Case No: C/2001/1964

Neutral Citation Number: [2002] EWCA Civ 74
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM IMMIGRATION
APPEAL TRIBUNAL

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 31st January, 2002

B e f o r e :

LORD JUSTICE SIMON BROWN
LORD JUSTICE SEDLEY
and
SIR MURRAY STUART-SMITH

- -

ROLANDAS SVAZAS — Appellant
- and -
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT — Respondent

- -

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

- -

Mr. Hugh Southey (instructed by Purcell Brown & Co. for the Appellant)
Mr. Robin Tam (instructed by Treasury Solicitor for the Respondent)

- -

Judgment
As Approved by the Court

Crown Copyright ©

Lord Justice Sedley:

Proceedings

1. This is one of two appeals which were to have come together before the court by permission of Schiemann LJ. and Keene LJ. respectively. Each was an appeal against a decision of the Immigration Appeal Tribunal upholding the dismissal by an adjudicator of an application for asylum.

2. The first appeal, *B v Secretary of State for the Home Department* (C/2001/1278) was, however, disposed of by an agreement, ENDORSED BY Collins J. as President of the I.A.T., that it be remitted to the Immigration Appeal Tribunal for rehearing.

3. To an important but not complete extent the facts of the two cases converge. Both appellants have left Lithuania and have sought asylum in this country on the ground that, as members of the now illegal Communist Party of Lithuania, they have a well-founded fear of persecution from which the Lithuanian state is unable or unwilling to protect them. In each case differently composed appeal tribunals have held that although the threat of maltreatment emanates from agents of the state, namely the police, an imperfect but sufficient level of protection is afforded by that state. The reasoning of the two tribunals, however, differs in ways which are not wholly referable to the factual differences between the two cases.

4. Mr Svazas's appeal was heard by the IAT (Mr M.W.Rapinet, Mr J.R.A.Fox and Mrs M Padfield) on 17 May 2001. The IAT had before it the decision in Ms B's case, which had been heard on 19 March 2001 by a panel consisting of Mr D.K.Allen, Mrs J. Jordan and Dr A.U. Chaudhry. This decision, promulgated on 9 April, is adopted and built upon extensively in the determination in Mr Svazas's appeal, making it necessary to read the two together.

History

5. What the two cases have in common is the following. Following the break-up of the Soviet Union and the restoration of independence to Lithuania, the Communist Party was banned in August 1991. It was not made a crime to be a member of the party. According to Dr. Vesna Popovski, a specialist in contemporary Lithuanian studies, whose evidence both tribunals found helpful, members of the Communist Party were nevertheless arrested and detained for up to 24 hours and might be maltreated in detention. Such violent conduct on the part of the police was unconstitutional and unlawful, and the authorities tried to prosecute the officers responsible. The tribunal which heard Ms B's case matched her evidence with the State Department report and Home Office Country Assessment which were also before them and said (in paragraph 27):

> "As we understood Dr Popovski's evidence, in essence she was saying that from the point of view of the government, matters such as the events that occurred to the Appellant should not happen and that they were trying to prosecute officers for offences of this kind. This is confirmed by the objective evidence elsewhere. For example it is stated at paragraph 4.28 of the Country Assessment for October 2000 that police sometimes beat or otherwise physically mistreat detainees. The local press have reported that incidents of police brutality are becoming more common. In many instances, the victims reportedly are reluctant to bring charges against police officers for fear of

> reprisals. A total of 79 officers were dismissed for illegal or fraudulent activities in the first six months of 1998 for a variety of offences, compared with 182 for all of 1997. During the first six months of 1999 four police officers were charged with abuse of power and one officer was sentenced. The Ministry of Interior stated that the district police and inspectors are the most negligent in the force. To strengthen the integrity of the police the Inspectorate General of the Ministry of the Interior was given administrative autonomy in May 1997. It is said at page 2 of the State Department Report that in 1999 the Inspectorate General was reorganised into an office of the Inspector General, and some functions of the inspectorate were delegated to the Internal Investigations Division of the police department. The Inspector General cannot investigate abuses of his own authority but can act only on the order of the Minister. Mr Jones [Ms B's counsel] referred us to the fact that at 5.9 of the Country Assessment it is said that a key exception to the normal co-operation of government authorities local NGOs is the Ministry of Interior, which has continually refused to release information on police brutality and statistics on corruption based incidents. However the most recent State Department Report notes at page 6 that a key exception in the past of this co-operation was the Ministry of Interior which continually refused to release information on police brutality and statistics on corruption related incidents. It says however that the Ministry is more willing to share such information however it has released few statistics or reports. We note also the association of the defence of human rights in Lithuania, an umbrella organisation for several small human rights groups all of which operate without government restriction."

6. The tribunal which heard Mr. Svazas's case expressed its indebtedness to the passage quoted above. It went on, assisted by a further report of Dr. Popovski of 3 May 2001, to make further findings which will I set out in full a little later. First, however, it is necessary to look at the two cases separately.

Ms. B

7. Setting on one side the differences between the adjudicator and the tribunal, the facts established about Ms B include these. She had been a member of the Communist youth organisation since 1996 and an active member of the Lithuanian Communist Party since 1998. In October 1999 she received threatening telephone calls. In November and December 1999, and again in January 2000, she was arrested, briefly detained and interrogated. On the third occasion she was raped, subsequently suffering a miscarriage. Three days after her last arrest, on 7 January 2000, she made a complaint to a senior police official. Her complaint was treated with contempt. A little over a fortnight later she came to the United Kingdom, was given permission to remain for six months, and after five weeks here applied for asylum.

8. It does not seem to have been doubted by the IAT that Ms B had a fear of persecution by reason of her political opinions. The question whether her fear was objectively well founded

was approached by the Tribunal in terms of sufficiency of protection. Their conclusion (in paragraph 29) was this:

> "Although we were not addressed on this point specifically, it seems to us that it is impossible to consider this case without referring to the decision of the House of Lords in *Horvath v Secretary of State for the Home Department* which is reported at [1999] INLR 7 (the IAT hearing) at [2000] INLR 15 in the Court of Appeal, and [2000] 3 WLR 379 in the House of Lords. It is clear from this judgement that in considering the ability of the state or its willingness to protect, it is a pre-requisite that the state must have in place a general system of criminal law enforcement for its citizens from which by its terms, the asylum applicant or the class to which he belongs is not excluded. This requirement is met by considering whether the duty to its citizens at large is met by the provisions made. It is clear from our review of the objective evidence in this case that, albeit underground activity by the Communist Party is considered illegal, there is no suggestion that the Lithuanian legal system and in particular its general system of law enforcement is not available for most communists and non-communists. Dr Popovski made it clear that the authorities would say that activities such as happened to the Appellant in this case should not occur and that it is aware of the fact that local police were involved in activities which are contrary to Lithuanian law and they are trying to prosecute these officers. There is evidence before us which we have described above of prosecutions taking place albeit that there are difficulties and sometimes people are concerned about reprisals. Nevertheless, even bearing in mind what happened to the Appellant in Lithuania, we consider that the system in place is one which offers her sufficiency of protection. Internal flight would not appear to a possibility, but we do consider that the machinery is there for her to take action and to report and seek the prosecution of any police officer who does not treat her in accordance with the provisions of the law in Lithuania, and we consider that as a consequence she has not made out her claim to be in need of international protection."

Mr Svazas

9. Mr Svazas is also 30 years old, and also an active member of the Lithuanian Communist Party. The adjudicator, whose findings were uncontested, accepted his evidence that he was first arrested in 1993, then in August 1995, then in September 1998. On the first occasion he had been held for two weeks, during which he was beaten and kicked. On the second occasion he had been held for between 10 and 14 days and similarly treated. In December 1998, following two weeks' further detention in September, he was charged with being engaged in illegal activities. He was released subject to reporting conditions, but in violation of these he came on 17 December 1998 to the United Kingdom and sought asylum on arrival.

10. Among the undisputed facts recorded by the IAT were that he had been arrested more than once, the last time in September 1998, because of his political activity, and that there was a

reasonable likelihood that he would be arrested again on return. It was also accepted expressly by the adjudicator and implicitly by the IAT (paragraph 8) "that prison conditions are such in Lithuania that he may well be subjected to a degree of police brutality whilst in detention".

11. The Tribunal went on:

> "9. …. It is clear that the appellant knew that he belonged to an illegal organisation, knew that the activities upon which he was engaged were illegal and was not surprised that the police were interested in him. We entirely agree that he might well be prosecuted upon return by reason of his illegal activities …
>
> 10. The question therefore is whether, assuming the prosecution is successful and he is sentenced to detention, that would amount to persecution. No point has arisen before us as to whether or not any sentence might be unduly harsh in relation to the nature of the offence committed. No evidence has been put before us as to the length of sentences now passed for this type of crime and we are therefore not in a position to make any judgment as to whether or not any sentence would be so harsh to amount to persecution. We concentrate entirely on the question whether or not he would suffer maltreatment at the hands of the police, whilst in prison, either awaiting trial or following sentence, and whether that maltreatment amounts to persecution because it arises from his membership of the Communist Party."

12. It is to be observed, in the light of Dr Popovski's evidence, that these arrests cannot have been for membership of the Communist Party, since by itself this is not, she says, a criminal offence. This may well explain why no charge was preferred following either of the first two spells of detention. It is not clear what the subject of the charge was following the most recent arrest and release.

13. The IAT expressed its conclusions in this way:

> "14. Mr Middleton [counsel for Mr Svazas] has conceded that there is in place a very soundly prepared and based constitution which does protect minorities and does observe the provisions of the Human Rights Convention. The essence of his argument, however, is that the constitution is not enforced at grass roots level and this permits police brutality directed at members of the Communist Party such as this appellant. This submission has to be considered within the context of the Court of Appeal judgment in the case of *Horvath*. On the basis of the documentation before us and also Mr Middleton's admissions, we are satisfied that there is in place a constitution and a judicial and criminal legal system which does ensure protection of the citizens of Lithuania. It does not discriminate against any minority groups and in particular members of the Communist Party. The US State Department Report makes it clear that as part of this system there is a proper judicial system, albeit a somewhat young one, and in the process of being developed, which does ensure impartial trials and

> proper legal representation.
>
> 15. We are satisfied that the government accepts that there is a degree of police brutality and we entirely accept Dr Popovski's statement that this arises out of prejudice against what Lithanians endured under the previous Soviet regime. However, we are also satisfied that the government has taken steps to ensure that there is proper discipline of these officers exceeding their powers and perpetrating brutality upon detainees. We fully accept that the system cannot be flawless as thing are at the moment in Lithuania i.e. democracy emerging after many years of Communist rule. But we are totally satisfied that what acts of brutality are perpetrated are not condoned by the authorities and that proper systems are in place to obtain redress against the perpetrators.
>
> 16. We fully accept that, largely arising out of Dr Popovski's comments, individual policemen might well prove to be vindictive against the appellant were he to be taken into custody by reason of his Communist allegiance, but these are transgressions by individuals, contrary to any codes of discipline issued by the police or Ministry of Interior and are capable of redress.
>
> 17. Arising out of this finding it follows that the appellant, although he may find prison conditions poor and acts of brutality perpetrated against him, will be no worse than any other prisoner detained for any ordinary criminal offence for which he has been sentenced. The system has clearly got many imperfections, not least of which is the conduct of the police towards prisoners. We are not satisfied that the appellant would suffer more adverse conditions and greater brutality by virtue of his membership of the Communist Party and that such action would be condoned by the authorities and that he would not have any form of redress were he to be singled out from amongst any fellow prisoners."

Law: *(a) persecution and protection.*

14. The Convention relating to the Status of Refugees, as amended by the protocol of 31 January 1967, by Article 1A(2) applies the term "refugee" to any person who

> "owing to a well-founded fear of being persecuted for reasons of … 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 …"

The meaning and application of the latter part of this provision are increasingly prominent in the recent jurisprudence of the Convention.

15. Persecution which may make an individual a refugee typically takes two forms. One is persecution by individuals, not themselves agents of the state, whom the state cannot or will not control. The effect of persecution by such people, and the standard of adequate state

protection from them, has been considered in detail by the House of Lords in *Horvath v. Home Secretary* [2000] 1 AC 489. The other form is persecution by agents of the state itself. Here the persecutors are clad in the authority of the very state which is supposed to afford its citizens protection. But within this category there is an important distinction between abuse which is authorised or tolerated by the state and rogue officials who from time to time abuse their authority. And in the space between these two poles lie cases like the present, where the evidence accepted by the fact-finding tribunals depicts a police force which systematically or endemically abuses its power despite the law and the will of the government to stop it.

16. In the absence (so far as counsel have been able to ascertain) of any reported Commonwealth decisions on the issue, the accepted international approach to such situations is perhaps best stated by Professor James Hathaway, *The Law of Refugee Status* (1991), pages 125-6:

> "The most obvious form of persecution is the abuse of human rights by organs of the State, such as the police or military. This may take the form of either pursuance of a formally sanctioned persecutory scheme, or non-conforming behaviour by official agents which is not subject to a timely and effective rectification by the State. In such cases, it is clear that the citizen can have no reasonable expectation of national protection, since the harm feared consists of acts or circumstances for which the governmental authorities are responsible."

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 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.

17. So understood, this passage of Professor Hathaway's work marches with the protection test identified by Lord Lloyd of Berwick in *Adan v. Home Secretary* [1999] 1 AC 293, 304, and adopted by Lord Hope of Craighead both in *Adan* itself and in his leading speech in *Horvath*. As Mr Tam submitted, *Adan* is the juridical context in which *Horvath* was decided. By the protection test Lord Lloyd means the need for the asylum seeker to show that he is unable or, by reason of a well-founded fear of persecution, unwilling to avail himself of the protection of his home state. The asylum seeker must of course also establish that he has a well-founded fear of persecution for a reason stipulated in the Convention. This Lord Lloyd calls the fear test. He describes the respective requirements of a well-founded fear of persecution and a lack of protection from it as "two separate tests".

18. In *Horvath* Lord Hope comments:

> "… the two tests are nevertheless linked to each other by the concepts which are to be found by looking to the purposes of the Convention. The surrogacy principle which underlies the issue of State protection is at the root of the whole matter."

19. Mr Southey has drawn our attention to the further passage in which Lord Hope (at 497) says:

> "… in the context of an allegation of persecution by non-state agents, the word "persecution" implies a failure by the State to make protection available against the ill-treatment or violence which the person suffers at the hand of his persecutors. In a case where the allegation is of persecution by the State or its own agents the problem does not, of course, arise. There is a clear case for surrogate protection by the international community."

But, possibly having in mind the kind of case which has arisen here, Lord Hope goes on to say:

> "… 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."

Lord Clyde (at 510) similarly speaks of:

> "… a system of domestic protection and machinery for the detection, prosecution and punishment [of persecutors] … More importantly, there must be an ability and a readiness to operate that machinery."

20. To this one may add what Stuart Smith LJ said in this court, with the subsequent approval of the House of Lords, in *Horvath* [2000] INLR 15, 26:

> "Moreover, the existence of some policemen who are corrupt … 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 converse presumption, however, is not necessarily as strong: a state which is willing to afford protection may be unable to do so. Willingness to control abuse is, as Stuart-Smith LJ says, a presumptive feature of a democracy; but in a country like Lithuania the ability to do so may well be impeded by the legacy of the very past from which it is extricating itself.

21. Lord Hope's exegesis of the protection principle seems to me, with respect, to chime closely with Professor Hathaway's analysis of persecution by agents of the state. It is precisely the application of a practical standard which is going to result in a demand by fact-finding tribunals for convincing evidence, where the agents of persecution are themselves officers of the state, that the state not only possesses mechanisms for controlling its officials but

operates them to real effect. In this respect, which is practical in form but constitutional in nature, it differs from the standard of protection from persecution by non-state agents with which *Horvath* was concerned . In response to the appellant's case, Mr Tam in his skeleton argument for the Home Secretary put forward a simple "either/or" paradigm: either the state is authorising, instigating or condoning ill-treatment or it is not. In oral argument, however, he proposed a continuum of situations and accepted that widespread abuse of detainees by state officials, albeit unlawful and not condoned by the state, could amount to persecution by the state in the absence of effective protective measures. One reason why he was right to do so is that without such measures the asylum seeker will ordinarily be unable to avail himself of his own state's protection from the persecution which, ex hypothesi, he justifiably fears.

22. It needs to be noted that there is a second limb to the protection test. It applies to a person whose fear of persecution for a Convention reason is well-founded and who "… owing to such fear, is *unwilling* to avail himself of the protection of [his] country …" In other words, even though the home state may be able to provide protection, the fear now justifiably felt by the individual may be such that he is unwilling to rely on the state to protect him. The latter, which is barely explored in our jurisprudence, is capable of mattering in cases such as the present. Whether or not Mr Svazas is "able" to avail himself of the Lithuanian state's protection, such as it is, against police brutality, he may be justifiably unwilling to try. The 1951 Convention was drafted less than thirteen years after the events of the *Kristallnacht*, when Brownshirt-led mobs wrecked and looted Jewish property in Germany and Austria, and the Nazi authorities claimed to be powerless to stop them. The wave of refugees which followed had led to controversial restrictions on numbers in several liberal host states. The inappropriateness in such a situation of telling a refugee that he must rely on the state's undoubted ability to protect him must have been at the forefront of the minds of those who wrote this passage into the Convention. It is likely to have a particular bearing where systematic persecution is carried out by agents of a state which repudiates their acts. It does not mean that every such claim will pass the protection test; but it does mean - reverting to Professor Hathaway's formulation - that a state which, however anxious to halt abuse, does not act promptly and effectively to stop its officials persecuting citizens on Convention grounds will not be affording protection of which the victim is able or, in view of his fear, willing to avail himself. It follows that where I have held (in paragraph 21) that a different standard of protection is engaged where the persecutors wear official uniforms, I do not mean simply that the *Horvath* test has to be applied to different circumstances. I mean - and it seems to me, with respect, that their Lordships House had this distinction clearly in mind - 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 which I have had the advantage of reading in draft. The difference may be no more than one of emphasis, but in reasoned adjudications such differences can be critical.

Law: (b) political opinion

23. I turn to the fear test. There is no dispute that Mr Svazas realistically fears that he will yet again be detained for substantial periods and ill-treated if he is sent back to Lithuania. There are thus two distinct elements of what he fears which are capable of amounting to persecution for a Convention reason: one is being repeatedly detained because of his political opinions; the other is being ill-treated because of them.

24. It is not at all clear to me, on the findings of the adjudicator and the IAT, what apart from his political opinions has caused the police repeatedly to detain Mr Svazas. Membership of the Communist Party of Lithuania is not a crime, but the party itself is banned. Inquiries which I have made indicate that there has been no challenge to the ban before the European Court of Human Rights. But the evidence does not explain what the ban means. Does it mean simply that, while people can join the Communist Party and try to persuade others to support it, it has no legal status and cannot contest elections? Or does it mean that any activity on its behalf beyond bare membership is criminal? We do not know. But the IAT has recorded Mr Svazas as accepting that his activities were illegal, and it seems to be implicit in their decision that it was about these that he was held for interrogation.

25. He was held, however, for periods not of days but of weeks. Since Lithuania is a member of the Council of Europe, with a judge on the European Court of Human Rights, it must have demonstrated that its legal system complies in essential aspects with the ECHR, including the provisions of article 5 against arbitrary or prolonged detention. Even in cases of suspected terrorism, more than four days' detention without judicial authority violates the requirement that the state bring the suspect promptly before a judge: *Brogan v UK* (1988) 11 EHRR 117, para.62. The adjudicator (paragraph 22) accepted evidence that many detainees in Lithuania are "held in pre-trial detention without clear legal grounds for their incarceration". It has, however, not been argued before us, and has not so far been argued before the IAT, that the appellant's spells of detention were other than lawful arrests for - presumably - reasonably suspected crimes, albeit of a political nature. Nor has it apparently been argued that what seem to have been at least two spells of unlawfully prolonged detention following arrest were the consequence of Mr Svazas' political opinions.

26. There is in many cases of this kind a worrying question whether the deployment of the ordinary law against citizens of a particular ethnicity, say, or a particular political opinion can reach a level which amounts to persecution. In *Sivakumar v Home Secretary* (unreported, 24 July 2001, CA), a case concerning the arrest and torture of a Sri Lankan Tamil suspected of having terrorist connections, Dyson LJ, speaking for the court, said:

> "… where a person to whom a political opinion is imputed or who is a member of a race or social group is the subject of sanctions that do not apply generally in the state, then it is more likely than not that the application of the sanctions is discriminatory and persecutory for a Convention reason. That is where there is a prosecution followed, in the event of conviction, by a sentence imposed by a court. The inference of persecution for a Convention reason is all the stronger where, as in the present case, the sanction is torture by state authorities which is not even lawful by the law of the state concerned."

Mr Southey has sought to rely both on this passage and on reasoning to similar effect in the judgment of Waller LJ at paragraphs 183 and 184 in *Sepet and Bulbul v Home Secretary* [2001] INLR 376, 440; but I do not think that either can help him given the assumed facts in the present appeal.

27. This leaves the question of the way Mr Svazas can expect to be treated once in the hands of the Lithuanian police. Mr Tam's case, for the Home Secretary, is straightforward: it is deplorable that the police regularly treat prisoners with violence, but the reason for it has nothing to do with their political opinions - it is simply that they are prisoners. Even if

repeated police violence towards Mr Svazas amounts to persecution, he therefore submits, it falls outside the Convention because it has nothing directly to do with his politics. Mr Tam accepts that a "but for" test (for which Mr Southey contends) would enable the appellant to succeed, since but for his political views he would not be in detention at all; but he submits that the test is rejected by a majority of their Lordships in *Shah and Islam v Home Secretary* [1999] 2AC 629 and is inconsistent with the decision of this court in *Sepet and Bulbul v Home Secretary* [2001] INLR 376. I accept that "but for" is not the appropriate translation of "for reasons of" in the Convention. But it does not follow that the appeal fails on this score.

Law: (c) the two tests related.

28. It is relevant to consider how the fear test and the protection test relate to one another. The passage of Lord Hope's speech in *Horvath* at [2001] 1 AC 497 which I have quoted in paragraph 19 above is explicitly related to persecution by non-state agents. So is his summary at 499:

> "….I consider 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. I think that it follows that, in order to satisfy the fear test *in a non-state agent case* [my italics], the applicant for refugee status must show that the persecution which he fears consists of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection."

One sees readily that a fear of persecution by non-state agents may not be well-founded if the state is both able and willing to provide protection against it, and that to this extent protection may enter into the fear test. What, with respect, has caused occasional difficulty is Lord Hope's concluding paragraph:

> "Where the allegation is of persecution by non-state agents, the sufficiency of state protection is relevant to a consideration whether each of the two tests - the "fear" test and the "protection" test - is satisfied. The proper starting point, once the tribunal is satisfied that the applicant has a genuine and well-founded fear of serious violence or ill-treatment for a Convention reason, is to consider whether what he fears is "persecution" within the meaning of the Convention. At that stage the question whether the state is able and willing to afford protection is put directly in issue by a holistic approach to the definition which is based on the principle of surrogacy."

Lord Clyde (at 514) put it this way:

> "… it seems to me inevitable that the persecution to which the Convention refers is a persecution which takes account of the protection available. Of course where the state is itself through its agents the persecutor, the question does not require to arise. Active persecution by the state is the very reverse of protection."

29. It is clear that their Lordships (Lord Browne-Wilkinson and Lord Hobhouse agreed with

Lord Hope) were being careful to limit their pronouncements in *Horvath* to cases of persecution by non-state agents. The question is how far they apply beyond this category. It seems to me that there is a real difference, to which Lord Hope and Lord Clyde themselves draw attention, between state and non-state agent cases. Critically, too, there is within the former class a series of gradations which I have discussed in paragraph 15 et seq. above. In such cases it seems to me to be both analytically useful and legally appropriate to respect the distinction between the establishment of a well-founded fear of persecution by state officials - which by definition displays an extant failure of state protection - and the existence of sufficient protection in the form of effective measures to prevent such misconduct. Nothing said by their Lordships in *Horvath* contra-indicates this approach, which draws upon the distinction spelt out in *Adan.*

30. I have called the distinction analytically useful because experience shows that adjudicators and tribunals give better reasoned and more lucid decisions if they go step by step rather than follow a recital of the facts and arguments with a single laconic assessment which others then have to unpick, deducing or guessing at its elements rather than reading them off the page. I have called it legally appropriate for a reason I gave in *Karanakaran v Home Secretary* [2000] INLR 122, 149, and which I take the liberty of citing only because it has been endorsed by Professor Hathaway (proceedings of the International Association of Refugee Law Judges, Berne, October 2000):

> "There may possibly be countries where a fear of persecution, albeit genuine, can so readily be allayed in a particular case by moving to another part of the country that it can be said that the fear is either non-existent or not well founded, or that it is not 'owing to' the fear that the applicant is here. But a clear limit is placed on this means of negating an asylum claim by the subsequent provision of the Article that the asylum seeker must be, if not unable, then unwilling because of 'such fear' - ex hypothesi his well-founded fear of persecution - to avail himself of his home state's protection. If the simple availability of protection in some part of the home state destroyed the foundation of the fear or its causative effect, this provision would never be reached."

Accordingly it seems to me that the distinction authoritatively drawn in *Adan* between the fear test and the protection test, albeit glossed in non-state agent cases by Lord Hope's concluding remarks in *Horvath*, remains material to cases such as the present.

30. Our attention has been drawn to the recent decision of this court in *Wierzbicki v Home Secretary* [2001] Imm.A.R.602. The appellant was a Polish gypsy whose case was that his family and their home were being repeatedly attacked not only by hostile neighbours but by police officers whom they called on for protection. Schiemann LJ put the issue in this way:

"In the paradigm case the persecutor is the government or its agents. We however are concerned with the case where the persecutors are not the government as such, but intolerant fellow citizens, including some policemen. The government as such is opposed to the actions of the persecutors."

The appeal failed on the ground that the IAT had applied the right test of protection and had come to a tenable conclusion against the applicant. At the date of the hearing before us, the

appellant was petitioning the House of Lords for leave to appeal and the Home Secretary had been invited to make submissions in opposition. The essence of the case advanced in the petition is that on the evidence the police should have been treated as state agents of persecution against whose acts the state afforded insufficient protection. To this extent, as the above citation from Schiemann LJ shows, the case starts from a lower factual base than the present case because there the police activity had been treated as the work of rogue officers and not - as here - systemic abuse. The Home Secretary's opposition to the grant of leave has accordingly been based primarily on the submission that the decision was an unexceptionable application of principles established *Horvath* to findings of fact.

31. In my judgment - and Mr Tam has not urged the contrary - this court's decision in *Wierzbicki* does not anticipate anything that we have to decide. It is premised on facts which put the case on the non-state agents side of the line. If both the petition and the appeal succeed, their Lordships' reasons will of course have a very direct bearing on this case. In the circumstances, however, our decision will have to come first.

Discussion

32. In my judgment this case has not been properly decided by the IAT in the light of the law as I understand it to be. There are two main reasons.

33. First, the IAT has posed one question but answered another. The question, cited in paragraph 11 above, was:

> "whether, assuming the prosecution is successful and [the appellant] is sentenced to detention, that would amount to persecution."

This, with respect, was not the question. It is the kind of question which arises in cases where, for example, people are repeatedly arrested on the basis of their ethnicity but are charged with criminal offences. Here neither the legality nor the political neutrality of the repeated detentions of the appellant was put in issue: both were assumed. What remained in issue was whether as a member of the Communist Party in custody Mr Svazas faced particular treatment which (a) amounted to persecution for a Convention reason and (b) was treatment by state agents which the state, despite its endeavours, could not control.

34. In the event these were in substance the issues which the IAT went on to address in the passage reproduced in paragraph 13 above. While much of it supports Mr Tam's submission that the appellant faced only what every prisoner of the Lithuanian police at present faces, two sentences go further: "We are satisfied that the government accepts that there is a degree of police brutality and we entirely accept Dr Popovski's statement that this arises out of prejudice against what Lithuanians endured under the previous Soviet regime …. We fully accept that, largely arising out of Dr Popovski's comments, individual policemen might well prove to be vindictive against the appellant were he to be taken into custody by reason of his Communist allegiance…"

35. These findings of discriminatory brutality meted out by reason of the victim's political

opinion are not compatible with the expressed conclusion that the appellant, if detained again, "will be no worse than any other prisoner". They are in my judgment sufficient, in the context of repeated spells of detention, to sustain a finding of persecution for a Convention reason and so to meet the fear test.

36. If such a finding is to be made, the next question will be whether the protection test is met. The picture established by the IAT can be paraphrased as one of a nascent democracy in which the constitutional guarantees of proper treatment of citizens by the police are, despite the professed will and endeavours of the government, systematically or at least endemically violated. In this situation I do not think that the reference to "individual policemen" proving vindictive towards Communists is enough by itself, absent a clear finding based on evidence, to confine the discriminatory treatment to rogue activity; and even then it would not follow that such activity necessarily fell within the *Wierzbicki* description of "fellow citizens, including some policemen": there are well-known instances from Latin America of freelance street violence by police officers which may well demand a higher standard of protection, where it is carried out for a Convention reason, than is envisaged in the *Horvath* context. In any case some view has to be formed of what proportion of policemen behave in this way and in what situations. It is also necessary to bring into the final picture the important information from the decision in *B* which I have set out in paragraph 5 above and to which the IAT in the present case made reference early in its reasons. It suggests a less than wholehearted readiness on the part of government to admit the extent of the problem, and a low and declining rate of intervention to remove delinquent police officers.

37. Whether singling out Communist prisoners for assault (and no doubt other types of prisoner too) is systemic or endemic or sporadic, it necessarily represents an initial failure of protection on the part of the state. If so, the critical question - adopting Lord Hope's approach - will be whether what the state does to stop it happening reaches a practical standard appropriate to the duty it owes all of its citizens. If discriminatory brutality is found to be too widespread to be written off as delinquent activity of the sort that could occur in any system, the paradigm will shift away from the *Horvath* end of the spectrum towards the less explored class of state agents who take advantage of their power but do not act on behalf of the state: in ordinary parlance, a police force whose members are out of control. Even in such a context a practical standard of protection does not require a guarantee against police misconduct, but it does, as Professor Hathaway says, call for timely and effective rectification of the situation which is allowing the misconduct to happen. For reasons given earlier in this judgment - essentially because it has a different starting point - this is a different model of protection from that which on authority is called for by the Convention when the source of the fear of persecution is people whom the state has to police but who themselves do not deploy or therefore abuse the state's own power. How different will depend on the state of affairs disclosed by the evidence.

38. Mr Tam began his submissions by suggesting that the case is concluded by the adjudicator's finding (in paragraph 24) that "the appellant's evidence does not show that that [police] brutality meets the minimum level of severity to amount to either persecution or torture". Speaking for myself, I do not know what a minimum level of brutality is: brutality on the part of police officers is always unacceptable, and its repetition can amount to persecution. The IAT showed no inclination whatever to adopt this reason for their conclusion, and I am not surprised. I respectfully agree with Sir Murray Stuart-Smith's final comment on this aspect of the case so long as it is not misunderstood . Nothing in the Convention definition of a refugee turns on the degree of persecution. To say that particular ill-treatment falls

towards the bottom end of the scale of what amounts to persecution is not, therefore, to say anything that matters legally. The meaning of persecution can be elusive, but for the decision-maker the single question is whether what is feared by the asylum-seeker amounts to persecution or not. If it does, the focus of the fear test turns to the reason for the persecution and to whether the applicant has a fear of it which is both genuine and well-founded. In this regard, as Sir Murray Stuart-Smith says, the worse the persecution, the more will be required to demonstrate the availability of adequate state protection; but that is a matter of evidence and judgment which arises once the persecution threshold has been passed.

Conclusion

39. I would allow this appeal to the extent of remitting it to a differently constituted Immigration Appeal Tribunal to be decided in accordance with the judgments of this court. I would not regard any issue as closed to either side which was available on the previous occasion, even if it was not in the event developed.

40. I would leave it to the President of the Immigration Appeal Tribunal to decide whether this case and the already remitted case of *B* should be heard together. There are obvious legal advantages to it, but there may be practical drawbacks.

Sir Murray Stuart-Smith:

41. I agree that this appeal should be allowed and the case remitted to the Immigration Appeal Tribunal for further consideration in the light of our judgments.

42. There were essentially two questions in this case:

(i) Was the ill-treatment to which this Appellant was subjected, assuming it was sufficiently serious to amount to persecution, for a Convention reason, or was it, as the tribunal thought, no more than what all detainees suspected of illegal conduct, are likely to face at the hands of the police?

(ii) Seeing that the ill treatment was at the hands of the police, who are normally to be regarded as the agents of the state, did the home state afford sufficient protection against it, such that the appellant does not require the surrogate protection of the UK?

43. For the reasons given in paragraphs 34 and 35 of the judgment of Sedley LJ I am left in doubt whether the Tribunal correctly addressed the first question, since the acceptance of Dr Popovski's evidence as there set out could lead to the conclusion that the ill-treatment could be for a Convention reason.

44. As to the second question I am also left in doubt whether the Tribunal sufficiently appreciated the different standard of protection that is required in the case of non-state agents, the pure *Horvath* situation, as opposed to that where the persecutors are the police. Like Simon Brown LJ I should make it plain that I do not think that the Tribunal were

necessarily wrong to reach the conclusion they did, but I am concerned that they did not give full weight to the fact that it was the state's officials who were concerned in this persecution and not non-state agents.

45. I would only wish to add one or two comments to what has been said by my Lords in relation to the standard of protection that should be considered sufficient where the police or other officials are involved.

46. First there is a danger in applying too literally Professor Hathaway's statement referred to in paragraph 16 of Sedley LJ's judgment - 'non-conforming behaviour by official agents which is not subject to a timely and effective rectification by the state'. If this is meant to mean that in every case of police brutality the offender is swiftly and successfully brought to justice. I cannot accept it. The state cannot guarantee protection. What has to be attained is:

> "A practical standard which takes proper account of the duty the state owes to all its nationals …." (per Lord Hope in *Horvath* [2001] 1 AC 489 500).
>
> "A system of domestic protection and machinery for the detection, prosecution and punishment of [persecution] … More importantly there must be an ability and a readiness to operate that machinery" [per Lord Clyde at p 510]

And I venture to repeat what I said in the Court of Appeal in that case, which appears to have been approved by the majority of their Lordships:-

> "To say that the protection must be effective suggests it must succeed in preventing attacks, which is something that cannot be achieved. Equally to say that the protection must be sufficient, begs the question, sufficient for what? 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. It must be remembered that inefficiency and incompetence is not the same as unwillingness, unless it is extreme and widespread. There may be many reasons why criminals are not brought to justice including lack of admissible evidence even where the best endeavours are made; they are not always convicted because of the high standard of proof required, and the desire to protect the rights of accused persons. Moreover, the existence of some policemen who are corrupt or sympathetic to the criminals, or some judges who are weak in the control of the court or in sentencing, 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."

Although these statements are made in this context of non-state agents, they are equally applicable in the present case, provided it is borne in mind that where the police are concerned a higher standard of protection is required.

47. Secondly I agree with Simon Brown LJ that the more senior the police officers are 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 I would also add that 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 that it can provide adequate protection. In the present case Mr Tam submitted to the court that the ill-treatment suffered by the Appellant was not sufficiently serious to amount to persecution. This does not seem to have been a point taken below, and like my Lords, I think it must be assumed that the Immigration Appeal Tribunal considered that it did pass the threshold of amounting to persecution. But nevertheless I think it is right to say that it falls towards the bottom end of the scale of what amounts to sufficiently serious ill-treatment to constitute persecution.

Lord Justice Simon Brown:

48. Sedley LJ's judgment fully sets out the facts, applicable law and arguments advanced on this appeal and my own judgment can be correspondingly short.

49. As I read the Immigration Appeal Tribunal's determination, the appellant failed in his appeal before them on two independent grounds: the Tribunal concluded first that such police brutality as the appellant was likely to suffer whilst detained in prison would be no worse because of his membership of the Communist Party than would be suffered by the general run of detained prisoners in Lithuania; and secondly that the authorities did not condone such police brutality, but rather had put in place systems to discipline individual officers who offended. (It seems to me plainly implicit in the Tribunal's determination that they, unlike the Adjudicator, regarded the brutality in question as "… meet[ing] the minimum level of severity to amount to either persecution or torture …" and I wholly concur with Sedley LJ's reasoning in paragraph 38 of his judgment for rejecting Mr Tam's submission to the contrary.)

50. To succeed before us, therefore, the appellant must show that the Tribunal erred in each of those two central conclusions. As to the first - that all those in police detention in Lithuania are equally at risk of brutality so that the appellant's (assumed) persecution would not be for a Convention reason - I agree with what Sedley LJ says at paragraphs 34 and 35 of his judgment. In short, whilst clearly it would be insufficient for the appellant to establish merely that "but for" his membership of the Communist party he would not be imprisoned and thereby exposed to police brutality, he overcomes this difficulty by pointing to those passages in the determination which appear to link the brutality of some officers to their lasting hostility towards Communism.

51. I turn, therefore, to the Tribunal's second critical finding, namely that the risk of brutality comes from individual police officers whose conduct the authorities, so far from condoning, are intent on punishing. This conclusion, as paragraph 14 of the Tribunal's determination makes plain, derives from their consideration of the Court of Appeal's (rather than the House of Lords') judgment in *Horvath* and the important question for our decision on this appeal is whether, and if so to what extent, the *Horvath* principle applies to persecution by officers of the state as opposed to non-state agents. By "the *Horvath* principle" I mean the principle that in the case of persecution by non-state agents no case for surrogate protection

by the international community (ie asylum) arises unless the home state fails to afford sufficient protection against it, "sufficient" for this purpose meaning

> "… a practical standard which takes proper account of the duty which the state owes to all its nationals …" (Lord Hope at [2001] 1 AC 489,500)
>
> "… a system of domestic protection and machinery for the detection, prosecution and punishment of [persecution] …. More importantly there must be an ability and a readiness to operate that machinery." (Lord Clyde at 510).

52. The appellant's most extreme argument would be that the *Horvath* principle simply has no application in the event of persecution by officers of the state - see in particular:

a) Lord Hope at 497:

> "In a case where the allegation is of persecution by the state or its own agents the problem does not, of course, arise. There is a clear case for surrogate protection by the international community. But in the case of an allegation of persecution by non-state agents, the failure of the state to provide the protection is nevertheless an essential element. It provides the bridge between persecution by the state and persecution by non-state agents which is necessary in the interests of the consistency of the whole scheme";

b) Lord Clyde at 514:

> "In that context [of deciding what is meant by persecution in the context of the Convention] it seems to me inevitable that the persecution to which the Convention refers is a persecution which takes account of the protection available. Of course where the state is itself through its agents the persecutor, the question does not require to arise. Active persecution by the state is the very reverse of protection. … It is in the context of persecution by third parties that the problem of protection becomes more significant."

53. For my part, however, I would reject so extreme an argument: 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, as Lord Clyde points out in the passage just quoted, where the state itself through its agents is actively persecuting the refugee, it is plainly not protecting him - quite the reverse. But that is only the position 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 what Professor Hathaway (in the passage cited in paragraph 16 of my Lord's judgment) calls "… non-conforming behaviour by official agents …".

54. 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.

55. With these thoughts in mind, I too would reject the Tribunal's conclusion on this part of the case: not, let me make plain, because I regard their findings as necessarily inconsistent with their entitlement to reject this asylum claim on the proper application of the *Horvath* principle, but rather because (without the advantage of our judgments) they evidently failed to recognise the particular importance of the fact that state officials were directly involved in this appellant's ill-treatment.

56. In the result, I too would allow this appeal and make the order proposed in paragraph 39 of Sedley LJ's judgment. The Tribunal next seised of the case will of course need to pay particular attention to the considerations raised in paragraphs 36 and 37 of that judgment.