and to make a key distinction between state and non-state agents of persecution. While the state cannot be asked to do more than its best to keep private individuals from persecuting others, it is responsible for what its own agents do unless it acts promptly and effectively to stop them. …
>
> 22. … It follows that where I have held … that a different standard of protection is engaged where the persecutors wear official uniforms, I do not mean simply that the *Horwath* test has to be applied to different circumstances, I mean … that there is a different starting point, albeit the ultimate question is the same. Rather than require to be satisfied that the state is actively or passively complicit in persecution by other citizens, the decision-maker in a case like the present (which does not concern isolated rogue activity) is faced with the state's undoubted responsibility and must examine what the state is doing about it. To this extent I respectfully differ from the judgment of Sir Murray Stuart-Smith … The difference may be no more than one of emphasis, but in reasoned adjudications such differences can be critical."

Simon Brown LJ and Sir Murray Stuart Smith did not have the same qualms about articulating the notion of a continuum of circumstances spanning the state agency/non-state actor divide to which the *Hovath* test could be applied. Simon Brown LJ said, at para 54 and 55

> "54. … the question of the protection available in the home state seems to me of no less importance when state agents are involved as when the relevant ill-treatment is inflicted exclusively by non-state agents. The ultimate question in all cases is whether or not the asylum seeker can establish the need for surrogate protection by the international community for want of sufficient protection in his home state. Of course … where the state itself through its agents is actively persecuting the refugee, it is plainly not protecting him – quite the reverse. But that is the position only in those comparatively few cases where the state itself actively instigates or condones the ill-treatment. It is not the position where the state is trying to eradicate … 'non-conforming behaviour by official agents'.
>
> 55 In short, there will be a spectrum of cases between, on the one extreme, those where the only ill-treatment is by non-state agents and, on the other extreme, those where the state itself is wholly complicit in the ill-treatment. Within that spectrum the question to be addressed is whether or not the state can properly be said to be providing sufficient in the way of protection. When, however, one comes to address the question in this context rather than in the context of ill-treatment exclusively by non-state agents, one must clearly recognise

> that the more senior the officers of state concerned and the more closely involved they are in the refugee's ill-treatment, the more necessary it will be to demonstrate clearly the home state's political will to stamp it out and the adequacy of their systems for doing so and for punishing those responsible, and the easier it will be for the asylum seeker to cast doubt upon their readiness, or at least their ability, to do so. "

Sir Murray Stuart-Smith, at paras. 45-48, made similar observations, preferring the approach of Simon Brown LJ to that of Sedley LJ in this respect. He said at para 48:

> "… I agree with Simon Brown LJ that the more senior the police officers who are involved in this persecution the more necessary it is for the state to demonstrate that their procedures are adequate and enforced so far as possible. But … the gravity of this ill-treatment is a material consideration. The more serious the ill-treatment, both in terms of duration, repetition and brutality, the more incumbent it is upon the state to demonstrate it can provide adequate protection …"

48. I respectfully agree – in particular with the way in which Simon Brown LJ and Sir Murray Stuart-Smith put the matter - that the spectrum of intensity of risk for consideration and evaluation runs across the divide between state agency and non-state actor cases. However, generally speaking, state agency cases, in particular those where Article 3 ill-treatment by state agents is rife and/or emanates from the top or where the risk to life or of ill-treatment is exceptionally acute as in *Soering* and the *Lord Saville case,* are likely to have a lower threshold of risk for engaging Articles 2 or 3 than non-state actor cases. Suffice it to say that, in most non-state actor cases, whether the breach is couched as one of a positive or negative Article 3 obligation, for practical reasons the obligation is necessarily qualified, as was recognised by Lord Bingham of Cornhill's comment on the case in *R (Pretty) v. DPP* [2002] 1 AC 800, at para. 15:

> "If it be assumed that article 3 is capable of being applied at all to a case such as the present, and also that on the facts there is no arguable breach of the negative prohibition in the article, the question arises whether the United Kingdom … is in breach of its positive obligation to take action to prevent the subjection of individuals to proscribed treatment. In this context, the obligation of the state is not absolute and unqualified. So much appears from the passage … [in paragraphs 115 and 116] from the judgment of the European Court of Human Rights in *Osman* …. The same principle [in the context of Article 8] was acknowledged by the Court in *Rees v. United Kingdom* 9 EHRR 56 … in para 37 of its judgment."

49. Thus, there is the same "protection gap" whether our courts approach the issue by the real risk route, as Mr. Nicol does, or by the sufficiency of state protection route, as Miss Carss-Frisk does. Even where there are unusual circumstances requiring additional protective measures for a claimant, the test should not be taken as a tailor-made guarantee of safety in ECHR claims any more than it is in asylum claims. That pragmatic outcome is of a piece with the line of Strasbourg and our domestic jurisprudence in asylum *and* human rights contexts, starting with *Osman* and continuing through *Horvath, Bamonova, McPherson, Dhima, Krepel,* the *Lord Saville case* and *Svazas*.

50. That leaves the question where and how on the facts of any particular case, a court should set the threshold for engagement of an Article 3 obligation. It seems to me that the Court can do no better in this context than that indicated by Lord Clyde in the passage from his speech in *Horvath* set out in paragraph 21 above, namely that no general line can be drawn, its position is necessarily a matter for decision in the particular circumstances of each case. Mr. Nicol has not suggested that this case, on its facts, is of an extreme or unusually dangerous nature for non-state actor cases of this kind, certainly not in the *Soering* or *Lord Saville* mould. He has, as I have said, disavowed any claim of a guarantee for the Mr. and Mrs. Bagdanavicius of safety from Article 3 treatment. Yet, he maintained that they were entitled to challenge the Secretary of State's decision to return them to Lithuania because the provision of state protection there is such that it would expose them "a real risk" of such treatment.

51. Mr. Nicol's notion of a distinction, certainly in a non-state actor case of this sort, between a guarantee of safety from Article 3 treatment and a system that obviates, in the sense of eradicating, a risk of it is hard to grasp. And it would certainly be hard for the courts – never mind the Secretary of State and adjudicators – to apply on a day to day basis. He prayed in aid Arden LJ's emphasis in *McPherson* on the *deterrent* effect of a justice system in the receiving country as an apt way of considering whether it reduces the level of risk below the "real risk" threshold. And he contrasted and equally relied on the approach of the Court of Appeal in *Kinuthia v. SSHD* [2002] INLR 133, an asylum and a state agency case, in its firm assertion that the availability of a judicial remedy for mistreatment after it has occurred is or may not amount to adequate protection. (See also as to the inadequacy of *ex post facto* remedies *R (ZL & VL) v. SSHD* [2003] 1 All ER 1062, CA, at para 54, an application for permission to appeal to the Court of Appeal on the proper use of the certification procedure under section 115 of the 2002 Act.) But deterrence and prevention rather than punishment after the event are self-evident instances of ways in which to meet the risk, but do not in themselves assist Mr. Nicol in his fine distinction between a guarantee of protection from a risk of Article 3 ill-treatment and eradication of such risk.

52. To my mind, there is no logical difference between the guarantee of safety from Article 3 treatment, that Mr. Nicol disavowed, and an absence of risk from exposure to it, for which he contended, unless the courts continue to interpret "real risk" and sufficiency of state protection in the *Horvath* and *Dhima* sense.

53. In my view, whether or not the principle of surrogacy lies behind the protection given in asylum cases to refugees from persecution by non-state actors, the clear and only common-sense basis of assessing the risk - a "well-founded fear of persecution" for Refugee Convention reasons - is in conjunction with the notion of the sufficiency of state protection for which that Convention also expressly provides. That, as the Administrative Court said in *Dhima*, was the ratio in *Horvath* and is equally applicable to Article 3 claims. All their Lordships in *Horvath*, in considering the principle of sufficiency of state protection, clearly had in mind the ability as well as the willingness of the receiving state to provide it and the qualified nature of the obligation in the *Osman* sense of what is practicable and reasonable. And, as I have said, the majority were equally clearly of the view that, where sufficiency of state protection arises as an issue, its determination is integral to the determination of the level of risk and whether it reaches the threshold for asylum – one cannot be considered without the other.

54. Accordingly, in my view, Mr. & Mrs Bagdanavicius should fail on their first ground of appeal that the *Horvath* test of sufficiency of state protection, interpreted in the above sense, does not apply to Article 3 claims.

Summary of conclusions on "real risk/sufficiency of state protection
The common threshold of risk

55. 1) The threshold of risk is the same in both categories of claim*;* the main reason for introducing section 65 to the 1999 Act was not to provide an alternative, lower threshold of risk and/or a higher level of protection against such risk through the medium of human rights claims, but to widen the reach of protection regardless of the motive giving rise to the persecution.

Asylum claims

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

3*)* Fear of persecution is well-founded if there is a "reasonable degree of likelihood" that it will materialise; *R v. SSHD, ex p. Sivakumaran* [1988] AC 956, per Lord Goff at 1000F-G;

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; *Osman, Horvath, Dhima.*

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; *Horvath; Banomova. McPherson* and *Kinuthia*.

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; *Osman.*

Article 3 claims

7) The same principles apply to claims in removal cases of risk of exposure to Article 3 ill-treatment 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; *Dhima, Krepel* and *Ullah.*

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; *Dhima, Krepel; Chahal.*

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; *Horvath.*

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 action against such ill-treatment by non-state actors; *Svazas*.

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; *Dhima, Krepel, Svazas*.

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; *Dhima; McPherson; Krepel*.

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; *Osman.*

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; *Osman*.

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 - and the same applies to the certification process under section 115(1) and/or (2) of the 2002 Act.

2) The Secretary of State's certification of the claims as "clearly unfounded"

56. Section 115 of the 2002 Act denies a person whose claim the Secretary of State has certified as "clearly unfounded" an in-country right of appeal to an adjudicator. The Judge correctly described its conceptual progenitor as the "manifestly unfounded" certificate for which section 72(2)(a) of the 1999 Act made provision in third country entry cases. I should say a little more about the background to and the material parts of section 115. In general, a person to whom the Secretary of State refuses leave to enter the United Kingdom under the Immigration Act 1971 may appeal against that refusal to an adjudicator on asylum and human rights grounds under sections 69(1) and 65(1) respectively of the 1999 Act. Although the appeals provisions of that Act have been repealed and replaced by Part 5 of the 2002 Act from 1st April 2003, the old appeal provisions continue to apply to events before that date. Accordingly, if the Secretary of State had not certified the claims, or if this Court were to quash the certificates, they would have a right of appeal to an adjudicator under the old provisions.

57. The scheme of section 115 is, in section 115(1), to prohibit an appeal on asylum or human rights grounds under the 1999 Act while the claimant remains in the United Kingdom if the Secretary of State certifies that the appeal is "clearly unfounded", and, in section 115(6) to require the Secretary of State to issue such a certificate if the claimant has a right of residence in one of the states listed in section 115(7) (which includes Lithuania) unless he is satisfied that the claim is not "clearly unfounded". Section 115(8) provides that the Secretary of State is responsible for adding states to the list, and indicates the criteria that he should apply when considering the exercise of either power:

> "The Secretary of State may by order add a State, or part of a State, to the list in subsection (7) if satisfied that –
>
> (a) there is *in general* in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and

> (b) removal to that State or part of persons entitled to reside there will not *in general* contravene the United Kingdom's obligations under the Human Rights Convention.' [my emphases] …

The words "in general" in that provision sit well with the jurisprudence to which I have referred, requiring our courts to have regard in removal cases to the *systemic* sufficiency of state protection in the receiving country in question.

58. The rather bumpy structure of section 115(1) and (6) when considered together might suggest a different approach to certification according to whether the Secretary of State is exercising the power to certify under sub-section (1) or the significantly qualified duty to do so under sub-section (6) in respect of a claimant with a right of residence in a state listed in sub-section (7). However, as Lord Phillips, giving the judgment of this Court in *ZL and VL v. SSHD* [2003] EWCA Civ 25, has indicated at paras 57 and 58, the threshold for certification in each case is much the same, namely, that if the claim cannot on any legitimate view succeed, it is clearly unfounded. This is essentially the same the same test as that adopted by Lord Hope in *Thangarasa v. Secretary of State* [2002] UKHL, 36, at para. 34, in applying the "manifestly unfounded" test in section 72(2)(a) of the 1999 Act, namely that the claim "is so wholly lacking in substance that the appeal would be bound to fail". See also *R (Razgar) v. Secretary of State* [2002] EWHC 2554 Admin, per Richards J at paras. 13-14, affirmed by the Court of Appeal, [2002] EWCA Civ 840, at 111. Lord Hope also emphasised in *Thangarasa* that, the issue "must be approached in a way that gives full weight to the United Kingdom's obligations under the ECHR". Thus, as Lord Phillips said in *ZL*, at paras. 49 and 57, an "arguable case" or one that could "on any legitimate view succeed" would not qualify for certification. The question is a narrow one and the threshold for certification is high; see *Razgar*, per Dyson LJ, giving the judgment of the Court, at para. 111. It is one in which the courts, when they have the same material as that put before the Secretary of State, are in as good a position to determine as he is.

59. Mr. and Mrs. Bagdanavicius claim that the Judge wrongly upheld the Secretary of State's certification of the claims as "clearly unfounded", both as a matter of law and on the facts. Their legal challenge is based both on a claimed distinction between this test of certification and that of "manifestly unfounded" under section 72(2)(a) of the 1999 Act and on the near guarantee of safety that underlay Mr. Nicol's exposition of their case on the primary issue in this appeal on the meaning of real risk and sufficiency of state protection. As to the former, their case was that, notwithstanding this Court's judgment in *ZL*, the Judge wrongly adopted the same approach to that under the 1999 Act, since the 2002 Act demands a "more muscular approach" because it relates to a direct, rather than an indirect, return to the place of feared ill-treatment. They contended that questions of such ill-treatment are more readily justiciable before the Court than of systemic procedures in place in third countries.

60. Mr. Nicol submitted that the Secretary of State, in applying this test should keep in mind that he is considering the return of an unsuccessful claimant to a country where, he alleges, he will be at risk of persecution for an Asylum Convention reason and/or Article 3 ill-treatment. Such a risk, he maintained, called for particularly anxious scrutiny by the Secretary of State and, if necessary also by the courts, to ensure that a claimant is not returned to his home country if there is any possibility that an adjudicator might allow an appeal by him.

61. Whether certification is as to third country removal or direct to a state where it is claimed there is a risk of Article 3 ill-treatment, the logical approach of the court in determining whether the claim is "manifestly" or "clearly" unfounded is essentially the same. The route to a decision may be different in that, in the former both the ultimate risk and the risk of

being exposed to it by the third party state have to be considered, whereas in the latter there is no third country route to exposure to such risk. Nevertheless, the starting point under both provisions is the assessment of risk in the ultimate receiving country, and in section 115 cases, the finishing point also. It is not a question of a different "muscularity of approach"; it is simply a different route to the same end. And, if, as I have held, the Judge correctly applied the *Horvath* test to the question whether, on the material before the Secretary of State and him, Mr. and Mrs. Bagdanavicius had established that they would be at risk of exposure to Article 3 ill-treatment if they were returned to Lithuania, the basis for any challenge to the certification on the facts falls away. Accordingly, I would reject this ground of appeal.

3) Post-decision evidence

62. The third ground of appeal is that that the Judge, on the hearing of the substantive application for judicial review on 27th and 28th March 2003, wrongly refused to receive and/or consider when preparing his reserved judgment, the evidence submitted on behalf of Mr. and Mrs. Bagdanavicius on 26th February 2003 in response to the Secretary of State's third decision-letter of 25th February 2003. Their complaint is that the Secretary of State, in that decision letter, had wrongly misunderstood and had, therefore, mistakenly challenged the credibility, of their accounts of Zilavanis' violent conduct towards them and that, in their further evidence lodged on 26th February 2003, they had sought to correct that misunderstanding. They maintained that it went to: 1) the factual correctness of the Secretary of State's conclusion of the sufficiency of state protection for them in Lithuania; 2) whether Dr. Galeotti's expert evidence, as the Secretary of State maintained, had been based on a misunderstanding of their case, and 3) the issue of availability of the internal flight alternative.

63. The result, Mr. Nicol submitted, was that the Secretary of State had: 1) misunderstood the facts of Mr. and Mrs. Bagdanavicius' case put at its highest; 2) that the Judge, if he took the material into account, wrongly agreed with the Secretary of State's decision and certification; 3) that, alternatively, he wrongly failed to take the material into account; and 4) that, as the Secretary of State went on after the Judge's judgment to take the further material into account when preparing his fourth decision-letter of 30th April 2003, the Court should re-open the Secretary of State's certificate and make its own decision on the matter.

64. The Judge, in paragraphs 28 to 31 of his judgment, considered for himself whether their claims were "clearly unfounded", by reference to the claimants' various accounts and having regard to the available information as to conditions in Lithuania. He concluded that their factual case, taken at its highest, was deeply flawed and that an adjudicator would be bound to reject it as a basis for an asylum or a human rights claim. He referred to a successful asylum claim before an adjudicator in August 2001 of a relative of Mr. Bagdanavicius and to *Svazas,* in which Sedley LJ, in the leading judgment, paraphrased the picture of Lithuania in 2001 established by the Immigration Appeal Tribunal as:

> "one of a nascent democracy in which constitutional guarantees of proper treatment of citizens by the police are, despite the professed will and endeavours of the government, systemically or at least endemically violated."

65. On the other hand, the Judge drew attention to the more recent decision of the Immigration Appeal Tribunal, *SSHD v. Sirviene* [2002] UKIAT 02843, in which the Tribunal took a far more sanguine view of conditions in Lithuania by that stage, observing at para. 8 of its decision:

> "… on the material before us it is quite impossible to say that in Lithuania as a whole there is such a breakdown of effective protection against organised crime that anyone who is affected by it cannot be returned to Lithuania."

66. As I have indicated, the Judge's view of the material before him as to the conditions in Lithuania was that it did not assist Mr. and Mrs. Bagdanavius in their challenge to the certificate, any more than did the evidence of Dr. Galeotti, "having regard to the factual basis of their claim". As to Dr. Galeotti's reports, he said, at paragraph 18 of his judgment:

> "… The input of Dr. Galeotti, when placed alongside the Claimants' case, does not persuade me that an adjudicator might come to any conclusion other than that the Lithuanian authorities are willing and able to protect the Claimants from persecution and breaches of their human rights. …"

He went on to explain in paragraphs 29 to 31, the respects in which he regarded their factual case, taken at its highest, as deeply flawed, namely: as to the nature and frequency of Zilvanis' attacks on them, as to the attitude of the police and as to their explanation for their failure to seek help from them and on the issue of internal flight. In all those respects, he found their claims to be implausible because of significant inconsistencies and vagueness. He set out his reasons for that view most fully, at paragraph 30, under the heading of "Credibility and internal flight":

> "The accounts of the Claimants are set out in their interviews on 10-11 December 2002 and a number of later statements which seek to supplement or correct the earlier versions. ... In her Skeleton Argument, Miss Giovannetti [counsel for the Secretary of State] advanced a devastating critique of the Claimants' factual case. Having referred to the inconsistencies and the way in which the case developed by way of corrective statements, she put it in this way:
>
> > 'It is apparent from that account that when [the Claimants] first moved in together in 1996, Zilvanis would come to their house and beat up Mr. Bagdanavicius. The Claimants went to stay with relatives and moved within the town of Alytus. There is no suggestion that Zilvanis has ever come to the Claimant's house since [1996]. Mrs. Bagdanavicius has not seen him since late 1997/early 1998 and his ill-treatment of Mr. Bagdanavicius has been limited to beating him when he sees him in the street; once in 2002 and twice in 2002.
> >
> > The Claimants' explanation for not moving away from Alytus is that Zilvanis would use his Mafia connections to track them down wherever in Lithuania they might move. This is also relied upon as a response to the question of internal relocation. … However, this rather misses the point: if their account is to be believed, and if Zilvanis has such powerful Mafia connections that he could track them down wherever they might go in Lithuania, he plainly is not motivated to use them, because even with them living in the same town, his actions

> have been limited to three occasions in two years when he has beaten Mr. Bagdanavicius upon seeing him in the street.'
>
> "In other words, taking the account at its highest (notwithstanding its inherent inconsistencies, vagueness and implausibility) this is a factually weak case and an Adjudicator could not legitimately be satisfied that internal relocation is not an option."

67. Mr. Nicol stigmatised those conclusions of the Judge as wrong on the facts, given all the information before him, including the post–25th February 2003 statements, and, given the Secretary of State's previous disavowal of defending his certificate on grounds of credibility, unfair in their reliance on inconsistencies and vagueness in Mr. and Mrs. Bagdanavicius' accounts. In any event, he submitted, if their credibility was a consideration, an adjudicator might have been better placed than the Secretary of State, or the Judge himself, to determine the matter. He advanced a number of arguments of fact as to the proper interpretation of the evidence before the Secretary of State going to their reluctance to seek help from the authorities, including the impact on them of the conduct of which they complained and the aggravating feature of their mixed marriage.

68. Miss Carss-Frisk supported the Judge's view that the claims would have been bound to fail before an adjudicator. And she observed that it does not matter whether the Judge took into account the post-decision material, as it is now for this Court to determine the issue in the light of the material before it. She maintained that it simply added to the existing picture of Mr. and Mrs. Bagdanavicus' evolving and inconsistent attempts to meet the Secretary of State's various criticisms of the factual basis of their claims. She added that, even if the most recent statements were accepted as true, the Secretary of State's stance at the time of the hearing is affected only as to the number of times Zilvanis is said to have attacked Mr. Bagdanavicius, not his conclusion that such attacks were of an opportunistic nature from which internal flight would have been a remedy. Looking at the available evidence as a whole, she submitted that it showed that the attacks on Mr. and Mrs. Bagdanavicius were essentially opportunistic and, in Mrs. Bagdanviciene's case, as long ago as in 1997/98; Zilvanis' last known conviction was in 1998; Mr. and Mrs. Bagdanavicius had made no complaints to the Lithuanian authorities about his violence to them; they had never, before fleeing to this country at the end of 2002, tried to move away from their home town, Alytus; and such psychiatric difficulties from which Mrs. Bagdanavicius may now suffer stem largely from her childhood experiences.

69. As to the material before the Secretary of State and the Judge on the sufficiency of state protection in Lithuania, Miss Carss-Frisk said that it shows a parliamentary democracy with an independent judiciary, which has ratified the ECHR and a number of other human rights conventions and given them the force of law. She referred the Court to three Tribunal decisions which, she said indicated a general acceptance by it of the sufficiency of state protection in Lithuania, namely: *Sirviene*, at paras 7 – 8; *Tumarevic v. SSHD* [2002] UKIAT 07407 – a Roma case; and *SSHD v. Semetiene* [2002] UKIAT 08370. She also relied on the objective evidence before the Secretary of State and the Judge, including the Tribunal's factual analysis of much the same material in *Sirviene*, and a report of the United Nations Committee on the elimination of racial discrimination in March 2002 noting that, since achieving independence, Lithuania had achieved considerable progress in the field of human rights. All that material, she maintained, did not indicate that the country's criminal justice system excludes any class of persons from its protection.

70. In summary, Miss Carss-Frisk submitted that the Judge was entitled to find as he did in paragraphs 28 to 31 of his judgment, and was clearly correct, even in the light of Mr. and

Mrs. Bagdanavicus' most recent evidence, as was the Secretary of State in his fourth decision letter of 30th April 2003.

71. Whether the Judge did or did not consider and take proper account of the post 25th February 2003 material, this Court, given its obligation of "anxious scrutiny" in cases such as this, should consider it to the extent that it is relevant to its decision. The same applies to any "fresh evidence" tendered in support of the appeal to the Court. See the observations of the Strasbourg Court in *Vilvarajah v. UK* (1991) 14 EHRR 248, and *Chahal*, at para. 97, and recent applications of the principle to the admission of fresh evidence in this Court: *A v. SSHD* [2003] EWCA Civ 175, per Keene LJ, with whom Peter Gibson and May LJJ agreed, at paras. 21 and 22; following: *Turgut v. SSHD* [2000] Imm AR 306, CA, per Schiemann LJ at 323-324; *Haile v. IAT* [2002] Imm AR 170, CA; and *Khan v. SSHD* [2003] EWCA Civ 530, CA, at paras. 26, 30 and 31.

72. What all that does for the integrity of our present system of judicial review, including what Lord Walker of Gestingthorpe considered at the end of his speech in *R v. BBC, ex p. Prolife Alliance* (2003) UKHL 23, at paras 131-144, as "the long trek away from *Wednesbury"*, or for the efficiency of the appellate process and the reality of what remains of the principle of finality, is open to question. It may soon be time for Parliament and/or the Courts to take a more comprehensive and principled look at both forensic processes with a view to reshaping their structures and jurisdictions so that the form and substance of what the courts are doing bears some resemblance to each other. However, if and to the extent that the Judge may not have considered or taken into account the post 25th February 2003 material, this Court has done so. And I consider, for the reasons advanced by Miss Carss-Frisk, that it would have had no effect on his conclusion that the appeal would have been bound to fail before an adjudicator.

73. With the Court's obligation of anxious scrutiny still in mind, the Court has also looked at the "fresh evidence" upon which Mr. and Mrs. Bagdanavicius seek to rely for the first time before this Court, i.e. namely their response to the Secretary of State's fourth decision letter of 30th April 2003. As the Court said in *ZL*, at paras 29 and 56, the test is an objective one – one that the Court can readily apply once it has the materials that the Secretary of State had. It is then as well placed as he was to make the decision which, at its simplest, is whether the claimants had an arguable case. The further material goes to Mrs. Bagdanaviciene's present precarious mental state, Zilavnis' criminal connections and activities up to 1998 and his unbalanced state. It also includes an assertion by Mrs. Bagdanaviciene's sister - notwithstanding her recent lack of contact with Zilvanis - that he has the means and intention to resume his ill-treatment of Mr. and Mrs. Bagdanavicius if they return to Lithuania. In my view, this fresh information, even if credible, has no materiality to the essential issue on which the Secretary of State and the Judge found against them on the certificate that, even if their account was taken at its highest, it did not disclose an arguable case of risk of Article 3 ill-treatment for which the Lithuanian authorities were not willing and able, if requested, to provide sufficient state protection in the *Horvath* sense.

74. If I am right in my view that the Secretary of State and the Judge were correct in rejecting the primary contention of Mr. and Mrs. Bagdanavicius that their return to Lithuania would subject them to Article 3 ill-treatment, their alternative argument of the non-availability of internal flight falls away. For the sake of completeness, I simply mention that their argument under this head was that the Secretary of State and the Judge should have concluded on all the material before them that it would have been open to an adjudicator to accept that internal flight would have been futile because Zilvanis would have used his Mafia connections to track them down and to continue his campaign of terror against them. As to the Secretary of State's and the Judge's response that such a likelihood was

unarguable because Zilvanis had not harassed them at their home in Alytus and had only attacked Mr. Bagdanavicius when he happened to meet him in the street, Mr. Nicol maintained that it was not so overwhelming that an adjudicator, after seeing and hearing Mr. and Mrs. Bagdanavicius, would have been bound to accept it. In my view, and for the reasons I have already given in relation to the post-decision evidence and fresh evidence put before this Court on the primary issue as to the nature of the alleged threat from Zilvanis, the Secretary of State and the Judge correctly concluded that this basis of the claim too would have been bound to fail before an adjudicator.

4) Reasons

75. The complaint under this head is that the Judge wrongly held that the Secretary of State had given adequate reasons for certifying their claims as clearly unfounded, particularly since the certification affects both fundamental rights of effective appeal and protection from Article 3 ill-treatment. Mr. Nicol submitted that, given the Secretary of State's sequential amendment and updating of his reasons, it was not enough for him to say that he had certified because there were no reasonable prospects of success in any appeal; he should have given more particulars, for example, on the issue of Mr. and Mrs. Bagdanavius' credibility. He said that it was not good enough for him simply to explain the certificate on the basis that there were no reasonable prospects of success on appeal. He suggested that the Secretary of State's decision letters indicated confusion on his part as to whether and to what extent he relied upon lack of credibility of the claims as support for the certificates. He suggested that the Secretary of State had confused or not correctly applied the test of "clearly unfounded" and that he should have given separate reasons on each of the components of the claims.

76. Miss Carss-Frisk replied that where, as here, there has been a detailed and reasoned substantive decision, there is no need for the Secretary of State to provide yet further reasons for certifying the claims. As to the changing and developing nature of the decision-making process, she argued that it followed inevitably from the challenge and further information provided by the Refugee Legal Centre to each of the Secretary of State's decisions; he was entitled to respond to the changing case and material as it was put to him. The final decision was clear and fair, one of taking Mr. and Mrs. Bagdanavicus' claims at their highest – i.e. their best factual case on a fair reading of the evidence – an approach entirely consistent with the reasoning of this Court in *ZL*.

77. The Judge dealt with this issue shortly in paragraph 32 of his judgment. In rejecting the suggestion that the certification was inadequately reasoned, he said that the reasoning, with which he agreed, was plain. The Secretary of State had considered the claims to be clearly unfounded; they were clearly unfounded because they would be bound to fail before an adjudicator; and they would have be been bound to fail before an adjudicator for the reasons given by the Secretary of State in his evolving decision-making process in response to the successive representations and further material put before him on behalf of Mr. and Mrs. Bagdanavicius.

78. In my view, there can be no possible criticism of the Secretary of State's reasoning of his final decision. It followed four decision-letters, all of which responded in considerable detail to the evolving and latest material submitted to him on behalf of Mr. and Mrs. Bagdanavicius. It is, as Miss Carss-Frisk, submitted and the Judge ruled, plain from the most recent decision-letter, when read with what had gone before, why the Secretary of State concluded that the claims were bound to fail. No further reasons were necessary. Accordingly, I would also reject this ground of appeal.

79. It follows that I would dismiss the appeals.

Lady Justice Arden:

80. I agree.

The Lord Chief Justice:

81. I also agree.

Order: Appeal dismissed; no order as to costs; detailed assessment of appellants' Legal Services Commission; leave to appeal refused.

(Order does not form part of the approved judgment)