Case No: C2/2003/2327

**Neutral Citation Number: [2004] EWCA Civ 846**
**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**(Mr Michael Supperstone Q.C, sitting as a Deputy High Court Judge)**

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 1 July 2004

**Before :**

**THE RIGHT HONOURABLE LORD JUSTICE THORPE**
**THE RIGHT HONOURABLE LORD JUSTICE SCOTT BAKER**
**and**
**THE RIGHT HONOURABLE LORD JUSTICE WALL**

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**Between :**

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| **Michael Atkinson** | **Appellant** |
| **- and -** | |
| **Secretary of State for the Home Department** | **Respondent** |

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(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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**Richard Drabble Q.C and David Jones** (instructed by **Irving & Co**) for the **Appellant**
**Michael Fordham and Kate Gallafent** (instructed by **Treasury Solicitor**) for the **Respondent**

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# Judgment
# As Approved by the Court

**LORD JUSTICE SCOTT BAKER:**

1. This appeal is brought with the leave of Laws L.J against the decision of Mr Michael Supperstone Q.C. sitting as a Deputy High Court Judge in the Administrative Court on 10 October 2003 when he refused the appellant's application for judicial review.

2. The appellant arrived in the United Kingdom from Jamaica on 21 February 2002. He was admitted as a visitor for six months. He was declined an extension of time to remain. He overstayed. On 2 April 2003 he presented himself to the police and claimed asylum.

3. He claimed that if returned to Jamaica he would face mistreatment or persecution due to his imputed political opinion because of being perceived as an informer for the People's National Party (PNP). He also claimed he would face persecution as a perceived homosexual because he had worked with a homosexual. His claim was also, in due course, framed under the Human Rights Convention.

4. The Secretary of State rejected both his asylum and human rights claims and certified under section 94 of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") that both claims were clearly unfounded. The effect of such certification is to deprive an applicant of a right of appeal to an adjudicator whilst remaining in this country. The appellant applied for judicial review of the Secretary of State's decision but the judge upheld the certification. Before us the appeal has been directed solely at the Human Rights Convention, and in particular Article 3 which provides:

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

5. Section 94 of the 2002 Act is headed: "Appeal from within United Kingdom: unfounded human rights or asylum claim." It provides:

> "(1) This section applies to an appeal under section 82(1) where the appellant has made an asylum claim or a human rights claim (or both).
>
> (2) A person may not bring an appeal to which this section applies in reliance on section 92(4) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded.
>
> (3) If the Secretary of State is satisfied that an asylum claimant or human rights claimant is entitled to reside in a State listed in subsection (4) he shall certify the claim under subsection (2) unless satisfied that it is not clearly unfounded.
>
> …….
>
> (5) The Secretary of State may by order add a State, or part of a State, to the list in subsection (4) 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."

The Secretary of State has added Jamaica to the list of States in subsection (4).

6. The appellant's case is that the certification was unlawful because the appellant's claim was not "clearly unfounded." In consequence he has been wrongly deprived of his in-country right of appeal. The judge rejected the appellant's arguments and declined to interfere with the Secretary of State's decision.

7. There is not, I think, any dispute about the "clearly unfounded" test to be applied. The issue is as to its application. The judge directed himself in these terms at paragraph 8:

> "The question for the court on an application for judicial review is whether the Secretary of State was entitled to be satisfied that the claims were clearly unfounded. The Court of Appeal has recently given guidance on the approach to be adopted when considering this question. In *R (on the application of L and another) v Secretary of State for the Home Department* [2003] 1 ALL ER 1062 Lord Phillips of Worth Matravers MR said:
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> > "[In considering s115] the decision maker will (i) consider the factual substance and detail of the claim (ii) consider how it stands with the known background data (iii) consider whether in the round it is capable of belief (iv) if not, consider whether some part of it is capable of belief (v) consider whether, if eventually believed in whole or in part, it is capable of coming within the refugee convention. If the answers are such that the claim cannot on any legitimate view succeed, than the claim is clearly unfounded; if not, not." (para 57)."
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> The meaning of "manifestly unfounded" within section 72(2)(a) of the Immigration and Asylum Act 1999 was considered by the House of Lords in *R v Secretary of State for the Home Department, ex p Thangarasa, ex p Yogathas* [2002] 3WLR 1276. Lord Bingham said:
>
> > "Before certifying as "manifestly unfounded" an allegation that a person has acted in breach of the human rights of a proposed deportee the Home Secretary must carefully consider the allegation, the grounds on which it is made and any material relied on to support it. But his

> consideration does not involve a full-blown merits review. It is a screening process to decide whether a deportee should be sent to another country for a full review to be carried out there or whether there appear to be human rights arguments which merit full consideration in this country before any removal order is implemented. No matter what the volume of material submitted or the sophistication of the argument deployed to support the allegation, the Home Secretary is entitled to certify if, after reviewing this material, he is reasonably and conscientiously satisfied that the allegation must clearly fail" (at p1283)".

The judge went on to say that there is no material difference between "clearly unfounded" and "manifestly unfounded." I agree. Furthermore, in my view the passage I have recited from the judge's judgment accurately states the law.

8. The purpose of the "clearly unfounded" test is to try and ensure that the appellate system in the asylum and immigration field does not remain swamped with wholly unmeritorious appeals, as has been the case in the past.

9. The Secretary of State's decision letter, written on his behalf by Mr Harrison, of the Integrated Casework Directorate, is dated 15 April 2003. It runs to six pages and sets out clearly the basis for rejecting the appellant's claims and granting certificates under section 94. It says that there were really three questions under consideration. These were (i) the truth or otherwise of the basic facts as recounted by the appellant that caused him to leave Jamaica. For present purposes there is no dispute; they can be taken as described in the decision letter; (ii) the availability of state protection; (iii) the availability of relocation.

10. I recite the facts as described in the decision letter.

(a) You live in a Jamaican labour party (JLP) dominated area and your brother had a relationship with the sister of the JLP leader of your area, but the quality of their relationship deteriorated. About four years ago you got drawn into their problems and as a result you were, attacked by five JLP people, and the seriousness of your injuries required you to remain in hospital for three months. The police came to the hospital to investigate the attack but you told them that you did not know who had attacked you.

(b) 3-4 years ago your friend's drinks van was robbed. He told the police that you would be able to help them with their enquiries and they came to your home to question you. The police were seen outside your home by your neighbours, and even though you told the police that you could not help them, the robbers (who were members of the JLP) labelled you as being an informer and a supporter of the

government (SEF q48, q60). You have said, however, that you are not a member of any political party. Also, that you were accused by JLP members of informing on them with regard to the murder of a local youth a week later (statement para 9).

(c) Whilst standing at your gate in January 2002 you overheard and saw approximately 25 people who were members of the JLP planning a revenge killing against members of the People's National Party (SEF, q5,6). You did not report this to the police because you suspect that they work in league with the JLP (SEF q16), but after the killings (which included two children) you spoke out with your friend about your disapproval of the killings and he told members of the JLP of your views (SEF q13). Also, because your 5 year old daughter had been a classmate of one of the children who had been killed, you bought a wreath for the funeral of one of the children (Further Questions, q21). As a result of your actions, members of the JLP again suspected that you were an informer for the PNP (SEF q18). After your friend told the JLP of your views, four men including the local leader came to your house to speak to you and asked you to "*come down the lane*." You resisted and suffered jaw, head and rib injuries (SEF q27, q31). They ran away when your sister appeared shouting for help (SEF q33).

(d) You spent 7-8 days in hospital on this occasion and the day after you were discharged you witnessed the rape of the mother of your baby and of your sister by members of the JLP (SEF q37 and letter from RLC para15), allegedly as punishment for taking you to hospital.

(e) You have also been accused of being a homosexual because your boss (who you have worked with for two years) is homosexual and you were spotted getting out of his car in your neighbourhood when he dropped you off from work. People stoned his car and broke his windshield.

(f) You left Jamaica and travelled to the United Kingdom where you arrived on 21 February 2002 when you were given leave to enter on your visitor's visa for six months. You claimed asylum on 2 April 2003 after being arrested as a person who has failed to observe a condition of leave to enter and subject to administrative removal in accordance with section 10 of the Immigration and Asylum Act 1999.

11. Mr Drabble Q.C, who has appeared before us for the appellant, accepts the facts as recounted in the decision letter except that they must be viewed in the context of the appellant's account in his witness statement. Importantly this recounts what Mr Drabble submits is an entirely credible account of why the appellant did not go to the police. He said that if anything is reported to the police the police inform the JLP; this is obvious because it soon becomes common knowledge in the area.

12. The JLP leader referred to in the decision letter is Cleveland Downer. The appellant in his statement mentions that Cleveland Downer's mother formerly had a relationship with a sergeant in the CID. This sergeant remains a source of information, which he telephones to Cleveland Downer who sometimes gives money to the police.

13. Cleveland Downer has been taken to court for murder and other offences arising out of the incident referred to at paragraph 10(c) above. We were told that his trial has been repeatedly adjourned because of the non-attendance of witnesses. Eventually one of the witnesses did attend but the trial had to be adjourned because of the non-attendance of the judge. Even in effective legal systems there are from time to time difficulties in bringing individual criminals to justice. So it may be that little by way of conclusion can be drawn from these bare facts. However, as will become apparent shortly, lack of progress of Mr Downer's trial is entirely consistent with the appellant's expert evidence.

14. At the heart of this case lies the appellant's contention that if returned to Jamaica there will be inadequate state protection to prevent him from suffering inhuman and degrading treatment; his Article 3 rights will be breached. So this case is in reality about Article 3 and sufficiency of state protection. If the Secretary of State fails on this issue there is the subsidiary question about the availability of internal relocation. The submission of Mr Drabble, is that the Jamaican State does not have the ability to provide him with Article 3 protection either in his home area or anywhere else in Jamaica.

15. In *R (Bagdanavicius and another) v Secretary of State for the Home Department* [2004] 1WLR 1207 Auld L.J., with whom the Lord Chief Justice and Arden L.J. agreed, drew attention to the symmetry of approach between Article 3 and Geneva Convention cases. In Refugee Convention cases the court is concerned with a well founded fear of persecution for a Convention reason and in Article 3 cases with the likelihood of torture, inhuman or degrading treatment or punishment." He said at para 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 law breakers."

He pointed out that 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 United Kingdom* (1998) 29 EHRR 245. There it was observed, in relation to an Article 2 issue, that the obligation had to be interpreted in such a way that it did not place an impossible or disproportionate burden on the authorities. Not every claimed risk to life requires the authorities to take operational measures to prevent that risk from materialising. The risk had to be 'real and immediate' and the question was whether the state had failed to take measures within the scope of its powers, which judged reasonably, it might have been expected to take to avoid that risk.

16. It is important to look rather carefully at the speeches of their Lordships in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 where the House of Lords considered the type of problem that arises in the present case albeit in the context of asylum cases i.e protection by the state against persecution by non-state actors. What is the extent of the Home State's obligation? What is meant by "sufficiency of protection"? At what point do the United Kingdom's treaty obligations under the Geneva Convention or Article 3 of the ECHR require it to step in?

17. Lord Hope referred to the principle of surrogacy. He said at 495C that the general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community. He continued at 495G: "If the principle of surrogacy is applied, the criterion must be whether the lack of alleged protection is such as to indicate that the home state is unable or unwilling to discharge *its* duty to establish and operate a system for the protection against persecution of its own nationals." He went on at 496E to say that fortunately the situation in Slovakia was not such as to give rise to the problems that arise in many states where there is no effective state or authority, or the state is unable to provide protection. At 499G he repeated his view that the obligation to afford refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals. He said:

> "The applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill-treatment for a Convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well founded, do not entitle him to the status of a refugee. The Convention has a more limited objective, the limits of which are identified by the list of Convention reasons and by the principle of surrogacy."

18. Lord Hope, having identified unwillingness or inability on the part of the home state as the factor that triggered surrogate protection, went on to say at 500F:

> "But the application of the surrogacy principle rests upon the assumption that, just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard which takes proper account of the duty which the state owes to all its nationals. As Ward L.J said [2000] INLR 15, 44G, under reference to Professor Hathaway's observation in his book at p105, 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."

19. Lord Lloyd and Lord Clyde referred to observations of Stuart-Smith L.J in the Court of Appeal that there are parts of London and New York where one may indeed have a well founded fear of being attacked in the street but that does not mean there is not an efficient police force or an impartial judiciary. Stuart-Smith L.J said at para 22:

> "In my judgment there must be in force in the country in question a criminal law which makes the violent attacks by the persecutors punishable by sentences commensurate with the gravity of the crimes. The victims as a class must not be exempt from the protection of the law. There must be a reasonable willingness by the law enforcement agencies, that is to say the police and courts, to detect, prosecute and punish offenders."

Lord Clyde having cited that passage went on at 511C to say:

> "And in relation to the matter of unwillingness he pointed out that inefficiency and incompetence is not the same as unwillingness, that there may be various sound reasons why criminals may not be brought to justice, and that the corruption, sympathy or weakness of some individuals in the system of justice does not mean that the state is unwilling to afford protection. "It will require cogent evidence that the state which is able to afford protection is unwilling to do so, especially in the case of a democracy." The formulation does not claim to be exhaustive or comprehensive, but it seems to me to give helpful guidance."

He went on to say at 514F that it is no part of the international scheme that people should qualify as refugees merely because private persons in their home state seek to interfere with their rights and freedoms. The present case is concerned, however, not with random attacks by Roma on Skinheads but with the treatment of informers and the ability of the state to protect them.

20. In the *Queen (on the application of Dhima) v Immigration Appeal Tribunal* [2002] INLR 243 Auld L.J said that all their Lordships in *Horvath* 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. He went on to say at para 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."

21. Auld L.J at para 22 in *Bagdanavicius* referred to what he had said in *Dhima* and also to the observations of Clarke L.J in the earlier case of *Banomova v Secretary of State for the Home Department* [2001] EWCA Civ 807 (a Convention case):

> "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."

In his summary of conclusions in *Bagdanavicius* Auld L.J said this at p 1231:

> "(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* and *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* 29 EHRR 245."

22. In the present case, therefore, the question is whether the state of Jamaica is both willing and able to provide reasonable protection to the appellant. The evidence does not raise any real doubt about *willingness* to provide such protection: the real focus is on its *ability* to do so. The difficult question is where to draw the line that defines what is an appropriate standard. It is not enough that some individuals will be failed by the state's criminal justice system, not enough that the state has not been effective in removing risk. There has in my judgment to be a systemic failure that relates at the very least to a category of persons of whom the individual under

consideration is one. In this case the focus is on informers or perceived informers or those who in some way are the target of the gangs or the dons who head them. In my view it is no answer that a state is doing its incompetent best if it nevertheless falls below the appropriate standard. One has to ask whether the state is failing to perform its basic function of protecting its citizens. Does the writ of law run or not?

23. Before turning to the evidence upon which the Secretary of State based his certificate, it is necessary to mention four more authorities that were referred to in argument. The first is *A v Secretary of State for the Home Department* [2003] EWCA Civ 175. This case was decided by the Court of Appeal on 21 January 2002. Ms A came from the Tivoli Gardens area of West Kingston in Jamaica, a poor urban area dominated by a gang, an area loyal to the JLP. After a quarrel, her 13 year old daughter had been shot and killed by a gang member. Ms A reported it to the police and gave them the name of the gang member responsible. Three weeks later her 21 year old son was shot and killed after he had threatened to see his sister's killer went to prison. Gang members came and threatened her as an informer. She moved out of the West Kingston area about one week later to a non JLP part of Kingston where she remained for six months. She then moved to a number of other premises in non JLP areas but was not welcome because she came from Tivoli Gardens. The following year her brother was shot by the same gang who killed her son and daughter.

24. The adjudicator accepted that local dons and their gangs controlled areas in poor urban communities but concluded an asylum claim was not established. The threat from the Tivoli Gardens gang was because Ms A was seen as an informer. As for her ECHR claim, she would not be at significant personal risk if she settled elsewhere on the island. The IAT dismissed her appeal, concluding that she would not be at risk from the Tivoli Gardens gang if she moved away from her home area. In the Court of Appeal there was additional evidence, including from Mr Hilaire Sobers, the same distinguished expert whose evidence is before the court in the present case. In short his evidence was that the power and influence of the dons who head the gangs extends over the whole island and the appellant would be at substantial risk of harm if returned to any part of Jamaica. Hit men could be hired for as little as £100 sterling and it would be difficult for Ms A to conceal her Tivoli Gardens origins.

25. Keene L.J, with whom Peter Gibson and May LJJ agreed, said he was persuaded that the removal directions given by the Secretary of State would involve a breach of Ms A's human rights. Articles 2 and 3, he pointed out, are absolute rights. A contracting state, such as the United Kingdom, will be in breach of the ECHR if it expels or removes a person to a state where there is a real risk to that person from people who are not public officials. Removal of Ms A would be in breach of her human rights because there was a real risk both to her life and of Article 3 treatment from the Tivoli Gardens gang and from others within Jamaica. Mr Sobers' evidence was that these criminal gangs and their operations are not confined to the so- called garrison communities. Gunmen have been "exported" to other areas to terrorise various groups of people including suspected informers. The dons have developed networks throughout the island of Jamaica.

26. This decision, submits Mr Drabble, presents a serious obstacle to the Secretary of State's case that the appellant's human rights claim is clearly unfounded. In the light of the evidence accepted in *A v the Secretary of State for the Home Department* could the Secretary of State properly conclude, as Lord Hope put it in *R (Yogothas) v Secretary of State for the Home Department; R (Thangarasa) v Secretary of State for the Home Department* [2003] 1AC 920 para34, that the claim was "so clearly without substance that (an appeal to an adjudicator) was bound to fail"?

27. Mr Fordham, for the Secretary of State, submits that the present appeal turns on its own particular facts and that there has been an improvement in the position in Jamaica. Furthermore, the focus in *A* was on relocation within Jamaica and not the more fundamental question of sufficiency of protection.

28. In *R (Brown) v Secretary of State for the Home Department* [2003] EWHC 2045 Admin Crane J held that the Secretary of State was entitled to certify his conclusion that relocation offered sufficiency of protection outside Kingston on the facts of that case. He did, however, say that leaving aside the question of relocation he would have held that the Secretary of State was not entitled on the evidence presented to conclude that there was sufficiency of protection for human rights purposes in relation to the protection of informers and suspected informers. This case does, however, seem to me to have been very fact specific on both points. In the present case there is the unchallenged evidence of Mr Sobers.

29. We were referred briefly to *R (Gibson) v Secretary of State for the Home Department* [2003] EWHC 1919 Admin where leave to apply for judicial review of the Secretary of State's decision to include Jamaica on the "white list" (that is those countries included in section 94(4) of the 2002 Act to which removal would not in general involve a serious risk of persecution or breach of human rights) was refused. The court in that case does not, however, appear to have been invited to consider any expert evidence.

30. The final case to which I make brief mention is *R (Britton) v Secretary of State for the Home Department* [2003] EWCA Civ 227 in which the Court of Appeal remitted the case to the IAT to consider the sufficiency of protection issue. It had neither dealt with the appellant's evidence nor given reasons for its decision. Tuckey L.J said at para 20:

> "The fact that the law enforcement and security forces in Jamaica are over-zealous does not mean that they exert effective control. Nor does the fact they use armed response when apprehending criminal suspects. The CIPU report which we have seen does refer to gang violence in Jamaica, particularly in Kingston and the police's ability to control it. It may be that on consideration of that material it can properly be concluded that there is sufficiency of protection. But neither the special adjudicator nor the IAT refer to that part of the report in their decisions, or appear, to have given it any consideration in the light of the appellant's evidence to which I have referred. "

31. Perhaps all these authorities go no further than to show that there is an issue about sufficiency of protection in Jamaica that requires careful consideration when it is raised in individual cases.

32. The Secretary of State in his decision letter referred to a number of initiatives that had been instigated by the Jamaican Government aimed at kerbing inter-communal violence. These included the establishment of the Crime Management Unit (CMU), a special operations group of the Jamaica Constabulary Force (JCF). This targeted particular hotspots. Also, the police had increased their presence on the streets providing buffer zones between warring gangs in different neighbourhoods. This was said to have crippled the activities of the gangs in the affected areas. In late 2001 700 troops from the national reserve were deployed onto the streets throughout Jamaica during a 30 day operation to crack down on crime. In November 2002 the government launched a New Crime Plan whose basic purpose was to dismantle paramilitary criminal groupings and break the backs of criminal gangs. In the same month the police took delivery of 101 new motorcycles 28 buses and jeeps to bolster their resources. This was all part a scheme of more active intelligence gathering and pro-active policing methods. The plan was to dismantle the gangs responsible for much of the crime in Jamaica. A key sentence in the decision letter appears at para14 where the Secretary of State says:

> "In the light of ongoing initiatives by the Jamaican Government to fight crime and gang violence with the cooperation of both the police (JCF) and the military (Jamaica Defence Force (JDF)) there is in general sufficiency of protection for victims of criminal violence in Jamaica."

A little later the decision letter continues:

> "The Secretary of State considers that this demonstrates the willingness by the Jamaican authorities to deal with the problem of political/garrison violence."

33. The issue is not in my view however whether the Jamaican authorities have the *willingness* to deal with the problem but whether they have shown the *ability* to do so. The decision letter it should be noted was written just four or five months after the November 2002 initiatives. The question is whether these initiatives have had the success that the Secretary of State suggests. The evidence suggests that, at least on one view, they have not.

34. We have had the advantage of two additional reports from Mr Sobers that postdate the judge's decision. Mr Sobers in his report of 20 October 2003 refers not only to clear deficiencies in the initiatives but also to the chronic institutional weaknesses of the Jamaican police force and the contrasting strengths of the typical Jamaican criminal gangs. The implicit assumption in the Home Office's analysis that the balance of power favours the Jamaican authorities, he says, is wrong. Criminal networks in Jamaica continue to act with almost complete impunity in inflicting reprisals upon persons like the appellant who have offended them. He says he strongly rejects the assertions of the Home Office that the latest initiatives have

led to any or any substantial improvement in the capacity of the police or the military to protect citizens like the appellant from threats from reputed gang members. The new initiatives are largely quantative in nature and do not address the qualitative dimensions of Jamaica's crime phenomenon particularly the symbiosis between organised crime and politics. Whilst it is true that the November 2002 crime plan theoretically aims at dismantling criminal gangs, he is not aware of any fundamental changes in (a) the capacity of the police to accomplish this or (b) the linkage between crime and politics/civil society. The problems associated with organised crime are deeply entrenched in Jamaican polity and are unlikely in his view to be resolved in the short term.

35. Mr Sobers has produced a further report dated 25 May 2004. In it he picks up on various points made in the respondent's skeleton argument. He says that the thrust of his opinion is not so much the capacity of the Jamaican authorities to eliminate or insulate the threat to the appellant, but the impotence of the Jamaican state to provide protection. He emphasises his conclusion that there does not currently exist in Jamaica any reasonable system of protection. Indeed, he says that the capacity of the state in this regard may well have diminished even further since the preparation of his principal opinion, given Jamaica's worsening rate of violent crime and recent developments with respect to the Jamaican police force. He says that the violent crime has increased rather than diminished in 2004. At a press conference on 8 April 2004 the Commissioner of Police stated that there were 277 murders in the first three months of 2004, 69 more than during the first three months of 2003. Another 110 people were killed in April. The deputy police commissioner is reported as saying that the increase in the crime rate has not been met by a commensurate increase in police resources to deal with it. Mr Sobers also refers to various news reports emphasising the continuing nexus between politics and crime.

36. The judge concluded in para18 of his judgment that: "there is a sufficiency of protection for (the appellant) in Jamaica." Mr Drabble complains that this language answers the wrong question and that no reasoning is given for the implicit judgment that there is no other tenable view of the facts insofar as they relate to state protection. He submits that in any event, and putting matters at their lowest, there is a considerable issue about the extent to which state protection is available for someone in the shoes of the appellant to protect him against Article 3 conduct. Despite the expressed willingness to provide protection, does the state actually achieve it?

37. In my judgment there is force in Mr Drabble's criticism of the Secretary of States certification and of the judge's decision to uphold it. It is clear that there has been a long-standing and endemic problem in Jamaica and the state authorities ability to overcome it. There is no doubt about willingness to tackle the problem. It is another matter, however whether effective steps have been taken to achieve the bare minimum required to provide reasonable protection for informers and perceived informers who find themselves in situations such as the appellant.

38. Mr Fordham submits that it is relevant to look at what else the state should be doing. No one, he argues, has identified where the fault is. You cannot condemn the Home State without identifying what it should be doing. In my judgment this

is not a helpful approach when considering an allegation of the kind in this case, namely a systemic failure.

39. There is a helpful passage from the judgment of Collins J in *Secretary of State for the Home Department v Kacaj* [2002] INLR 354 where he said this at para 21 in giving the judgement of the IAT:

> "It may be said that it is no consolation to an applicant to know that if he is killed or tortured, the police will take steps to try to bring his murderers or assailants to justice. He is concerned with the risk that he may be killed or tortured and if the authorities cannot provide effective protection to avoid the risk there will be a breach of the Convention if he is returned. Practical rather than theoretical protection is needed. We see the force of that contention, but in our view it fails to recognise that the existence of a system should carry with it a willingness to do as much as can reasonably be expected to provide that protection. In this way, the reality of the risk is removed. Since the result will be similar namely persecution or a violation of a human right, it would be wrong to apply a different approach. We do not read *Horvath*…..as deciding there will be a sufficiency of protection whenever the authorities in the receiving state are doing their best. If this best can be shown to be ineffective it may be that the applicant will have established that there is an inability to provide the necessary protection. But it is clear that, as Lord Hope of Craighead said (at 388F and 249C respectively):
>
> > '…..(I)t is a practical standard, which takes proper account of the duty which the state owes to all its own nationals'
>
> The fact that the system may break down because of incompetence or venality of individual officers is generally not to be regarded as establishing unwillingness or inability to provide protection. In many cases, perhaps most, the existence of the system will be sufficient to remove the reality of risk."

40. I am far from saying that the appellant will necessarily succeed on an appeal to an adjudicator, but it seems to me that the present evidence raises, at the very least, a serious question on whether the state of Jamaica provides a sufficiency of protection to informers or perceived informers in the category of the appellant. On one view at least Jamaica has not shown a reasonable ability to resolve the problem and provide the basic protection required.

41. In his decision letter at para 15 the Secretary of State says that in the light of the 2002 initiatives the appellant could seek the help of the Jamaican police and that there are avenues of redress open to him if he is able to show that the police is his

area are acting inappropriately. On one view of the evidence this is not so. Mr Sobers suggests that oversight agencies are not effective.

42. All this leads me to the conclusion that the certification threshold described by the Master of the Rolls in *L* has not been crossed. On a legitimate view of the facts the appellant's claim that Jamaica does not provide a sufficiency of protection could succeed.

*Fresh evidence*

43. Before the judge the appellant relied on a report from Mr Sobers that had been prepared in the case of *Brown*. The judge observed that the facts of *Brown* were plainly distinguishable from those in the present case and so they are. But Mr Sobers account of the general circumstances in Jamaica are relevant to the present case. Since then Mr Sobers has produced the two further reports of 29 October 2003 and 25 May 2004 directed specifically to the facts of the present case. The respondent takes no point about the admissibility of fresh evidence. Rather it is said that the fresh evidence vitiates neither the certification nor the reviewing judge's conclusions. Having read the whole of Mr Sobers evidence, the Secretary of State maintains his certification. Accordingly we too have looked at the certification in the light of the whole of Mr Sobers evidence.

*The nature of the judge's review*

44. There is a further point that requires clarification. Essentially this court has to consider the correctness of the judge's decision when reviewing the Secretary of State's certification. The judge had to decide whether the certification was lawful. He decided that it was. The judge decided that the appellant's claim in respect of Article 3 could not on any legitimate view succeed and that it was therefore clearly unfounded. In the course of argument we asked Mr Fordham about the judge's finding at paragraph 30 that he, like the Secretary of State, was satisfied that the claims were clearly unfounded. Did the judge have to stand in the shoes of the Secretary of State and ask himself whether this was a view to which the Secretary of State was entitled to come, albeit he himself might not have come to the same conclusion, or was it up to the judge to look at the matter afresh and form his own view? Mr Fordham told us that for the purposes of the present case he was prepared to proceed on the latter basis. He referred us to *Bagdanavicius* at para58 where Auld L.J said:

> "The question is a narrow one and the threshold for certification is high; see *Razgar* [2003] Imm AR 529, per Dyson L.J 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."

Whilst we have not heard argument on the point, I consider that the speech of Lord Bingham of Cornhill in *Razgar* [2004] UKHL 27 (see paras 16,17) confirms that Mr Fordham was right to make this concession. The judge had to ask himself how an appeal to an adjudicator would be likely to fare.

45. Accordingly, as it seems to me, it is necessary to ask whether in the light of all the present information the appellant's Article 3 claim was bound to fail. More specifically, was the appellant's contention that the Jamaican State was unwilling or unable to provide him with sufficiency of protection bound to fail or could the claim on a legitimate view succeed?

*Internal relocation*

46. The judge concluded that the evidence did not support the appellant's assertion that relocation was not viable. He noted that although the appellant's expressed fear was that the gang would find him wherever he was in Jamaica, what caused him to leave after the February 2002 attack was that his attackers had said that when he returned home they were going to kill him and that he should leave the area because he was an informer. His reason for not reporting the attack to the police was that it would have made things worse; he would not have been able to continue to live in his area because if he did the JLP would kill him or attack him again.

47. The judge referred to the Secretary of State's decision letter in which he had noted that the appellant's home was in the southern part of the parish of St. Andrews, one of the notorious problem areas, and that it was reasonable for him to relocate in an area where gang violence was less prevalent. He appears to have accepted Mr Fordham's submission that to the extent that the case was comparable to *Brown* he would not come to a different conclusion to that of Crane J who upheld in that case the certification as "clearly unfounded" on the issue of internal relocation. It is difficult to know the extent of the material available to Crane J although he did have a report from Mr Sobers.

48. Mr Fordham submits that the judge was correct on this question because even taking account of Mr Sobers' evidence the appellant was unable to point to any insufficiency of protection outside a garrison area. I cannot accept this. In his most recent report Mr Sobers says:

> "Simply put, relocation will neither eliminate nor substantially reduce the risk of harm to (the appellant) from gang reprisals."

49. In his earlier report of 29 October 2003 Mr Sobers had made it clear that his reason for this conclusion was primarily the small size of Jamaica and the trans-geographic power and reach of criminal gangs in the island. The fact that Jamaica is only 4,400 sq miles makes it difficult, if not impossible, for someone to conceal their identity at least for any length of time. Strangers, says Mr Sobers, attract more attention in small communities. He also points out that successful relocation requires social and economic support which, for most Jamaicans, is limited or absent. Jamaica has no state-sponsored welfare system. It is difficult or impossible to relocate without the independent means to do so or access to private social or economic support. Jamaica remains a highly violent society driven by strong enduring impulses for retribution. Those who offer, or appear to offer, support to targets of reprisal almost invariable become targets themselves. Few, if any, are willing to put their lives on the line for a target like the appellant. The judge did not of course have the more recent reports of Mr Sobers. He did, however, have

that of 6 August 2003 prepared for the case of *Brown* which spoke in similar terms, albeit terms that were less specific to the appellant's case, on the issue of relocation.

50. The judge also had before him a report from Amnesty International of 8 September 2001 but made no reference to the following passage at p 3:

> "Those who inform the police either of alleged criminal activities within the communities or of their own experiences of crime would be likely to be viewed as informers and could expect rough local 'justice' for going against the local social and political order. Given the extent to which influence of local leaders extends beyond the confines of individual garrisons, and the fact that outsiders are immediately identifiable in close communities such as those that exist in Jamaica, they would be unlikely to be able to find safe haven in another area of the same political persuasion. If they moved into the opposition's area they would similarly be at risk of violence. They would also bring a risk of violence to those who sheltered them and would obtain little effective assistance from the police."

Or that at p 11:

> "Being an informer, being suspected of being an informer, or being a relative or associate of an informer would also place a person at extreme risk of violence outside their own garrison community."

Or that at p 12:

> "The ability of a person to successfully relocate within Jamaica could be expected to be dependent on a range of factors, including their status as an informer, origins from a PNP or JLP community, their socio-economic status, sexuality, familial connections with local community and other factors.
>
> Amnesty international is concerned that a person of the profile given in Mr Atkinson's asylum account would not be able to successfully relocate within Jamaica and would face the risk of human rights violations if enforcibly returned."

51. These passages all seem to me to be consistent with the three reports from Mr Sobers. In my judgment certification was not justified on the relocation issue. It has to be borne in mind that for the relocation issue to become a live one there is a presupposition that there is no sufficiency of protection for Article 3 purposes in the appellant's home community. I simply cannot accept that in such circumstances his arguments that internal relocation is not a viable alternative are clearly unfounded.

*Conclusion*

The Secretary of State was wrong to conclude that the appellant's Article 3 claim was clearly unfounded. The material that we have seen, both as before the Secretary of State at the time of his original decision, and as supplemented by the later reports of Mr Sobers, indicates that there is a real question whether the State of Jamaica provides sufficiency of protection for an informer or supposed informer in the shoes of the appellant. The subsidiary question of internal relocation likewise raises issues that should not, on the material before us, have been rejected as clearly unfounded. Accordingly in my judgment the appeal should be allowed, the application for judicial review should succeed and the Secretary of State's certification should be quashed.

**Lord Justice Wall**:

52. I have had the advantage of reading Scott Baker LJ's judgment in draft. I agree with him that this appeal should be allowed for the reasons which he gives, and that the Secretary of State's certification under section 94 of the Nationality Immigration and Asylum Act 2002 should be quashed.

53. I only wish to add two short points. The first is that, out of fairness to the deputy judge, I should say that my assessment of the Secretary of State's certification (and in particular his reliance on the criteria identified in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 49, set out by Scott Baker LJ in paragraphs 16 to 19 of his judgment) was influenced by the additional material from Mr. Sobers, which was not, of course, before the deputy judge.

54. In the light of the decision of this court in *E v Secretary of State for the Home Department: R v Secretary of State for the Home Department* [2004] EWCA Civ 49 at paragraphs 76-77, Mr. Fordham - very fairly in my view - did not object to the admission of the fresh material from Mr. Sobers. Consideration of that material, in conjunction with the facts asserted by the appellant (which for current purposes must be taken to be credible) make it impossible, in my judgment, for this court to say that the appellant's claim under Article 3 of the Human Rights Convention is clearly unfounded.

55. At the same time I wish to emphasise the limited nature of our decision. It is, of course, that the Secretary of State was wrong to certify the claim under section 94(2) of the 2002 Act. The appellant is, accordingly, entitled to appeal to an adjudicator, where his case will be determined on its merits. I wish specifically to record my agreement with paragraph 40 of Scott Baker LJ's judgment. The appellant may or may not succeed on his appeal. It is sufficient for this court to find that the evidence before us raises a serious question as to whether the State of Jamaica provides a sufficiency of protection to informers or perceived informers in the category of the appellant, and that on one view at least Jamaica has not shown a reasonable ability to resolve the problems and provide the basic protection required. To go any further than this is unnecessary and, indeed, would be quite inappropriate.

**Lord Justice Thorpe:**

56. I am in wholehearted agreement with the judgment of Scott Baker LJ, which I have read in draft, and with the reasons that support his conclusion.

**Order: Appeal allowed; respondent do pay appellants costs of the appeal such costs to be subject to detailed assessment on the standard basis if not agreed; costs of the appellant are subject to a detailed community legal services assessment.**

**(Order does not form part of the approved judgment)**