HOUSE OF LORDS SESSION 2004–05
**[2004] UKHL 55**

*on appeal from: [2003]EWCA Civ 666*

# OPINIONS

# OF THE LORDS OF APPEAL

# FOR JUDGMENT IN THE CAUSE

**Regina**
***v.***
**Immigration Officer at Prague Airport and another (Respondents) *ex parte* European Roma Rights Centre and others (Appellants)**

ON
THURSDAY 9 DECEMBER 2004

The Appellate Committee comprised:

Lord Bingham of Cornhill
Lord Steyn
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell

**HOUSE OF LORDS**

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# Regina *v.* Immigration Officer at Prague Airport and another (Respondents) *ex parte* European Roma Rights Centre and others (Appellants)

**[2004] UKHL 55**

## LORD BINGHAM OF CORNHILL

My Lords,

1. At issue in this appeal is the lawfulness of procedures adopted by the British authorities and applied to the six individual appellants at Prague Airport in July 2001. All these appellants are Czech nationals of Romani ethnic origin ("Roma"). All required leave to enter the United Kingdom. All were refused it by British immigration officers temporarily stationed at Prague Airport. Three of these appellants stated that they intended to claim asylum on arrival in the UK. Two gave other reasons for wishing to visit the UK but were in fact intending to claim asylum on arrival. One (HM) gave a reason for wishing to visit the UK which the immigration officer did not accept: she may have been intending to claim asylum on arrival in the UK or she may not. The individual appellants, with the first-named appellant ("the Centre", a non-governmental organisation, based in Budapest, devoted to protection of the rights of Roma in Europe), challenge the procedures applied to the individual appellants as incompatible with the obligations of the UK under the Geneva Convention (1951) and Protocol (1967) relating to the Status of Refugees and under customary international law. They also challenge the procedures as involving unjustifiable discrimination on racial grounds.

*Background*

2. It is well known that the number of those seeking asylum in the UK has risen steeply in recent years. It is also well known that while a minority of asylum applications have succeeded, whether directly or on

appeal, a large majority have not. There is, as Burton J observed in paragraph 10 of his very lucid judgment in these proceedings ([2002] EWHC 1989 (Admin)), an "administrative, financial and indeed social burden borne as a result of failed asylum seekers".

3. An increasing number of applications for asylum in recent years have been made by Czech nationals. The number more than doubled from 515 in 1998 to 1200 in 2000. It is agreed that the vast majority (if not all) of these applications were made by Roma. At around this time Czech Roma generally had low levels of education, suffered from high unemployment and lived in relatively poor housing conditions. Some Roma may have faced discrimination from within Czech society in employment, education and access to services. Sporadic attacks by "skinheads" occurred. In some individual cases (it is agreed) discrimination and harassment may have been sufficiently severe to reach the level of persecution. But the success rate of asylum applications in this country was not high. Of 1800 asylum decisions affecting Czech applicants made by the Home Secretary in the year 2000, only ten were to grant asylum and a further ten to grant exceptional leave to remain. The success rate of asylum appeals by Czech nationals was around 6% at the beginning of 2001.

4. In February 2001 the governments of this country and the Czech Republic made an agreement. The effect of this was to permit British immigration officers to give or refuse leave to enter the UK to passengers at Prague Airport before they boarded aircraft bound for this country. The agreement was first implemented on 18 July 2001. British immigration officers were posted to Prague airport to "pre-clear" all passengers before they boarded flights for the UK. Leave to enter was granted to those passengers requiring it who satisfied the officers that they were intending to visit the UK for a purpose within the Immigration Rules. Others who required leave to enter, including those who stated that they were intending to claim asylum in the UK and those who the officers concluded were intending to do so, were refused leave to enter. This effectively prevented them from travelling to this country, since no airline would carry them here. This operation was mounted at Prague Airport intermittently, usually for a few days or weeks at a time, without advance warning. Its object was to stem the flow of asylum seekers from the Czech Republic. That was its effect. In the three weeks before the operation began there were over 200 asylum claims (including dependants) made by Czech nationals at entry points in the UK. Only 20 such claims were made in the three weeks after it began, during which period 110 intending travellers were refused leave to enter at Prague Airport. Among those refused leave to enter at this time were

the six individual appellants, to whom it is convenient to refer collectively as "the appellants".

*Domestic immigration legislation*

5. The domestic statute generally governing the administration of immigration control is the Immigration Act 1971. Under sections 1 and 2 of this Act, British and some Commonwealth citizens are in the ordinary way free to come and go from the UK without let or hindrance. Others are not permitted to enter unless given leave to do so under the Act (section 3). The power to give or refuse leave to enter is exercised by immigration officers (section 4). There are a number of grounds, specified in the Immigration Rules, on which leave to enter may be granted, as (for example) to visit or study. The Rules also specify grounds on which leave to enter will be refused, one of which (rule 320(1)) is that "entry is being sought for a purpose not covered by these Rules". By section 3A of the Act, inserted by section 1 of the Immigration and Asylum Act 1999, it was provided (so far as relevant):

> "(1) The Secretary of State may by order make further provision with respect to the giving, refusing or varying of leave to enter the United Kingdom.
>
> (2) An order under subsection (1) may, in particular, provide for -
>
> (a) leave to be given or refused before the person concerned arrives in the United Kingdom;
>
> (b) the form or manner in which leave may be given, refused or varied;
>
> (c) the imposition of conditions;
>
> (d) a person's leave to enter not to lapse on his leaving the common travel area.
>
> (3) The Secretary of State may by order provide that, in such circumstances as may be prescribed -
>
> (a) an entry visa, or
>
> (b) such other form of entry clearance as may be prescribed,
>
> is to have effect as leave to enter the United Kingdom."

It was in due course provided that visas were required to enter the UK by nationals or citizens of a large number of countries, not including the Czech Republic. It was also provided, in article 7 of the Immigration (Leave to Enter and Remain) Order 2000 (SI 2000/1161), as follows:

> "*Grant and refusal of leave to enter before arrival in the United Kingdom*
>
> 7. - (1) An immigration officer, whether or not in the United Kingdom, may give or refuse a person leave to enter the United Kingdom at any time before his departure for, or in the course of his journey to, the United Kingdom.
>
> (2) In order to determine whether or not to give leave to enter under this article (and, if so, for what period and subject to what conditions), an immigration officer may seek such information, and the production of such documents or copy documents, as an immigration officer would be entitled to obtain in an examination under paragraph 2 or 2A of Schedule 2 to the Act.
>
> (3) An immigration officer may also require the person seeking leave to supply an up to date medical report.
>
> (4) Failure by a person seeking leave to supply any information, documents, copy documents or medical report requested by an immigration officer under this article shall be a ground, in itself, for refusal of leave."

This provision was supplemented by a new rule 17A of the Immigration Rules, which provides:

> "*Persons outside the United Kingdom*
>
> Where a person is outside the United Kingdom but wishes to travel to the United Kingdom an Immigration Officer may give or refuse him leave to enter. An Immigration Officer may exercise these powers whether or not he is, himself, in the United Kingdom. However, an Immigration Officer is not obliged to consider an application for leave to enter from a person outside the United Kingdom."

*The Refugee Convention and its domestic effect*

6. The United Kingdom is one of some 140 states parties to the 1951 Refugee Convention. The broad aims of that Convention are reflected in its preamble:

> "*The High Contracting Parties,*
>
> Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,
>
> Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,
>
> Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,
>
> Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,
>
> Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,
>
> Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend

upon the co-operation of States with the High Commissioner,…..".

Under article 1A(2), the term "refugee" applies to any person who

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

For present purposes the most relevant articles of the Convention are articles 31, 32 and 33:

> "*Article 31. Refugees unlawfully in the country of refuge*
>
> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.
>
> *Article 32. Expulsion*
>
> 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

*Article 33. Prohibition of expulsion or return ('refoulement')*

1. No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

7. Under rule 16 of the Statement of Changes in Immigration Rules (1983)(HC 169) it was formerly provided:

> "Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugees (Cmd 9171 and Cmnd 3906). Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments …"

Despite this somewhat informal mode of incorporation Lord Keith of Kinkel, in *R v Secretary of State for the Home Department, Ex p Sivakumaran* [1988] AC 958, 990, observed that the provisions of the

Convention and Protocol had for all practical purposes been incorporated into United Kingdom law. But in 1993 steps were taken to strengthen the mode of incorporation by providing in primary legislation, in section 2 of the Asylum and Immigration Appeals Act 1993, headed "Primacy of Convention", that

> "Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention" [defined to mean the 1951 Convention and the Protocol]."

Plainly the Rules cannot provide for asylum applications to be handled less favourably to the applicant than the Convention requires.

8. The following immigration rules, relating to asylum, are relevant:

> "*Definition of asylum applicant*
>
> 327. Under these Rules an asylum applicant is a person who claims that it would be contrary to the United Kingdom's obligations under the United Nations Convention and Protocol relating to the Status of Refugees for him to be removed from or required to leave the United Kingdom. All such cases are referred to in these Rules as asylum applications.
>
> *Applications for asylum*
>
> 328. All asylum applications will be determined by the Secretary of State in accordance with the United Kingdom's obligations under the United Nations Convention and Protocol relating to the Status of Refugees. Every asylum application made by a person at a port or airport in the United Kingdom will be referred by the Immigration Officer for determination by the Secretary of State in accordance with these Rules.
>
> 329. Until an asylum application has been determined by the Secretary of State or the Secretary of State has issued a certificate under section 11 or section 12 of the Immigration and Asylum Act 1999, no action will be taken to require the departure of the asylum

applicant or his dependants from the United Kingdom.

330. If the Secretary of State decides to grant asylum and the person has not yet been given leave to enter, the Immigration Officer will grant limited leave to enter.

*Grant of Asylum*

334. An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:

(i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom; and

(ii) he is a refugee, as defined by the Convention and Protocol; and

(iii) refusing his application would result in his being required to go (whether immediately or after the time limited by an existing leave to enter or remain) in breach of the Convention and Protocol, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group.

335. If the Secretary of State decides to grant asylum to a person who has been given leave to enter (whether or not the leave has expired) or to a person who has entered without leave, the Secretary of State will vary the existing leave or grant limited leave to remain.

*Refusal of asylum*

336. An application which does not meet the criteria set out in paragraph 334 will be refused."

*The course of proceedings*

9. In their application for judicial review, the Centre and the appellants challenged the procedure adopted by the Immigration Officer at Prague Airport on the grounds, first, that it unlawfully discriminated against Roma on racial grounds and, secondly, that it was (put very generally) contrary to the obligations of the United Kingdom under the

1951 Convention and customary international law. Both these contentions were fully argued before Burton J, who rejected them in the judgment already referred to and dismissed the application. In the Court of Appeal (Simon Brown, Mantell and Laws LJJ) the Centre and the appellants again advanced both contentions, this time with the support of the United Nations High Commissioner for Refugees (represented by Mr Guy Goodwin-Gill) as intervener. All three members of the court held against the Centre and the appellants on the Convention and international law issue, and a majority (Simon Brown and Mantell LJJ, Laws LJ dissenting) on the discrimination issue also: [2003] EWCA Civ 666, [2004] QB 811.

10. Both issues (perhaps better described as groups of issues) have again been fully debated before the House, again with the benefit of Mr Goodwin-Gill's submissions on behalf of the UNHCR. On the discrimination issue, I am in full and respectful agreement with the opinion of my noble and learned friend Baroness Hale of Richmond and would, for the reasons which she gives, make the order which she proposes. I shall in this opinion address only the Convention and international law issue, as it is convenient to call it.

*The Convention and international law issue*

11. The power to admit, exclude and expel aliens was among the earliest and most widely recognised powers of the sovereign state. In England, it was a prerogative power of the crown. Sir William Holdsworth (*A History of English Law*, vol x, pp 395-396) considered Jeffreys CJ undoubtedly correct when he said in *The East India Company v Sandys* (1684) 10 ST 371, at pp 530-531:

> "I conceive the King had an absolute power to forbid foreigners, whether merchants or others, from coming within his dominions, both in times of war and in times of peace, according to his royal will and pleasure; and therefore gave safe-conducts to merchants strangers, to come in, at all ages, and at his pleasure commanded them out again."

But the crown's prerogative power over aliens was increasingly questioned, and since 1793 the power to exclude aliens has in this country been authorised by statute, whether temporary in effect (33

George III c.4; 56 George III c.86; 11 & 12 Victoria c.20) or permanent (for example, the Aliens Act 1905, the Aliens Restriction Act 1914).

12. It has been the humane practice of this and other states to admit aliens (or some of them) seeking refuge from persecution and oppression in their own countries. The generous treatment of French protestants in this country is an early and obvious example (see Holdsworth, *op cit*, vol IX, pp 100-101), and many later examples spring to mind. But even those fleeing from foreign persecution have had no right to be admitted and no right of asylum. There is a wealth of authority to this effect: see, for example, Blackstone, 1 *Commentaries*, p 251; *Musgrove v Toy* [1891] AC 272, 282; *R v Bottrill, Ex p Kuechenmeister* [1947] KB 41; *Ruddock v Vadarlis* [2001] FCA 1329, (2001) 183 ALR 1, para 125; Halsbury's *Laws of England*, 3rd ed (1952), vol 1, para 967. Three quotations will suffice. In *Attorney-General for Canada v Cain* [1906] AC 542, 546, the Privy Council held:

> "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel, Law of Nations, book 1, s 231; book 2, s 125."

In *Johnstone v Pedlar* [1921] 2 AC 262, 283, Lord Atkinson said:

> "Aliens, whether friendly or enemy, can be lawfully prevented from entering this country and can be expelled from it …"

More recently, in *T v Secretary of State for the Home Department* [1996] AC 742, 754, Lord Mustill said:

> "although it is easy to assume that the appellant invokes a 'right of asylum', no such right exists. Neither under international nor English municipal law does a fugitive

> have any direct right to insist on being received by a country of refuge. Subject only to qualifications created by statute this country is entirely free to decide, as a matter of executive discretion, what foreigners it allows to remain within its boundaries."

Over time there came to be recognised a right in sovereign states to give refuge to aliens fleeing from foreign persecution and to refuse to surrender such persons to the authorities of their home states: *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55, (2000) 204 CLR 1, paras 137-138; P Weis, "The United Nations Declaration on Territorial Asylum" (1969) CYIL 92, 95. But these rights were not matched by recognition in domestic law of any right in the alien to require admission to the receiving state or by any common law duty in the receiving state to give it.

13. The treatment of those seeking refuge from persecution in their home states was, pre-eminently, a field calling for international co-operation and agreement. Inter-governmental arrangements were made between certain states in 1922, 1924, 1926 and 1928, and in 1933 a Convention relating to the International Status of Refugees was made at Geneva under the auspices of the League of Nations. This was of limited application. Article 3 provided:

> "Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order.
>
> It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin …"

This language might be understood to oblige contracting states to admit refugees coming to seek asylum, but in the opinion of a respected commentator the word *refouler* in the authoritative French text was not used to mean "refuse entry" but "return" "reconduct" or "send back", and the provision did not refer to the admission of refugees but only to the treatment of refugees who were already in a contracting state: A Grahl-Madsen, *The Status of Refugees in International Law* (1972), vol

II, para 179(i). Further international conventions and arrangements were made in 1935, 1938, 1939 and 1946.

14. Article 14 of the Universal Declaration of Human Rights proclaimed in 1948 that

> "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

Those who drafted this provision rejected a proposal that a right to asylum should be granted, and Professor Hersch Lauterpacht described the formula adopted as "artificial to the point of flippancy": "The Universal Declaration of Human Rights" (1948) 25 BYIL 354, 373-374. See also F Morgenstern, "The Right of Asylum" (1949) 26 BYIL 327, 336-337; Grahl-Madsen, *op cit*, para 179 (ii).

15. The brutal persecutions and the mass displacements of people experienced during the 1930s and 1940s highlighted the need for a new international agreement on refugees. This was negotiated under the aegis of the newly-formed United Nations. The provisions most germane to this appeal have been quoted in paragraph 6 above, and need not be repeated. Nor need reference be made to the 1967 Protocol. But attention must be drawn to certain features of the Convention. First, it was (like its predecessor) a convention relating to the status of refugees. The focus of the Convention was on the treatment of refugees within the receiving state. Secondly, and like most international conventions, it represented a compromise between competing interests, in this case between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of sovereign states to maintain control over those seeking entry to their territory on the other: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 247-248, 274; *Rodriguez v United States* (1987) 480 US 522, 525-526. Thirdly, the Convention was exclusively directed to those who are "outside the country" of their nationality or, in the case of stateless persons, "outside the country" of their former habitual residence. It is only to persons meeting that definition, expressed in article 1A(2) of the Convention, that the Convention applies at all, unless they have been considered to be refugees under earlier arrangements. Fourthly, the Convention is directed towards those who are within the receiving state. Fifthly, the French verb *refouler* and the French noun *refoulement* are, in article 33, the subject of a stipulative definition: they must be

understood as having the meaning of the English verb and noun "return". The last three of these points merit some elaboration.

16. The requirement that a foreign national applying for refugee status must, to qualify as a refugee, be outside his country of nationality is unambiguously expressed in the Convention definition of refugee quoted in para 6 above. The point could not be more clearly expressed than in para 88 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1992):

> "It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country."

17. In his work *Convention Relating to the Status of Refugees* (Institute of Jewish Affairs, 1953), Nehemiah Robinson wrote:

> "Article 33 concerns refugees who have gained entry into the territory of a Contracting State, legally or illegally, but not to refugees who seek entrance into this territory. In other words, Article 33 lays down the principle that once a refugee has gained asylum (legally or illegally) from persecution, he cannot be deprived of it by ordering him to leave for, or forcibly returning him to, the place where he was threatened with persecution, or by sending him to another place where that threat exists, but that no Contracting State is prevented from refusing entry in this territory to refugees at the frontier. In other words, if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck."

This opinion was endorsed by Weis (*op cit*, pp 123-124) and Grahl-Madsen (*op cit*, p.94). It was upheld by a majority of the United States Supreme Court in *Sale, Acting Comr, Immigration and Naturalisation Service v Haitian Centers Council Inc* 509 US 155 (1993), p183, fn 40. It has been upheld by the High Court of Australia in *Minister for Immigration and Multicultural Affairs v Ibrahim*, above, para 136, and *Minister for Immigration and Multicultural Affairs v Khawar* [2002]

HCA 14, (2002) 210 CLR 1, para 42. In the last passage cited, McHugh and Gummow JJ said:

> "Rather, the protection obligations imposed by the Convention upon Contracting States concern the status and civil rights to be afforded to refugees who are within Contracting States."

The House was referred to no judicial authority to contrary effect. It has had the benefit of expert and authoritative commentary on the negotiations which culminated in the 1951 Convention, a legitimate guide to interpretation if the effect of a provision is in doubt and the travaux préparatoires yield a clear and authoritative answer: see article 32 of the Vienna Convention on the Law of Treaties. Those conditions are, in my opinion, met in this case when the scope of article 33 of the Convention falls to be considered. As appears from Weis, *The Refugee Convention 1951* (Cambridge, 1995, pp 328, 334, 335) and "The UN Declaration on Territorial Asylum" (1969) CYIL 92, 124, "expel" was understood to apply to a refugee who had already been admitted to the territory of a country. There was more doubt about the meaning of "*refouler*". It was however understood that the expression should have the same meaning as "return", applicable to refugees who had already entered a country but were not yet resident there. The potential ambiguity was resolved by agreement that the French word *refoulement* (*refouler* in verbal use) should be included in brackets and between inverted commas after the English word "return" wherever the latter appeared in the text. In 1967 the United Nations adopted a Declaration on Territorial Asylum which provided, in article 3, that no person entitled to invoke article 14 of the Universal Declaration of Human Rights should be subjected to measures such as rejection at the frontier, but a conference held in 1977 to embody this and other provisions in a revised convention ended in failure. As Gummow J put it in *Ibrahim* (2000) 204 CLR 1, para 142, in his judgment given in October 2000,

> "there have been attempts which it is unnecessary to recount here to broaden the scope of the Convention itself by a Draft United Nations Convention on Territorial Asylum but these collapsed more than twenty years ago."

18. Lord Lester of Herne Hill QC, for the appellants, did not seek to advance what would have been an impossible contention, that the appellants were covered by the express provisions of the 1951

Convention. Plainly they were not, for they had at no stage been outside the country of their nationality nor within this country and the procedures adopted by the British authorities at Prague airport did not involve expelling or returning them to the frontiers of the Czech Republic, a state they had never left. Instead, Lord Lester urged that the Convention should be given a generous and purposive interpretation, bearing in mind its humanitarian objects and purpose clearly stated in the preamble quoted in full in para 6 above. This is, in my opinion, a correct approach to interpretation of a convention such as this and it gains support, if support be needed, from article 31(1) of the Vienna Convention on the Law of Treaties which, reflecting principles of customary international law, requires a treaty to be interpreted in the light of its object and purpose. But I would make an important caveat. However generous and purposive its approach to interpretation, the court's task remains one of interpreting the written document to which the contracting states have committed themselves. It must interpret what they have agreed. It has no warrant to give effect to what they might, or in an ideal world would, have agreed. This would violate the rule, also expressed in article 31(1) of the Vienna Convention, that a treaty should be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context. It is also noteworthy that article 31(4) of the Vienna Convention requires a special meaning to be given to a term if it is established that the parties so intended. That rule is pertinent, first, because the Convention gives a special, defined, meaning to "refugee" and, secondly, because the parties have made plain that "*refouler*", whatever its wider dictionary definition, is in this context to be understood as meaning "return". It is in principle possible for a court to imply terms even into an international convention. But this calls for great circumspection since, as was said in *Brown v Stott* [2003] 1 AC 681, 703,

> "it is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree,"

and caution is needed

> "if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept."

19. In urging a broader and less literal approach to interpretation of the Convention, Lord Lester relied on article 26 of the Vienna Convention, entitled *Pacta sunt servanda*, which requires that a treaty in force should be performed by the parties to it in good faith and also on the requirement in article 31(1) that a treaty should be interpreted in good faith. Taken together, these rules call for good faith in the interpretation and performance of a treaty, and neither rule is open to question. But there is no want of good faith if a state interprets a treaty as meaning what it says and declines to do anything significantly greater than or different from what it agreed to do. The principle that *pacta sunt servanda* cannot require departure from what has been agreed. This is the more obviously true where a state or states very deliberately decided what they were and were not willing to undertake to do. The important backdrop to the Convention was well described by Hyndman, "Refugees under International Law with a Reference to the Concept of Asylum" (1986) 60 ALJ 148, 153, in a passage quoted by McHugh and Gummow JJ in *Khawar*, above, para 44:

> "States the world over consistently have exhibited great reluctance to give up their sovereign right to decide which persons will, and which will not, be admitted to their territory, and given a right to settle there. They have refused to agree to international instruments which would impose on them duties to make grants of asylum.
>
> Today, the generally accepted position would appear to be as follows: States consistently refuse to accept binding obligations to grant to persons, not their nationals, any rights to asylum in the sense of a permanent right to settle. Apart from any limitations which might be imposed by specific treaties, States have been adamant in maintaining that the question of whether or not a right of entry should be afforded to an individual, or to a group of individuals, is something which falls to each nation to resolve for itself."

While a state party must show good faith in interpreting and performing a treaty obligation, the International Court of Justice made plain in *In re Border and Transborder Armed Actions* (*Nicaragua v Honduras*) [1988] ICJ Rep 69, para 94, and repeated in *In re Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v Nigeria*) [1998] ICJ Rep 275, para 39, that

> "The principle of good faith is, as the Court has observed, 'one of the basic principles governing the creation and performance of legal obligations' …; it is not in itself a source of obligation where none would otherwise exist."

20. Lord Lester relied by analogy on the important decision of the European Court of Human Rights in *Golder v United Kingdom* (1975) 1 EHRR 524. In that case the applicant, while a serving prisoner, had sought to consult a solicitor with a view to issuing libel proceedings but had been denied access to the solicitor. He complained of interference with his article 6 right to a fair and public determination of his civil rights and obligations but faced the difficulty that, without legal help, he had been unable to initiate a proceeding to which his fair trial right could attach. Despite this difficulty his application succeeded and the Court held in paras 35-37:

> "35. … It would be inconceivable, in the opinion of the Court, that Article 6(1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.
>
> 36. Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6(1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6(1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (see the *Wemhoff* judgment of 27 June 1968, Series A no. 7, p.23, para. 8), and to general principles of law.
>
> The Court thus reaches the conclusion, without needing to resort to 'supplementary means of interpretation' as envisaged at Article 32 of the Vienna Convention, that Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the article embodies the 'right to a court', of which the right of access, that is

> the right to institute proceedings before courts in civil matters, constitutes one aspect only."

The analogical argument based on *Golder* is to the following effect: had the appellants not been effectively prevented by the UK authorities from travelling to this country, they could have done so and could on arrival have applied for asylum; that application would then have been assessed and, if the requisite grounds were established, granted; the British authorities' conduct in preventing the appellants travelling to the UK and failing to evaluate their asylum applications in Prague should not prejudice the appellants. There are, in my opinion, several reasons why this argument cannot prevail. In the first place, the Court's judgment in *Golder* was in large measure based on a detailed analysis of the French text of the European Convention and on the Court's interpretation of that Convention as a whole. But there are more fundamental objections. Nothing in Mr Golder's claim was inconsistent with any provision of article 6 or any other article of the European Convention, indeed the right claimed was held to be inherent in article 6. By contrast, the appellants' claim is inconsistent with the text of the Refugee Convention since it puts those expressly excluded from the protection of the Convention in the same position as those expressly included. It is a further point of distinction that Mr Golder on any showing had a right under article 6; the argument was as to the scope of that right. By contrast, the appellants had no right save such as might be correlative with the obligations undertaken by the United Kingdom in the 1951 Convention; but such obligations were dependent on the appellants being outside the state of their nationality, which they never were.

21. Reliance was also placed on the European Convention in a more direct way. Lord Lester accepted that the application of the Convention was essentially territorial, and acknowledged that, save for a fleeting reference in article 5(i)(f) and protocol number 4 (which the United Kingdom has not ratified), the Convention does not directly address issues of immigration and asylum. But there were, he submitted, situations in which a member state could, through the action of its agents outside its territory, assume jurisdiction over others in a way that could engage the operation of the Convention, and he suggested that this was one of them. The first of these points is correct, and also important. In *Bankovic v Belgium* (2001) 11 BHRC 435 the Court accepted (para 59) "that, from the standpoint of public international law, the jurisdictional competence of a state is primarily territorial", and added (para 67):

> "67. In keeping with the essentially territorial notion of jurisdiction, the court has accepted only in exceptional cases that acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of art 1 of the Convention."

Its conclusions, so far as relevant for present purposes, were expressed in paras 71 and 73:

> "71. In sum, the case law of the court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a contracting state is exceptional: it has done so when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government."

> "73. Additionally, the court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a state include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant state."

I have the very greatest doubt whether the functions performed by the immigration officers at Prague, even though they were formally treated as consular officials, could possibly be said to be an exercise of jurisdiction in any relevant sense over non-UK nationals such as the appellants. But even if this be assumed in the appellants' favour (as, on different facts, the Court of Appeal was content to assume in *R(B) v Secretary of State for the Foreign and Commonwealth Office* [2004] EWCA Civ 1344, 18 October 2004, para 66), the agreed facts summarised in para 3 above do not disclose any threat to life such as might engage article 2 of the European Convention or any risk of torture or inhuman or degrading treatment or punishment such as might engage article 3. The appellants were at all times free to travel to another country, or to travel to this country otherwise than by air from Prague. The appellants' position differs by an order of magnitude from that of

the Haitians, whose plight was considered in *Sale*, above, and whose treatment by the United States authorities was understandably held by the Inter-American Commission of Human Rights (Report No 51/96, 13 March 1997, para 171) to breach their right to life, liberty and security of their persons as well as the right to asylum protected by article XXVII of the American Declaration of the Rights and Duties of Man, of which the Commission found the United States to be in breach in para 163. The Commission also found the United States to be in breach of article 33(1) of the Refugee Convention: paras 156-158. This was a view shared by Blackmun J in his dissent in *Sale*. The facts differ from the present case since the Haitians, although they never reached the United States, were certainly outside Haiti, the country of their nationality.

22. With the strong and erudite support of Mr Goodwin-Gill, Lord Lester submitted, first, that customary international law is part of the common law and, secondly, that customary international law precludes a state from treating a potential or prospective applicant for asylum as the UK authorities treated the appellants, that is, by refusing them leave to enter and effectively thwarting their journey by air from Prague to the UK without examining the merits of any asylum claim the appellants, if allowed to travel, would make. I shall consider first the second of these submissions.

23. The conditions to be satisfied before a rule may properly be recognised as one of customary international law have been somewhat differently expressed by different authorities, but are not in themselves problematical. Guidance is given by the International Court of Justice in the *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) [1969] ICJ Rep 3, paras 70-71, on the approach where a treaty made between certain parties is said to have become binding on other states not party to the treaty:

> "70. The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention [on the Continental Shelf, 1958] no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of

subsequent State practice, - and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

71. In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained."

The relevant law was, I think, accurately and succinctly summarised by the American Law Institute in its *Restatement of the Foreign Relations Law of the United States (Third)* vol 1, 1986, para 102(2) and (3):

"(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted."

This was valuably supplemented by a comment to this effect:

"c. *Opinio juris.* For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation

> (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law. A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. It is often difficult to determine when that transformation into law has taken place. Explicit evidence of a sense of legal obligation (*e.g.*, by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions."

It is in my opinion clear, applying these principles, that even if the interpretation I have put on the Refugee Convention is accepted as correct, that is by no means the end of the appellants' international law argument. For the convention was made more than half a century ago. Since then the world has changed in very many ways. The existence of the Convention is no obstacle in principle to the development of an ancillary or supplementary body of law, more generous than the Convention in its application to those seeking asylum as refugees. That, essentially, is the argument advanced for the appellants.

24. The principles which should govern the treatment of those seeking asylum as refugees have continued to be the subject of continuing international discussion, and the appellants were able to point to a considerable body of material on the subject. I will refer to only some of it. In 1966 the Asian-African Legal Consultative Committee formulated the Bangkok Principles, which defined a refugee as one who had left the country of his nationality and provided that "A State has the sovereign right to grant or refuse asylum in its territory to a refugee". In 1967 the Committee of Ministers of the Council of Europe recommended (resolution (67)14) that member states should act in a particularly liberal and humanitarian spirit in relation to persons seeking asylum on their territory and that they should

> "in the same spirit, ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution …"

In 1977 the UNHCR Executive Committee (in Conclusion No 6 (XXVIII) "Non-Refoulement" *Report of the 28th Session*: UN doc A/AC. 96/549, para 53.4) reaffirmed

> "the fundamental importance of the observance of the principle of non-refoulement – both at the border and within the territory of a State of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees."

The same body reiterated in 1981 (Conclusion No 22 (XXXII, 1981, "Protection of Asylum-Seekers in Situations of Large-Scale Influx": *Report of the 32nd Session*: UN doc A/AC.96/601, para 57(2)) that

> "In all cases the fundamental principle of non-refoulement including non-rejection at the frontier must be scrupulously observed."

In 1984 the Committee of Ministers of the Council of Europe (Recommendation No R(84)1) adopted Resolution (67)14 and considered that the principle of non-refoulement had been recognised as a general principle applicable to all persons. In the same year a colloquium held at Cartagena, Colombia, on the international protection of refugees in Central America, Mexico and Panama reiterated

> "the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens."

The states parties to the 1951 Convention met at Geneva in December 2001 and adopted a Declaration (doc HCR/MMSP/2001/09, 16 January 2002) in which they called for universal adherence to the Convention and acknowledged

> "the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law."

The International Law Association, meeting in New Delhi in April 2002, referred in Resolution 6/2002 to "the fundamental obligation of States not to return (*refouler*) a refugee in any manner whatsoever to a country in which his or her life or freedom may be threatened" and declared:

> "1. Everyone seeking international protection as a refugee outside his or her country of origin and in accordance with the relevant international instruments should have access to a fair and effective procedure for the determination of his or her claim.
>
> 5. No one who seeks asylum at the border or in the territory of a State shall be rejected at the frontier, or expelled or returned in any manner whatsoever to any country in which he or she may be tortured or subjected to inhuman, cruel or degrading treatment or punishment, or in which his or her life or freedom may be endangered …"

Attention should lastly be drawn to General Comment No 31 ("The Nature of the General Legal Obligation Imposed on States Parties to [the International Covenant on Civil and Political Rights]") of the Human Rights Committee of the United Nations adopted on 29 March 2004:

> "10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States

> Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation."

The United Kingdom is a state party to the ICCPR but has not incorporated that Covenant (which contains no article specifically directed to asylum) into its domestic law.

25. The appellants rely very strongly on an Opinion given by Sir Elihu Lauterpacht QC and Daniel Bethlehem QC on "The scope and content of the principle of *non-refoulement*" published in *Refugee Protection in International Law* (ed Feller, Türk and Nicholson, Cambridge, 2003). Among the conclusions reached by these eminent authorities are these:

> "61. These principles will be particularly relevant to the determination of the application of the principle of *non-refoulement* in circumstances involving the actions of persons or bodies on behalf of a State or in exercise of governmental authority at points of embarkation, in transit, in international zones, etc. In principle, subject to the particular facts in issue, the prohibition on *refoulement* will therefore apply to circumstances in which organs of other States, private undertakings (such as carriers, agents responsible for checking documentation in transit, etc) or other persons act on behalf of a Contracting State or in exercise of the governmental activity of that State. An act of *refoulement* undertaken by, for example, a private air carrier or transit official acting pursuant to statutory authority will therefore engage the responsibility of the State concerned.

> 67. The reasoning in these cases supports the more general proposition that persons will come within the jurisdiction of a State in circumstances in which they can be said to be under the effective control of that State or are affected by those acting on behalf of the State more generally, wherever this occurs. It follows that the principle of *non-refoulement* will apply to the conduct of State officials or those acting on behalf of the State *wherever this occurs*, whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc."

Plainly, these observations are supportive of the appellants' case.

26. There would appear to be general acceptance of the principle that a person who leaves the state of his nationality and applies to the authorities of another state for asylum, whether at the frontier of the second state or from within it, should not be rejected or returned to the first state without appropriate enquiry into the persecution of which he claims to have a well-founded fear. But that principle, even if one of customary international law, cannot avail the appellants, who have not left the Czech Republic nor presented themselves, save in a highly metaphorical sense, at the frontier of the United Kingdom. Is there a rule of customary international law which provides that if a national of country A, wishing to travel to country B to claim asylum, applies in country A to officials of country B, he may not be denied leave to enter country B without appropriate enquiry into the merits of his asylum claim? It is an important question, since if there is such a rule it binds all states, the 140 or so states which are parties to the 1951 Convention and the 50 or so states which are not.

27. I think it a little doubtful whether a consensus of academic opinion has been demonstrated in favour of the rule for which the appellants contend. Even if it had, that would not be conclusive for, as Cockburn CJ said in *R v Keyn* (1876) 2 Ex D 63, 202,

> "even if entire unanimity had existed in respect of the important particulars to which I have referred, in place of so much discrepancy of opinion, the question would still remain, how far the law as stated by the publicists had received the assent of the civilized nations of the world.

> For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage …"

In considering whether the rule contended for has received the assent of the nations, it is pertinent to recall that the states parties to the 1951 Convention have not, despite much international discussion, agreed to revise its terms or extend its scope at any time since 1967. None of the citations in para 24 above is from a legislative instrument. The House was referred to no judicial decision supporting the rule contended for and a number of recent decisions (*Sale* in the United States, *Ibrahim* and *Khawar* in Australia) are inimical to it. Have the states in practice observed such a rule? It seems to me clear that they have not.

28. Section 1 of the Immigration (Carriers' Liability) Act 1987 provided that where a person requiring leave to enter the United Kingdom arrived in this country by ship or by aircraft and failed to produce a visa where required, the carrier by sea or air should be liable to pay a penalty of £2000. The visa regime and the imposition of liability on carriers were complementary measures intended to stem the flow of applicants for asylum, as Simon Brown LJ explained in *R v Secretary of State for the Home Department, Ex p Hoverspeed* [1999] INLR 591, 594-595:

> "What, then, is it which is said to justify placing these burdens, and most notably ICLA, upon carriers? The answer is said to be the imperative needs of immigration control in the face of ever-growing pressures from around the world. This too is deposed to in great detail by the respondent and once again I shall simplify it. In 1986 there was a significant increase in the number of asylum seekers, in particular from the Indian subcontinent and West Africa. In the result the visa requirement was extended to India, Pakistan, Bangladesh, Ghana and Nigeria. ICLA was passed as a necessary adjunct of the visa regime and, more generally, to complement immigration control and facilitate procedures at the port of

> entry. As the then Home Secretary, Mr Douglas Hurd, made plain at the second reading of the Bill in March 1987, it was intended to 'make it much more difficult for those who want to come to this country, but who have no valid grounds for doing so … It is also intended to stop abuse of asylum procedures by preventing people travelling here without valid documents and then claiming asylum before they can be returned'.
>
> The logical necessity for carriers' liability to support a visa regime is surely self-evident. Why require visas from certain countries (and in particular those from which most bogus asylum seekers are found to come) unless visa nationals can be prevented from reaching our shores? Their very arrival here otherwise entitles them to apply for asylum and thus defeats the visa regime. Without ICLA there would be little or no disincentive for carriers to bring them."

In an article published in 1998 ("United Kingdom: Breaches of Article 31 of the 1951 Refugee Convention" (1998) 10 Int J Refugee Law 205, 209-210), Richard Dunstan, formerly Refugee Officer, Amnesty International United Kingdom, graphically described the practice of some leading countries:

> "There can be little doubt that this pattern of the criminal conviction and imprisonment of would-be asylum-seekers for their use of false travel documents is related to the imposition of financial penalties under 'carrier sanctions' legislation in both the United Kingdom and North America. In recent years, and in common with many other western countries, the United Kingdom, Canada and the United States have imposed visa regimes on nationals of practically all significant refugee-producing countries, in an apparent attempt to reduce the number of would-be asylum-seekers from such countries arriving at their borders. These visa regimes have then been enforced by the imposition of heavy financial penalties on those transport operators bringing passengers lacking a valid visa where one is required. For example, under the Immigration (Carriers' Liability) Act 1987, the United Kingdom authorities impose a financial penalty of £2,000 per passenger brought without either a valid passport or a valid visa where one is required. Introducing this

> legislation in March 1987, the then Home Secretary, Douglas Hurd, stated that 'the immediate spur to this proposal has been the arrival of over 800 people claiming asylum in the three months up to the end of February 1987'. Between May 1987 and October 1996, fines totalling £97.6 million were imposed on over 440 airlines and shipping companies. The United Kingdom authorities have also provided training, advice and technical support in respect of the detection of false travel documents to airline staff based at various points of embarkation. In September 1996, for example, the Ethiopian News Agency (ENA) reported that the British Ambassador in Addis Ababa had recently donated forgery detection equipment to the Ethiopian Immigration Service; the same ENA report quoted the Ambassador as saying that a number of British immigration officers had spent two weeks in Addis Ababa in October 1995, training both Ethiopian immigration officers and Ethiopian Airline staff in the 'detection of forged documents and British visa and passport requirements'.
>
> Similarly, in the United States a financial penalty of US$3,000 per improperly-documented passenger may be imposed under section 273 of the Immigration and Nationality Act 1952, the penalty having been increased from US$1,000 in 1990. And in Canada a financial penalty of up to CAN$3,200 per improperly-documented passenger may be imposed under the Immigration Act 1976, as amended. As long ago as 1986, a total of 541 airlines were each fined CAN$1,000 by the Canadian authorities for not demonstrating sufficient vigilance in their checking of passengers' travel documents …"

A study conducted for the European Council on Refugees and Exiles, published in February 1999, showed that all states parties to the Schengen Convention, plus Norway and Iceland, who had concluded a parallel convention, had introduced a system of carriers' liability. Of 17 Western European countries only Ireland and Switzerland, at that time, had not. There was no evidence before the House to show the effect on prospective applicants for asylum of foreign countries' visa and carriers' liability regimes, but there is no reason to suppose that their effect is any different from our own. The evidence in the present case states that

> "But for the existence of the new pre-clearance powers under the 2000 Order, [the Home Secretary] may well have felt constrained to promote the introduction [of] a visa regime in respect of the Czech Republic, as has occurred (for example) with other countries that have generated large numbers of asylum applications."

Had a visa regime been imposed, the effect on the appellants, so far as concerned their applications for asylum, would have been no different. But it could not plausibly be argued that a visa regime would have been contrary to the practice of the nations. That conclusion must in my opinion apply also to the pre-clearance procedure which the appellants challenge. This makes it unnecessary to address the first submission recorded in para 22 above on the extent to which and the manner in which international law is or may become part of the common law.

29. I should briefly mention two additional arguments relied on by the appellants. It was said that the Prague Airport procedure violated the principle of legality. That principle is perhaps most clearly stated by Lord Hoffmann in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

This is an important and valuable principle. But it has no application to the present case, since the appellants enjoyed no right which, on any construction, Parliament had legislated to infringe or curtail.

30. It was argued on behalf of the three appellants who stated their purpose of seeking asylum to the immigration officers in Prague that leave to enter should not have been refused on the ground (rule 320 of the Immigration Rules: see para 5 above) that entry was being sought for a purpose not covered by the Rules. It was said that applying for asylum is a purpose covered by the Rules. It is of course true that the Rules lay down the procedure to be followed when an application for asylum is made. But it does not follow that applying for asylum is a purpose covered by the Rules, and it seems to me clear that it is not. Even if an application for asylum is duly made, this does not lead to the grant or refusal of leave to enter until the application is determined.

31. I am in full agreement with the opinion of my noble and learned friend, Lord Hope of Craighead, which I have had the opportunity to read in draft. For all these reasons, in essence those of the judge and the Court of Appeal, I would reject the appellants' arguments on the issues canvassed in this opinion. But the appeal must be allowed, for the reasons given by my noble and learned friend Baroness Hale.

**LORD STEYN**

My Lords,

32. In this appeal many significant issues have been debated. But surely the most important issue is whether the operation mounted by immigration officers at Prague Airport under the authority of the Home Secretary in 2001 and 2002 discriminated against Roma on grounds of their race. It is unlawful for public authorities, such as the Home Secretary and an immigration officer, to discriminate on racial grounds in carrying out any of their functions. The appellants put forward a case of direct discrimination on the grounds of race under the Race Relations Act 1976. The Home Secretary and the immigration officers strenuously denied that any discrimination had taken place. Mr Howell, who appeared on behalf of the Home Secretary and the immigration officer, invited the House of Lords to regard the allegations as very

serious. He submitted that the case of the appellants should be viewed with an initial scepticism that the United Kingdom could have put in place a system of discrimination on the grounds of race. That is how I will approach the matter.

33. The operation at Prague Airport is unique in the history of the immigration service. It was the first time such a procedure had been undertaken. And it has not been repeated. But the decision of the House transcends the particular circumstances of the case: it has implications for the responsibility of government not only for immigration policy but also for race relations policy generally.

34. The essential features of the operation can be stated quite simply. It was designed as a response to an influx of Czech Roma into the United Kingdom. The immigration officers knew that the reason why they were stationed in Prague was to stop asylum seekers travelling to the United Kingdom. They also knew that almost all Czech asylum seekers were Roma, because the Roma are a disadvantaged racial minority in the Czech Republic. Thus there was from the outset a high risk that individuals recognised as Roma would be targeted by specially intrusive and sceptical questioning. There was a striking difference in treatment of Roma and non Roma at the hands of immigration officers operating at Prague Airport. The statistics show that almost 90% of Roma were refused leave to enter and only 0.2% of non Roma were refused leave to enter. Roma were 400 times more likely than non Roma to be refused permission. No attempt was made by the Home Office to explain by the evidence of immigration officers the difference in treatment of Roma and non Roma. Although the Home Office was from the beginning on notice of the high risk of discrimination on grounds of race, no attempt was made to guard against discrimination.

35. New documents rightly produced by the Home Office during the hearing of the appeal are revealing. One extract is sufficient to show what immigration officers must have understood their functions at Prague Airport to involve:

> "The fact that a passenger belongs to one of these ethnic or national groups will be sufficient to justify discrimination - without reference to additional statistical or intelligence information - if an immigration officer considers such discrimination is warranted."

The immigration officers would have read this document in the light of a formal authorisation by the Secretary of State under section 19D of the Race Relations Act 1976. That authorisation purported to confer on immigration officers the express power to discriminate by reason of a person's ethnic origin against Roma. It is true that the Secretary of State does not rely on the authorisation. But it would have been known to immigration officers sent to Prague. Counsel for the Secretary of State argued that the authorisation was not in law an instruction. I would accept that. But the documents nevertheless reveal how immigration officers would have understood their principal task.

36. Following the principles affirmed by the House of Lords in *Nagarajan v London Regional Transport* [2000] 1 AC 501, there is in law a single issue: why did the immigration officers treat Roma less favourably than non-Roma? In my view the only realistic answer is that they did so because the persons concerned were Roma. They discriminated on the grounds of race. The motive for such discrimination is irrelevant: *Nagarajan v London Regional Transport, supra*.

37. The reasoning of the majority of the Court of Appeal in this case had at first glance the attractiveness of appearing to be in accord with common sense: *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] QB 811. Simon Brown LJ said (para 86, 840):

> "because of the greater degree of scepticism with which Roma applicants will inevitably be treated, they are more likely to be refused leave to enter than non-Roma applicants. But this is because they are less well placed to persuade the immigration office that they are not lying in order to seek asylum. That is not to say, however, that they are being stereotyped. Rather it is to acknowledge the undoubtedly disadvantaged position of many Roma in the Czech Republic. Of course it would be wrong in any individual case to assume that the Roma applicant is lying, but I decline to hold that the immigration officer cannot properly be warier of that possibility in a Roma's case than in the case of a non -Roma applicant. If a terrorist outrage were committed on our streets today, would the police not be entitled to question more suspiciously those in the vicinity appearing to come from an Islamic background?"

Mantell LJ agreed with this analysis. Laws LJ dissented. In "Equality: The Neglected Virtue" [2004] EHRLR 142, Mr Rabinder Singh QC convincingly exposed the flaw in the reasoning of the majority. He stated (at p154):

> "It is clear that there was less favourable treatment. It is also clear that it was on racial grounds. As all the judges acknowledged, the reason for the discrimination is immaterial: in particular, the absence of a hostile intent or the presence of a benign motive is immaterial. What the majority view amounts to is, on analysis, an attempt to introduce into the law of direct discrimination the possibility of justification. But Parliament could have provided for that possibility - as it has done in the context of allegations of indirect discrimination - and has chosen not to do so. In so far as the fields of immigration and nationality may be thought to require special treatment, permitting discrimination on certain grounds (ethnic or national origins) but not others (such as colour), again Parliament has catered for that possibility in enabling a minister to give an authorisation. The Government did not want to rely on the authorisation in the *Roma* case: that was a matter for its tactical choice but the courts should not bend over backwards to save the executive from what may have been its own folly. Their duty, as Laws LJ said, is to apply the will of Parliament as enacted in its laws. Moreover, the danger in the majority's reasoning is that it is capable of application outside the limited areas with which the Court was concerned. For example, it could be applied in the context of police stop and search powers. Simon Brown LJ expressly gives an example from just that context. This is potentially very damaging to race relations law going beyond what may have been perceived to be the problem in the *Roma* case itself."

I am in respectful agreement with this analysis. In my view the majority was wrong. Laws LJ was right.

38. I agree with the conclusion of Baroness Hale of Richmond that the system operated by immigration officers at Prague Airport was inherently and systemically discriminatory on racial grounds against Roma, contrary to section 1(1)(a) of the Race Relations Act.

39. It is now necessary to consider to what extent the operation at Prague Airport was also contrary to the obligations of the United Kingdom under international treaties to which the United Kingdom is a party and under customary international law.

40. It is necessary to consider the Convention relating to the Status of Refugees (1951). Article 3 provides as follows:

> "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."

Before I consider the reach of article 3, it is important to bear in mind the status of the Refugee Convention in United Kingdom in law. It is not a mere unincorporated treaty. Under rule 16 of the Statement of Changes in Immigration Rules (1983) (HC 169) it was formerly provided:

> "Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugees (Cmd 9171 and Cmnd 3906). Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments . . ."

In *R v Secretary of State for the Home Department, Ex p Singh*, The Times, June 8, 1987, the Divisional Court held that the Refugee Convention had "indirectly" been incorporated under English law. Later in the same year in *R v Secretary of State for the Home Department, Ex p Sivakumaran* [1988] AC 958, 990 Lord Keith of Kinkel observed that "The United Kingdom having acceded to the Convention and Protocol, their provisions have for all practical purposes been incorporated into United Kingdom law." Lord Bridge of Harwich, Lord Templeman and Lord Griffiths agreed with the opinion of Lord Keith. The difficulty is, however, that Immigration Rules are not law but merely instructions to immigration officers. *By themselves* they cannot effect an incorporation.

41. Against this background, Parliament decided to make reference to the Refugee Convention in primary legislation. Parliament was informed that the new provision was to be "an additional safeguard":

Hansard, Standing Committee A, 19 November 1992, col 151. Section 2 of the Asylum and Immigration Appeals Act 1993 provides:

> "Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention."

It is necessarily implicit in section 2 that no administrative practice or procedure may be adopted which would be contrary to the Convention. After all, it would be bizarre to provide that formal immigration rules must be consistent with the Convention but that informally adopted practices need not be consistent with the Convention. The reach of section 2 of the 1993 Act is therefore comprehensive.

42. Parliament must be taken to have been aware, in enacting the 1993 Act, that the courts had treated references in the immigration rules to the Refugee Convention as "indirectly" or "for practical purposes" incorporating it into domestic law: *Bennion, Statutory Interpretation,* 4th ed (2002), p 469. In the context of the decisions of the Court of Appeal and House of Lords in 1987 Parliament must have intended that the strengthened reference to the Refugee Convention in primary legislation would be treated by the courts as an incorporation of the Refugee Convention into domestic law. Moreover, the heading of section 2 is "Primacy of the Convention." This is a relevant and significant pointer to the overriding effect of the Convention in English law: *R v Montila and Others* [2004] UKHL 50, paras 31-37, per Lord Hope of Craighead. It is true, of course, that a convention may be incorporated more formally by scheduling it to an enactment, eg the Carriage of Goods by Sea Act 1971 which enacted the Hague-Visby Rules. But there is no rule specifying the precise legislative method of incorporation. It is also possible to incorporate a treaty in part, e.g. the European Convention on Human Rights was incorporated into our law without article 13: see Human Rights Act 1998. In my view it is clear that the Refugee Convention has been incorporated into our domestic law.

43. The question is whether, in addition to acting in breach of the Race Relations Act 1976, the immigration officers operating at Prague Airport were in breach of article 3 of the Refugee Convention as incorporated into United Kingdom law. Having given the matter careful consideration, I am driven to the conclusion that article 3 is not applicable. The non discrimination provision in article 3 is limited to

the application of "the provisions of this Convention." Article 3 does not contain a freestanding non discrimination provision. It resembles the weak provision in article 14 of the European Convention on Human Rights (1950). The appellants never left the Czech Republic and are therefore not "refugees" under article 1 of the Refugee Convention. They also never presented themselves at the frontier of the United Kingdom and properly construed the non-refoulement obligation under article 33 is not engaged. It is true, of course, that the Refugee Convention is a living instrument and must be interpreted as such. It must also be interpreted in accordance with good faith: article 31 of the Vienna Convention on the Law of Treaties. These are very important principles of interpretation. But they are not capable of filling gaps which were designedly left in the protective scope of the Refugee Convention. In my view there is no answer to the reasoning of Lord Bingham of Cornhill on these points.

44. It has been noted how in the early fifties weak non discrimination provisions were adopted in some early human rights treaties, namely in article 14 of the European Convention on Human Rights (1950) and articles 1 and 33 of the Refugee Convention (1951). But the strong moral condemnation of race discrimination in the Charter of the United Nations (1945) and in the Universal Declaration of Human Rights (1948) led in the sixties in more modern human rights instruments to the formulation of free standing non discrimination legal norms. The first of these treaties to be considered is the International Convention on the Elimination of All Forms of Racial Discrimination (1966). The first three preambles of this Convention read as follows:

> "*Considering* that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organisation, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,
>
> *Considering* that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

> *Considering* that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discriminate . . .

Article 2 provides:

> "1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
>
> (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
>
> (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any person . . ."

On 4 January 1969 this Convention entered into force. To date 169 states have become parties to it. On 6 April 1969 the United Kingdom ratified this treaty. The operation at Prague Airport placed the United Kingdom in breach of this international obligation.

45. The next relevant treaty provision is article 26 of the International Covenant on Civil and Political Rights (1966). It provides:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

On 23 March 1976 this Convention entered into force. To date 152 states have become parties. On 20 August 1976 the United Kingdom ratified this treaty. The United Kingdom purported to exercise governmental authority at Prague Airport. The operation carried out at Prague placed the United Kingdom in breach of the International Covenant.

46. Lastly, I turn to customary international law. The Universal Declaration of Human Rights (1948) was a proclamation of ethical values rather than legal norms. In article 1 it stated that "All human beings are born free and equal in dignity and rights." Article 2 expressly condemned distinctions of any kind on the grounds of race. The moral force of this instrument was enormous. The European Convention on Human Rights (1950) and the Refugee Convention (1951) are direct descendants of the Universal Declaration. But they contained relatively weak legal norms of non-discrimination. The great theme which runs through subsequent human rights instruments, national, regional and international, is the legal right of equality with the correlative right of non-discrimination on the grounds of race. Since 1965 international treaties have established comprehensive and strong legal norms against discrimination on the grounds of race. In 1970 the majority of the International Court, consisting of twelve judges, delivering judgment in *In re Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (second phase)* [1970] ICJ Rep 3, at paras 33-34 referred to obligations erga omnes (ie binding on all states and also having the status of peremptory norms [*jus cogens*]) in contemporary international law which included "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination." State practice virtually universally condemns discrimination on grounds of race. It does so in recognition of the fact that it has become unlawful in international law to discriminate on the grounds of race. It is true that in the world, as we know it, departures from this norm are only too many. But the international community has signed up to it. The moral norm has ripened into a rule of customary international law. It is binding on all states: see *Shaw, International Law,* 5th ed (2003), at p 257; *Meron, Human Rights and Humanitarian Norms as Customary Law,* 1989, at pp 95, 112, 118, 169, 184 and 191; and *Ragazzi, The Concept of International Obligations Erga Omnes,* 1997, Chapter 7. The operation at Prague Airport was also a breach of this rule of customary international law.

47. For these reasons, as well as the reasons given by Baroness Hale on the discrimination issue, I would allow the appeal and I would make the declaration which Baroness Hale proposes.

**LORD HOPE OF CRAIGHEAD**

My Lords,

48. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill on the asylum issue and Baroness Hale of Richmond on the discrimination issue. For the reasons which they have given, with which I am in full agreement, I would make the order that Lady Hale proposes. I should like to add just a few footnotes to what they have said.

*Rule 320 of the Immigration Rules*

49. Mention should be made of the appellants' argument that a decision to refuse leave to enter the United Kingdom was inconsistent with rule 320 of the Statement of Changes in Immigration Rules (1994) (HC 395). Lord Lester of Herne Hill QC chose, in the interests of time, not to develop this argument orally. But he adopted the arguments which were included in his written case, and I should like to say why, in agreement with Simon Brown LJ in the Court of Appeal [2004] QB 811, paras 52–54, I think that this argument too cannot be accepted.

50. These rules form part of the domestic legislation which was extended to the operation at Prague Airport in July 2001. They were made under section 3(2) of the Immigration Act 1971. This subsection permits the Secretary of State to make rules as to the practice to be followed in the administration of the Act for regulating the entry into and stay in the United Kingdom of persons required by the Act to have leave to enter. Immigration officers are required in the exercise of their functions to act in accordance with such instructions given to them by the Secretary of State as are not inconsistent with the immigration rules: 1971 Act, Schedule 2, para 1(3). It was the statement in para 16 of the former Statement of Changes in the Immigration Rules (1983) (HC 169) that where a person is a refugee full account shall be taken of the provisions of the Convention and Protocol relating to the Status of Refugees (Cmd 9171 and Cmnd 3906) ("the 1951 Convention") that enabled Lord Keith of Kinkel to observe in *R v Secretary of State for the Home Department, Ex p Sivakumaran* [1988] AC 958, 990 that their provisions had for all practical purposes been incorporated into United Kingdom law.

51. An updated statement of the immigration rules was laid before Parliament on 23 March 1990 (HC 251). It was further updated with effect from 1 October 1994 in the light of section 2 of the Asylum and Immigration Appeals Act 1993, which states that nothing in the immigration rules shall lay down any practice which would be contrary to the 1951 Convention. Further statements of changes have been issued from time to time. As at the relevant date the rules provided, among other things:

> "320. In addition to the grounds of refusal of entry clearance or leave to enter set out in Parts 2 – 8 of these Rules … the following grounds for the refusal of entry clearance or leave to enter apply:
>
> Grounds upon which entry clearance or leave to enter the United Kingdom is to be refused
>
> (1) the fact that entry is being sought for a purpose not covered by these Rules;
>
> …
>
> Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused
>
> ….
>
> 327. Under these Rules an asylum applicant is a person who claims that it would be contrary to the United Kingdom's obligations under the [1951 Convention] for him to be removed from or required to leave the United Kingdom. All such cases are referred to in these Rules as asylum applications.
>
> 328. All asylum applications will be determined by the Secretary of State in accordance with the United Kingdom's obligations under the [1951 Convention]. Every asylum application made by a person at a port or airport in the United Kingdom will be referred by the Immigration Officer for determination by the Secretary of State in accordance with these Rules.
>
> 334. An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that: (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;

> and (ii) he is a refugee, as defined by [the 1951 Convention]; and (iii) refusing his application would result in his being required to go (whether immediately or after the time limited by an existing leave to enter or remain) in breach of [the 1951 Convention], to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group.
>
> 336. An application which does not meet the criteria set out in paragraph 334 will be refused."

52. The appellants argue that the refusal to grant leave to enter the United Kingdom to the individual appellants who said when they were interviewed that they were intending to claim asylum there was not authorised by rule 320. This is because leave to enter was being sought "for a purpose" which was covered by the Rules, namely for the purpose of making a claim for asylum in the United Kingdom. Thus, so the argument runs, the immigration officers at Prague Airport should have allowed the appellants to travel to the United Kingdom, neither granting nor refusing them leave to enter, in the light of what they said their purpose was when they were being interviewed in Prague. This would have enabled a decision to be taken on their arrival in the United Kingdom, where the immigration officers would have been required by rule 328 to refer their applications to the Secretary of State. They would then have been given limited leave to enter or been detained pending the Secretary of State's decision on their applications.

53. We must take the Rules as we find them for the purposes of this argument. The one thing that is crystal clear is that the making of an asylum claim is not one of the purposes for which leave to enter may be given. Nor are there any rules which say that this is one of the purposes for which a person may seek leave to enter. The purposes to which rule 320 refers apply to particular categories of entrants for which the Rules in terms provide, such as visitors, students, family members, persons seeking to enter or remain in the United Kingdom for employment, for training or work experience, and so on. For each of these categories the Rules set out the matters about which the immigration officer must be satisfied. None of these categories includes the seeking of asylum or the status of a refugee. It is also to be noted that rule 334, which provides for the granting of asylum, adopts the language of the 1951 Convention without any modification or enlargement. The Secretary of State must be satisfied, among other things, that the applicant is in the United

Kingdom or has arrived at a port of entry in the United Kingdom and that he is a refugee as defined by the Convention. Plainly, neither of these requirements was satisfied in the case of the appellants. They were refused leave to enter while they were still at Prague Airport.

54. Recognising these difficulties, the appellants rely on the latter part of rule 320 which deals with cases which are not covered by other rules dealing with the grant or refusal of leave. In these cases, while leave to enter will "normally" be refused, the immigration officer is in terms of the rule not bound to refuse leave. But he is not bound to grant leave either. This is made clear by rule 17A of the Immigration Rules, inserted by Statement of Changes in Immigration Rules (2000) (HC 704), which provides that where a person is outside the United Kingdom but wishes to travel to the United Kingdom an immigration officer may give or refuse him leave to enter. The most that can be said is that, as the Secretary of State has power to grant exceptional leave to enter, such a person may be detained or granted temporary leave to enter pending a decision as to whether or not exceptional leave is to be granted.

55. The argument that the immigration officers at Prague Airport were not authorised by rule 320 to refuse leave to the appellants breaks down at this point. The appellants would have to show that the immigration officers were not authorised to refuse leave because the purpose for which the appellants were seeking to travel to the United Kingdom was one for which the Rules required that leave be granted. The latter part of rule 320 does not provide any support for that argument. The Rules lack any provision which requires that a person who wishes to claim asylum on arrival in the United Kingdom must be granted leave to enter before he begins his journey. As the respondents point out in their written case (para 123), visas are granted or refused on the same basis as leave to enter. There is no obligation under the Rules to grant a visa to a person who wishes to travel in order to seek asylum in this country. Equally there is no obligation to grant him leave to enter for this purpose.

56. For these reasons I am in no doubt that the argument which was based on rule 320 of the Immigration Rules must be rejected.

*Good faith as a source of law*

57. Lord Lester made much in the course of his argument of what he described as the obligation of good faith. He said that the actions of the immigration officers at Prague Airport were in breach of the 1951 Convention because their actions were designed, in breach of what he described as the obligation of good faith, to frustrate the central purposes of the Convention. This argument was supported by Mr Goodwin-Gill for the intervener. But he described good faith not as an obligation but as a principle. As he put in his written case, good faith is a general principle of customary international law which requires states, among other things, to exercise their rights consistently with their other obligations. Replying to the respondents' argument that the principle had no application in this case because it cannot give rise to new obligations, he said that no new obligations were in issue here. What was in issue was the lawfulness of measures that were taken to prevent the Convention ever being triggered. A state lacked good faith in the implementation of a treaty when it sought to avoid or to divert the obligation which is has accepted, or to do what it is not permitted to do directly.

58. This argument is attractive because it appears, if sound, to provide a neat and logical solution to the problem which faithful adherence to the language of the Convention presents. But it needs to be approached with caution. Lord Lester's description of good faith as an obligation is apt to mislead if taken out of context. Rules such as those on the observance of treaties described in articles 26 and 31 of the Vienna Convention on the Law of Treaties (1980) (Cmnd 7964), which provide that every treaty in force must be performed by the parties to it in good faith and that a treaty shall be interpreted in good faith, may be described as obligations. They are specific rules by which the parties to the Convention have agreed to be bound. But to describe good faith generally as an obligation suggests that good faith has a life and energy of its own. It suggests that it can operate outside the obligations which a treaty creates, by enlarging their scope beyond that which the parties agreed to when they signed up to it. And even if one adopts Mr Goodwin-Gill's more accurate approach to it as a principle, care still needs to be taken lest the boundaries of its operation are exceeded and it is used to enlarge what parties have agreed to, rather than to ensure fair dealing in the performance of the agreement and the exercise of the rights and duties which have been created by it.

59. The limited way in which the principle operates can be seen in the field of private law, where its origins lie. The modern theory of contract is derived from the consensual contracts of Roman law which are said to have been governed by the principle of bona fides: Reinhard Zimmermann, *The Law of Obligations* (1992), p 674. There are differences between the legal systems as to how extensive and how powerful the penetration of the principle has been. They range from systems in the civilian tradition where as a guideline for contractual behaviour the principle is expressly recognised and acted upon, to those of the common law where a general obligation to conform to good faith is not recognised. In an appeal in a Scottish case, *Smith v Bank of Scotland* 1997 SC (HL) 111, 121B Lord Clyde referred to "the broad principle in the field of contract law of fair dealing in good faith." The preferred approach in England is to avoid any commitment to over-arching principle, in favour of piecemeal solutions in response to demonstrated problems of unfairness: *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, 439, per Bingham LJ. The same result is reached by other means: Ole Lando and Hugh Beale, *Principles of European Contract Law*, Parts I and II (2000), p 116, note 1; Ewan McKendrick, *Contract Law* (2003), pp 533-535.

60. But, as Hector MacQueen, "Delict, Contract, and the Bill of Rights: a Perspective from the United Kingdom" (2004) 121 South African LJ 359, 382, points out, good faith in Scottish contract law, as in South African law, is generally an underlying principle of an explanatory and legitimating rather than an active or creative nature: see also his chapter on good faith in the Scots law of contract in *Good Faith in Contract and Property Law*, ed ADM Forte (Harte Publishing, 1999). That was so in Roman law, which distinguished between obligations *bona fidei* and *stricti iuris*, and enabled the *iudex* in the former case to provide remedies on grounds of good faith in *bonae fidei judicia:* Buckland, *A Text-Book of Roman Law*, 2nd ed (1932), pp 678, 704. It was a distinction which applied properly to the remedy, rather than to the obligation. It was not a source of obligation in itself. That remains generally true today in the civilian systems, which recognise the principle.

61. Against this background we ought not to be surprised that much of the development of international law, representing what has been agreed among nations, has been informed by the same principle and that it uses it in practice in the same way. Article 2 of the United Nations Charter (1945) provides that the principles in pursuance of which the Organization and its Members shall act include the principle in para 2 of the article, which states that all members "shall fulfil in good faith the

obligations assumed by them in accordance with the present Charter." The principle of good faith was explained by Sir Gerald Fitzmaurice, a former Judge of the International Court of Justice, "The Law and Procedure of the International Court of Justice: General Principles and Sources of Law" (1950) 27 BYIL 1, 12-13:

> "The essence of the doctrine is that although a State may have a strict right to act in a particular way, it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have bona fide reasons for what it does, and not act arbitrarily or capriciously."

The preamble to the Vienna Convention notes that "the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognised." In *In re Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, 268, para 46, the International Court of Justice stated that good faith is one of the basic principles governing the creation and performance of legal obligations, whatever their source. It has been said that good faith presents itself as an absolutely necessary ingredient to the operation of the whole international legal order: Michel Virally, "Review Essay: Good Faith in Public International Law" (1983) 77 AJIL 130, 133.

62. But it is one thing for good faith to present itself as a principle of general application, as it is in these materials. It is another for it to be appealed to as a source of obligation in itself. It is here that caution is needed. In *In re Border and Transborder Armed Actions (Nicaragua v Honduras)* [1988] ICJ Rep 69, 105, para 94 the International Court of Justice referred to its observations in the *Nuclear Tests* case about the basic principle, adding that good faith "is not in itself a source of obligation where none would otherwise exist." This proposition was reaffirmed in *In re Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* [1998] ICJ Rep, 275, 297, para 39. In his review essay on *La Bonne Foi en Droit International Public* by Elisabeth Zoller (Paris, 1977) Michel Virally criticises her conclusion that, as good faith is not an autonomous source of legal rights and duties, no general obligation to behave in good faith exists in public international law (1983) 77 AJIL 130, 131. The view which he takes, which I for my part would accept, is that good faith really is a principle of international law, that all the actors in the international legal order are subjected to it and that they must endure its consequences, since good

faith will serve to determine both the legal effects of their declarations and behaviour and the extent of their duties: p 133. But he also accepts it as true that, in practice, this general principle of law has only marginal value as an autonomous source of rights and duties and that, on this point, M Zoller's conclusions cannot be faulted. As he puts it, good faith is always related to specific behaviour or declarations. What it does is invest them with legal significance and legal effects: pp 133-134.

63. The question then is whether the appellants are seeking to do no more by appealing to this principle than insist that the rights and obligations which the 1951 Convention creates are exercised within the law, as Mr Goodwin-Gill put it, or whether they are seeking to enlarge what it provides so as to impose new obligations on the contracting states. In my opinion the answer to this question must be found in the language of the Convention, interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, as article 31 of the Vienna Convention requires. The argument that good faith requires the state to refrain from actions which are incompatible with the object and purpose of the treaty can only be pressed so far. Everything depends on what the treaty itself provides.

64. Nobody now seeks to argue that the operations which were carried out at Prague Airport were in breach of article 33, even on the most generous interpretation that could be given to it. What the Convention does is assure refugees of the rights and freedoms set out in Chapters I to V when they are in countries that are not their own. It does not require the state to abstain from controlling the movements of people outside its borders who wish to travel to it in order to claim asylum. It lacks any provisions designed to meet the additional burdens which would follow if a prohibition to that effect had been agreed to. The conclusion must be that steps which are taken to control the movements of such people who have not yet reached the state's frontier are not incompatible with the acceptance of the obligations which arise when refugees have arrived in its territory. To argue that such steps are incompatible with the principle of good faith as they defeat the object and purpose of the treaty is to argue for the enlargement of the obligations which are to be found in the Convention. For the reasons that I have given, I am not persuaded that this is the way in which the principle of good faith can operate.

*The Sale case: refoulement*

65. Lord Lester sought to build on the criticism of the decision of the US Supreme Court in *Sale, Acting Comr, Immigration and Naturalisation Service v Haitian Centers Council Inc* (1993) 509 US 155 in Report No 51/96 by the Inter-American Commission for Human Rights. The question in that case was whether an executive order directing the US Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they qualified as refugees violated article 243(h)(1) of the Immigration and Nationality Act 1952 and article 33 of the 1951 Convention. The Supreme Court held, Blackmun J dissenting, that the executive order was lawful. At p 187 Stevens J, speaking for the majority said:

> "Even if we believed that Executive Order 12807 violated the intent of some signatory states to protect all aliens, wherever they might be found, from being transported to potential oppressors, we must acknowledge that other signatory states carefully – and successfully – sought to avoid just that implication. The negotiating history, which suggests that the Convention's limited reach resulted from a deliberate bargain, is not dispositive, but it solidly supports our reluctance to interpret article 33 to impose obligations on the contracting parties that are broader than the text commands. We do not read that text to apply to aliens interdicted on the high seas."

66. The Inter-American Commission said that it preferred the dissenting opinion of Blackmun J for the reasons given in the amicus brief filed for the Office of the UNHCR. He rejected the view of the majority at p 180 that the word "return" in article 33, reinforced by the word "refouler" in parenthesis, had a narrower meaning than its common meaning. At pp191-193 he said that ordinary meaning of the word "refouler" (which he took to mean to repulse, drive back or repel) strongly reinforced the straightforward interpretation of the duty of non-return, that the text of article 33 was clear and that, whether the operative term was "return" or "refouler", it prohibited the Government's actions. In the Court of Appeal [2004] QB 811, para 34 Simon Brown J said:

> "For present purposes I propose to regard the *Sale* case as wrongly decided; it certainly offends one's sense of fairness."

67. Blackmun J's dissenting opinion was invoked by Lord Lester in support of his argument that the actions of the immigration officers at Prague Airport were contrary to the principle of non-refoulement as that principle was now recognised in customary international law. The executive order required the US Coast Guard to drive back or repel the Haitian asylum seekers, forcing them to return to their country of origin. That, he said, was the effect of the pre-clearance scheme, which was another example of an act in breach of the principle. He recognised, of course, that those who were dealt with at Prague Airport were in a different position from those who were turned back in the Haitians' case, who were undoubtedly refugees as defined by article 1A of the Convention when they were intercepted on the high seas as, assuming the other conditions were satisfied, they were outside the country of their nationality. But he submitted that the application of the refoulement principle by Blackmun J to the Haitians' case was directly comparable.

68. I do not, with respect, think that the *Sale* case was wrongly decided. The issue in that case was not as to what was or was not fair. The majority recognised the moral weight of the argument that a nation should be prevented from repatriating refugees to their potential oppressors whether or not the refugees were within that nation's borders: p 187. But in their opinion both the text and the negotiating history of article 33 affirmatively indicated that it was not intended to have extraterritorial effect. Judicial support for this view is found in the opinion of Gummow J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225,273-274 and in the other authorities which Lord Bingham has referred to.

69. As for the word "refouler", the dictionaries show both that there are many possible translations of it and that it is not an exact synonym for the English word "return" to which it has been attached in parenthesis by article 33. Le Trésor de la Langue Française informatisé, in the version dated 10 December 2002, gives a variety of meanings of the word, depending on what one is talking about. Its use in the medical and military contexts is referred to, as also is a description of the movement achieved by shunting a train. Its meaning in international law, in the context of "refoulement des étrangers", is said to be "acte par lequel la police des frontières s'oppose à l'entrée sur le territoire d'un

État d'un ressortissant étranger qui cherche à y pénétrer." This definition indicates an acceptance in contemporary usage of the wider meaning that Lord Lester was contending for. But the crucial question for present purposes is what the phrase "expel or return [refouler]" was understood to mean in 1951 when it was adopted by the Convention.

70. On this point I agree with the majority in the *Sale* case. The materials quoted in footnote 40 to their opinion provide ample support for the proposition that the word "return" in article 33 is not an exact synonym for the word "refouler." It refers to a refugee who is within the territory but is not yet resident there – to a person who has crossed the border and is on the threshold of initial entry, as it was put in *Shaughnessy v United States, ex rel Mezei* (1953) 345 US 206, 212. Grahl-Madsen, *The Status of Refugees in International Law* (1972), p 94 states that the prohibition of non-refoulement may only be invoked in respect of persons who are already present in the territory of the contracting state, and that article 33 does not oblige it to admit any person who has not set foot there.

71. The majority in *Sale* concluded their discussion of the meaning to be given to the text of the Convention with these words, at p 183:

> "The drafters of the Convention and the parties to the Protocol – like the drafters of 243(h) – may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of article 33; but a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions."

I see no reason to disagree with this assessment.

**BARONESS HALE OF RICHMOND**

My Lords,

72. On the asylum issue, I am in full and respectful agreement with the reasoning and conclusions of my noble and learned friend, Lord Bingham of Cornhill. A quite separate issue is whether the operation at Prague Airport was carried out in an unlawfully discriminatory manner, in that would-be travellers of Roma origin were treated less favourably than non-Roma were. In particular, it is alleged that they were subjected to longer and more intrusive questioning, they were required to provide proof of matters which were taken on trust from non-Roma, and far more of them were refused leave to enter than were non-Roma. The appellants seek a declaration to that effect.

73. Since 1968, it has been unlawful for providers of employment, education, housing, goods and other services to discriminate against individuals on racial grounds. The current law is contained in the Race Relations Act 1976, which in most respects is parallel to the Sex Discrimination Act 1975. The principles are well known and simple enough to state although they may be difficult to apply in practice. The underlying concept in both race and sex discrimination laws is that individuals of each sex and all races are entitled to be treated equally. Thus it is just as discriminatory to treat men less favourably than women as it is to treat women less favourably than men; and it is just as discriminatory to treat whites less favourably than blacks as it is to treat blacks less favourably than whites. The ingredients of unlawful discrimination are (i) a difference in treatment between one person and another person (real or hypothetical) from a different sex or racial group; (ii) that the treatment is less favourable to one; (iii) that their relevant circumstances are the same or not materially different; and (iv) that the difference in treatment is on sex or racial grounds. However, because people rarely advertise their prejudices and may not even be aware of them, discrimination has normally to be proved by inference rather than direct evidence. Once treatment less favourable than that of a comparable person (ingredients (i), (ii) and (iii)) is shown, the court will look to the alleged discriminator for an explanation. The explanation must, of course, be unrelated to the race or sex of the complainant. If there is no, or no satisfactory explanation, it is legitimate to infer that the less favourable treatment was on racial grounds: see *Glasgow City Council v Zafar* [1997] 1 WLR 1659, approving *King v Great Britain-China Centre* [1992] ICR 516. If the difference is on racial grounds, the

reasons or motive behind it are irrelevant: see, for example, *Nagarajan v London Regional Transport* [2000] 1 AC 501.

74. If direct discrimination of this sort is shown, that is that. Save for some very limited exceptions, there is no defence of objective justification. The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping. Even if, for example, most women are less strong than most men, it must not be assumed that the individual woman who has applied for the job does not have the strength to do it. Nor, for that matter, should it be assumed that an individual man does have that strength. If strength is a qualification, all applicants should be required to demonstrate that they qualify.

75. The complaint in this case is of direct discrimination against the Roma. Indirect discrimination arises where an employer or supplier treats everyone in the same way, but he applies to them all a requirement or condition which members of one sex or racial group are much less likely to be able to meet than members of another: for example, a test of heavy lifting which men would be much more likely to pass than women. This is only unlawful if the requirement is one which cannot be justified independently of the sex or race of those involved; in the example given, this would depend upon whether the job did or did not require heavy lifting. But it is the requirement or condition that may be justified, not the discrimination. This sort of justification should not be confused with the possibility that there may be an objective justification for discriminatory treatment which would otherwise fall foul of article 14 of the European Convention on Human Rights.

76. Discrimination law has always applied to public authority providers of employment, education and housing, and other services, as long as these services are of a similar kind to those which may be supplied by private persons. But a majority of this House held, in *R v Entry Clearance Officer, Bombay, Ex p Amin* [1983] 2 AC 818, that it did not apply to acts done on behalf of the Crown which were of an entirely different kind from any act that would ever be done by a private person, in that case to the application of immigration controls. This is still the case for sex discrimination, but the race discrimination law was changed in response to the MacPherson Report into the Stephen Lawrence case. It is now unlawful for a public authority to discriminate

on racial grounds in carrying out any of its functions. There are, however, a few exceptions and qualifications, one of which is relevant to this case.

77. The amendments came into force on 2 April 2001. The relevant provisions of the Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000, at the material time (they have been further amended since) were as follows:

"1 Racial discrimination

(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if-

(a) on racial grounds he treats that other less favourably than he would treat other persons; or

(b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but –

(i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and

(ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and

(iii) which is to the detriment of that other because he cannot comply with it.

…

3 Meaning of 'racial grounds', 'racial group' etc

(1) In this Act, unless the context otherwise requires-

'racial grounds' means any of the following grounds, namely colour, race, nationality or ethnic or national origins;

'racial group' means a group of persons defined by reference to colour, race, nationality or ethnic or national

origins, and references to a person's racial group refer to any racial group into which he falls.

…

(4) A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1) . . .must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

…

19B Discrimination by public authorities

(1) It is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination.

(2) In this section 'public authority'-

(a) includes any person certain of whose functions are functions of a public nature; but

(b) does not include any person mentioned in subsection (3).

…

19C Exceptions or further exceptions from section 19B for judicial and legislative acts etc

(4) Section 19B does not apply to any act of, or relating to, imposing a requirement, or giving an express authorisation, of a kind mentioned in section 19D(3) in relation to the carrying out of immigration and nationality functions.

…

19D Exception from section 19B for certain acts in immigration and nationality cases

(1) Section 19B does not make it unlawful for a relevant person to discriminate against another person on grounds of nationality or ethnic or national origins in carrying out immigration and nationality functions.

(2) For the purposes of subsection (1), 'relevant person' means

(a) a Minister of the Crown acting personally; or

(b) any other person acting in accordance with a relevant authorisation.

(3) In subsection (2), 'relevant authorisation' means a requirement imposed or express authorisation given-

(a) with respect to a particular case or class of case, by a Minister of the Crown acting personally;

(b) with respect to a particular class of case-

(i) by any of the enactments mentioned in subsection (5), or

(ii) by any instrument made under or by virtue of any of those enactments.

(4) For the purposes of subsection (1) 'immigration and nationality functions' means functions exercisable by virtue of any of the enactments mentioned in subsection (5).

(5) Those enactments are-

(a) the Immigration Acts (within the meaning of the Immigration and Asylum Act 1999 but excluding sections 28A to 28K of the Immigration Act 1971 so far as they relate to offences under Part III of that Act); . . ."

78. The effect, therefore, is to exempt an immigration officer from the requirement not to discriminate if he was acting under a relevant authorisation, that is a requirement or express authorisation given by a Minister of the Crown acting personally (or by the law itself, but that does not arise here). Shortly before the Prague operation began on 18 July 2001, the Minister had made the Race Relations (Immigration and Asylum) (No 2) Authorisation 2001, which came into force in April 2001, at the same time as the 2000 Act amendments. The operative parts are as follows:

**"DISCRIMINATION ON GROUND OF ETHNIC OR NATIONAL ORIGIN**

**Examination of passengers**

2. Where a person falls within a category listed in the Schedule and is liable to be examined by an immigration officer under paragraph 2 of Schedule 2 to the Immigration Act 1971 the immigration officer may, by reason of that person's ethnic or national origin -

(a) subject the person to a more rigorous examination than other persons in the same circumstances;

(b) exercise powers under paragraphs 2(3), 2A, 4 and 21 of Schedule 2 to the Immigration Act 1971;

(c) detain the person pending his examination under paragraph 16 (1) of Schedule 2 to the Immigration Act 1971;

(d) decline to give the person's notice of grant or refusal of leave to enter in a form permitted by Part III of the Immigration (Leave to Enter and Remain) Order 2000; and

(e) impose a condition or restriction on the person's leave to enter the United Kingdom or on his temporary admission to the United Kingdom.

**Persons wishing to travel to the United Kingdom**

(3) Where a person falls within a category listed in the Schedule and is outside the United Kingdom but wishes to travel to the United Kingdom, an immigration officer or, as the case may be, the Secretary of State may, by reason of that person's ethnic or national origin-

(a) decline to give or refuse the person leave to enter before he arrives in the United Kingdom; and

(b) exercise the powers to seek information and documents under articles 7(2), 7(3) and 13(8) of the Immigration (Leave to Enter and Remain) Order 2000."

79. Among the ethnic or national origins listed in the Schedule were Roma.

80. When these proceedings were begun on 18 October 2001, the claimants assumed that the immigration officers in Prague were operating under this Authorisation. The claim form therefore attacked the validity of the Authorisation. However, it is and has always been the respondents' case that the Authorisation did not apply to the Prague operation. Their case is not that the officers were discriminating lawfully but that they were not discriminating at all. Burton J accepted that they were not. Some individual differences in treatment were

explicable, not by ethnic difference, but by more suspicious behaviour. There were too few instances of inexplicable differences in treatment to justify a general conclusion. The difference between the proportion of Roma and non-Roma refused entry was explicable by reference to the proportions of Roma and non-Roma who were likely to seek asylum.

81. The Court of Appeal accepted that the judge was entitled to find that the immigration officers tried to give both Roma and non-Roma a fair and equal opportunity to satisfy them that they were coming to the United Kingdom for a permitted purpose and not to claim asylum once here. But they considered it 'wholly inevitable' that, being aware that Roma have a much greater incentive to claim asylum and that the vast majority, if not all, of those seeking asylum from the Czech Republic are Roma, immigration officers will treat their answers with greater scepticism, will be less easily persuaded that they are coming for a permitted purpose, and that 'generally, therefore, Roma are questioned for longer and more intensively than non-Roma and are more likely to be refused leave to enter than non-Roma' (Simon Brown LJ, paras 66 - 67). Laws LJ referred to the last of these propositions as 'plainly true on the facts of this case' (para 102). Simon Brown LJ, with whom Mantell LJ agreed, held that nevertheless this was not less favourable treatment, or if it was, it was not on racial grounds. The Roma were not being treated differently *qua* Roma but *qua* potential asylum-seekers. Laws LJ considered it 'inescapable' that this was less favourable treatment (para 102). He also concluded (para 109) that this was discrimination:

> "One asks Lord Steyn's question [in *Nagarajan v London Regional Transport* [2000] 1 AC 501, 521-522]: why did he treat the Roma less favourably? It may be said that there are two possible answers: (1) because he is Roma; (2) because he is more likely to be advancing a false application for leave to enter as a visitor. But it seems to me inescapable that the reality is that the officer treated the Roma less favourably *because* Roma are (for very well understood reasons) more likely to wish to seek asylum and thus, more likely to put forward a false claim to enter as a visitor. The officer has applied a stereotype; though one which may very likely be true. That is not permissible. More pointedly, he has an entirely proper reason (or motive) for treating the Roma less favourably on racial grounds: his duty to refuse those without a claim under the Rules, manifestly including covert asylum-seekers, and his knowledge that the Roma is more likely to be a covert

> asylum-seeker. But that is irrelevant to the claim under s 1(1)(a) of the 1976 Act."

82. On the factual premises adopted by the Court of Appeal, this conclusion must be correct as a matter of law. The Roma were being treated more sceptically than the non-Roma. There was a good reason for this. How did the immigration officers know to treat them more sceptically? Because they were Roma. That is acting on racial grounds. If a person acts on racial grounds, the reason why he does so is irrelevant: see Lord Nicholls of Birkenhead in *Nagarajan* at p 511. The law reports are full of examples of obviously discriminatory treatment which was in no way motivated by racism or sexism and often brought about by pressures beyond the discriminators' control: the council which sacked a black road sweeper to whom the union objected in order to avoid industrial action (*R v Commission for Racial Equality, Ex p Westminster City Council*) [1985] ICR 827); the council which for historical reasons provided fewer selective school places for girls than for boys (*R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155). But it goes further than this. The person may be acting on belief or assumptions about members of the sex or racial group involved which are often true and which if true would provide a good reason for the less favourable treatment in question. But 'what may be true of a group may not be true of a significant number of individuals within that group' (see Hartmann J in *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690, para 86, High Court of Hong Kong). The object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group. As Laws LJ observed, at para 108:

> "The mistake that might arise in relation to stereotyping would be a supposition that the stereotype is only vicious if it is *untrue*. But that cannot be right. If it were, it would imply that direct discrimination can be justified; . . . "

83. As we have seen, the legislation draws a clear distinction between direct and indirect discrimination and makes no reference at all to justification in relation to direct discrimination. Nor, strictly, does it allow indirect discrimination to be justified. It accepts that a requirement or condition may be justified *independently* of its discriminatory effect.

84. The question for us, therefore, is whether the factual premise is made out. The appellants mount essentially the same argument before us

as they did before both Burton J and the Court of Appeal. But, greatly to their credit, the respondents have made a further search and produced further evidence which casts a rather different light upon the case than was cast by their evidence in the courts below.

85. The appellants' case is, first, that the Prague operation carried with it a very high risk of racial discrimination. Its avowed object was to prevent people travelling from the Czech Republic to this country in order to seek asylum or otherwise overstay the limits of their leave to be here. The vast majority of those who have done this in the past are Roma. Many Roma have good reason to want to leave. For some, this may amount to persecution within the meaning of the Refugee Convention. The operation was targeting all potential asylum seekers, with or without a good claim. The object was not only to prevent the would-be travellers at the airport. It was also to deter others from even getting that far. Given the high degree of congruence between the object of the exercise and a particular ethnic group, which was recognised in public statements by the Czech Prime Minister and his deputy, the risk that the operation would be carried out in a racially discriminatory manner was very high.

86. That risk was exacerbated by the very existence of the Authorisation. This sanctioned discriminatory treatment of the very ethnic group to which the vast majority of the people against whom the Prague operation was targeted belonged. The evidence is that the immigration authorities responsible for the operation did not intend the officers in Prague to act on the Authorisation: its main object was to speed up processing at ports of entry to the United Kingdom when particular problems arose. So there was no instruction to the Prague officers to implement it. Nor do the records of individual cases give any indication that the officers thought that they were operating it. But the Authorisation was annexed to the Immigration Directorate's Instructions, chapter 1, section 11 of which is headed 'Race Relations (General)'. This seeks to explain the effect of this Authorisation, dealing with discrimination on grounds of *ethnic or national origin*, and an earlier one, which authorised discrimination on grounds of *nationality* if there was statistical or intelligence information of breach of immigration laws by persons of that nationality. Having set out the various ways in which officers might discriminate under either Authorisation, it contains the following passage about the later one with which we are concerned:

> "The fact that a passenger belongs to one of these ethnic or national groups will be sufficient to justify discrimination

> – without reference to additional statistical or intelligence information – if an immigration officer considers such discrimination is warranted."

87. This is under the heading of 'Examination of passengers', which relates to people arriving at UK ports of entry; but under the heading 'Persons wishing to travel to the UK' the following passage appears:

> "From May 2001, immigration officers may also discriminate in similar ways in relation to persons wishing to travel to the UK on the grounds of ethnic or national origin but only in relation to the groups listed . . . Additional statistical or intelligence evidence is not required as Ministers authorised the discrimination in respect of the listed groups."

88. Also available now are the slides and accompanying briefing for the training which all staff received on the 2000 Act and the Ministerial Authorisations under it. These stress the importance of the Authorisations to the work of the Department, point out that discrimination against the listed groups is permissible without statistical or intelligence information, and advise of the need to be familiar with the list, to be able to identify passengers belonging to those groups, and to use their experience, knowledge of groups and local intelligence to assist in identification. They do point out that 'discrimination is likely to be exercised primarily in relation to specific port exercises', but do not suggest that these are the only circumstances in which it can be done. The briefing stresses that 'personnel need to be alert to the ways in which the integrity of the control function might be detrimentally affected if staff chose to disengage by not subjecting certain people/groups to extra scrutiny where appropriate.'

89. The combination of the objective of the whole Prague operation and a very recent ministerial authorisation of discrimination against Roma was, it is suggested, to create such a high risk that the Prague officers would consciously or unconsciously treat Roma less favourably than others that very specific instructions were needed to counteract this. Officers should have been told that the Directorate did not regard the operation as one which was covered by the Authorisation. They should therefore have been given careful instructions in how to treat all would-be passengers in the same way, only subjecting them to more intrusive questioning if there was specific reason to suspect their intentions from

the answers they had given to standard questions which were put to everyone.

90. It is worth remembering that good equal opportunities practice may not come naturally. Many will think it contrary to common sense to approach all applicants with an equally open mind, irrespective of the very good reasons there may be to suspect some of them more than others. But that is what is required by a law which tries to ensure that individuals are not disadvantaged by the general characteristics of the group to which they belong. In 2001, when the operation with which we are concerned began, the race relations legislation had only just been extended to cover the activities of the immigration service. It would scarcely be surprising if officers acting under considerable pressure of time found it difficult to conform in all respects to procedures and expectations which employers have been struggling to get right for more than quarter of a century.

91. It is against this background that such evidence as there is of what happened on the ground at Prague Airport needs to be assessed. The officers did not make any record of the ethnic origin of the people they interviewed. The respondents cannot therefore provide us with figures of how many from each group were interviewed, for how long, and with what result. This, they suggest, makes it clear that the officers were not relying on the Authorisation: if they had been, they would only have had to record their view of the passenger's ethnicity. If correct, that would have been enough to justify refusal of leave. But what it also shows is that no formal steps were being taken to gather the information which might have helped ensure that this high-risk operation was not being conducted in a discriminatory manner. It also means that the only information available is that supplied by the claimants, and in particular the ERRC which was attempting to monitor the operation. The respondents can cast doubt on the reliability of this, but they cannot contradict it or provide more reliable information themselves. Indeed the figures gathered were used by both sides before Burton J as a 'useful working basis' (Judgment, para 27).

92. Mr Vasil, a Czech Roma working for the ERRC, observed most flights leaving for the UK on 11 days in January, 13 days in February, 14 days in March and 13 days in April 2002. He was able to identify the Roma travellers by their physical appearance, manner of dress and other details which were recognisable to him as a Roma himself. His observations showed that 68 out of 78 Roma were turned away whereas only 14 out of 6170 non-Roma were rejected. Thus any individual Roma

was 400 times more likely to be rejected than any individual non-Roma. The great majority of Roma were rejected. And only a tiny minority of non-Roma were rejected. It is, of course, entirely unsurprising that a far higher proportion of Roma were turned away. But if the officers began their work with a genuinely open mind, it is more surprising that so many of the Roma were refused. If all or almost all asylum seekers are Roma, it does not follow that all or almost all Roma are asylum seekers. It is even more surprising that so few of the non-Roma were refused. One might have expected that there would be more among them whose reasons for wanting to travel to the UK were also worthy of suspicion. The apparent ease with which non-Roma were accepted is quite consistent with the emphasis given in the Instructions and training materials to the sensible targeting of resources at busy times. The respondents have not put forward any positive explanation for the discrepancy.

93. Mr Vasil also observed that questioning of Roma travellers went on longer than that of non-Roma and that 80% of Roma were taken back to a secondary interview area compared with less than 1% of non-Roma. The observations of Ms Muhic-Dizdarevic, who was monitoring the operation on behalf of the Czech Helsinki Committee, were to much the same effect. She also points out that 'It was very obvious from their appearance which travellers were Roma and which were not. Firstly, at least 80% of the Roma could be readily identified by their darker skin and hair . . .' Aspects of her evidence have been attacked but not this.

94. These general observations are borne out by the experience of the individuals whose stories were before the court. The ERRC conducted an experiment in which three people tried to travel to the UK for a short visit. Two were young women with similar incomes, intentions and amounts of money with them, one non-Roma, Ms Dedikova, and one Roma, Ms Grundzova; the third, Ms Polakova, was a mature professional married Roma woman working in the media. Ms Dedikova was allowed through after only five minutes' questioning, none of which she thought intrusive or irrelevant. Her story that she was going to visit a woman friend who was also a student was accepted without further probing. Ms Grundzova was refused leave after longer questioning which she found intrusive and requests for confirmation of matters which had been taken on trust from Ms Dedikova. Ms Polakova was questioned for what seemed to her like half an hour, was then told to wait in a separate room, and was eventually given leave to enter. She felt that the interview process was very different from that undergone by the non-Roma passengers travelling at the same time as her and that the only reason she was allowed to travel was that she had told them that

she was a journalist interested in the rights of the Roma people. All three of these people were to some extent acting a part, in that their trips had been provoked and financed by the ERRC, but they were genuinely intending to pay a short visit to a friend or relatives living here. Czech television also conducted a similar experiment with a Roma man and a non-Roma woman wishing to pay a short visit to the UK. The non-Roma was given leave while the Roma was refused after a much longer interview. Unlike the ERRC test, we have a transcript from which one can see what it was about the Roma's answers which might have made the official suspicious even if he had not been a Roma. But the question still remains whether a non-Roma who gave similar answers would have been treated the same. The tiny numbers of non-Roma refused may suggest otherwise.

95. Then there are the claimants in the case. Three of them made no secret of their intention to seek asylum on arrival in the UK. They do not therefore complain of discrimination, because their less favourable treatment was on grounds other than their ethnic origin. Two of the claimants also intended to claim asylum but pretended that they did not. It is difficult therefore for them to complain of more intensive questioning which revealed their true intentions. The last claimant, HM, was refused entry in circumstances which again invite the question whether a non-Roma in similar circumstances would have been refused. She was of obviously Roma appearance, aged 61 at the time, living with her husband and children, but travelling alone. Her husband was recovering from a heart attack and she was awaiting spinal surgery. Both were unemployed and living on social security because of ill health, which might not be thought surprising given their age. She planned to visit her grandson-in-law in England, and was carrying a sponsorship letter from him, together with a return ticket and £100 cash. These facts do not suggest someone who is planning to abandon her husband and five children and move to England. On the other hand, the file note records that the grandson-in-law states that he has been awarded refugee status but provides no evidence of this, is currently living on benefits though seeking employment, and makes no mention of the grand-daughter to whom he was presumably married.

96. These are judicial review proceedings, not a discrimination claim in the county court. No oral evidence has been heard or findings of fact in the individual cases made. The question is not whether HM was indeed intending to claim asylum on arrival, although it seems somewhat unlikely in the circumstances. The question is whether a non-Roma grandmother would have been treated in the same way. Again, the

ERRC figures and the outcome of their test are some evidence that she would not.

97. It is not the object of these proceedings to make a finding of discrimination in any individual case. The object, as Burton J pointed out (Judgment, para 53(iv)), is to establish a case that the Prague operation was carried out in a discriminatory fashion. All the evidence before us, other than that of the intentions of those in charge of the operation, which intentions were not conveyed to the officers on the ground, supports the inference that Roma were, simply because they were Roma, routinely treated with more suspicion and subjected to more intensive and intrusive questioning than non-Roma. There is nothing surprising about this. Indeed, the Court of Appeal considered it 'wholly inevitable'. This may be going too far. But setting up an operation like this, prompted by an influx of asylum seekers who are overwhelmingly from one comparatively easily identifiable racial or ethnic group, requires enormous care if it is to be done without discrimination. That did not happen. The inevitable conclusion is that the operation was inherently and systemically discriminatory and unlawful.

98. In this respect it was not only unlawful in domestic law but also contrary to our obligations under customary international law and under international treaties to which the United Kingdom is a party. It is commonplace in international human rights instruments to declare that everyone is entitled to the rights and freedoms they set forth without distinction of any kind such as race, colour, sex and the like: see, for example, the Universal Declaration of Human Rights 1948, article 2; the International Covenant on Civil and Political Rights 1966, article 2; the European Convention on Human Rights, article 14; and the Refugee Convention itself in article 3 provides:

> "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."

99. But the ICCPR goes further, in article 26:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and

effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

100. The International Convention on the Elimination of all Forms of Racial Discrimination 1966 provides in article 2:

"(1) States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation."

101. Racial discrimination is defined in article 1 in terms of distinctions which have the 'purpose or effect of nullifying or impairing the recognition, or enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.' Article 1(2) states that the Convention does not apply to distinctions, exclusions, restrictions or preference made between citizens and non-citizens, but this certainly does not mean that States Parties can discriminate between non-citizens on racial grounds.

102. It was the existence of these and other instruments, some only in draft at the time, together with the principle of equality enshrined in the Charter of the United Nations and emphasised in numerous resolutions of the General Assembly, which led Judge Tanaka and the dissenting minority of the International Court of Justice in the *South West Africa Cases (Ethiopia v South Africa) (Liberia v South Africa) (second phase)* [1966] ICJ Rep 6, 293 to conclude that

> 'we consider that the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law . . .'

103. The General Assembly has 'urged all States to review and where necessary revise their immigration laws, policies and practices so that they are free of racial discrimination and compatible with their obligations under international human rights instruments' (UNGA Resolution 57/195, para I.6, adopted 18 December 2002; see also UNGA Resolution 58/160 adopted on 22 December 2003). The UN Committee on the Elimination of Racial Discrimination has expressed its concern at the application of section 19D, which it considers 'incompatible with the very principle of non-discrimination' (UN doc CERD/C/63/CO/11, para 16, 10 December 2003). A scheme which is inherently discriminatory in practice is just as incompatible as is a law authorising discrimination.

104. As to remedy, the conclusion is that discrimination is inherent in the operation of the scheme itself. It is therefore more appropriate to make a general declaration, rather than the more specific one sought by appellants. The refusal of leave to enter to far more Roma than non-Roma is only objectionable if some Roma were wrongly refused or some non-Roma were wrongly given leave. That we do not know. But the differential is further evidence of a general difference in approach between the two groups, which may have had other aspects than those to which our attention has specifically been drawn. Hence the following declaration meets the case:

> "United Kingdom Immigration Officers operating under the authority of the Home Secretary at Prague Airport discriminated against Roma who were seeking to travel from that airport to the United Kingdom by treating them less favourably on racial grounds than they treated others who were seeking to travel from that airport to the United Kingdom, contrary to section 1(1)(a) of the Race Relations Act 1976."

105. I would therefore allow the appeal on this ground and make the above declaration.

**LORD CARSWELL**

My Lords,

106. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Bingham of Cornhill and Baroness Hale of Richmond, and I too would allow the appeal and make a declaration in the terms proposed by Lady Hale.

107. Two main issues fall to be decided on the arguments presented to the House (a) the asylum issue, whether the procedures applied to the appellants were incompatible with the obligations of the United Kingdom under the Geneva Convention and Protocol relating to the Status of Refugees and under customary international law (b) the discrimination issue, whether those procedures involved unjustifiable discrimination on racial grounds.

108. On the asylum issue, I agree entirely with the reasons and conclusions contained in the opinion of Lord Bingham of Cornhill.

109. On the discrimination issue, it is claimed that persons of Roma origin wishing to travel from Prague to the United Kingdom were subjected to longer and more intrusive questioning than persons not of that origin, that they were required to provide proof of matters which other persons were not required to prove and that persons of Roma origin were refused leave to enter the United Kingdom in circumstances in which other persons would have been given it.

110. The last allegation has not on the facts established been borne out, nor, as Burton J pointed out in para 53 of his judgment, was it the immediate object of the proceedings to prove such an allegation in any individual case. It is important therefore to appreciate that the complaint is one of a discriminatory system, not of discrimination which prevented any specified individual from travelling to the United Kingdom. The evidence in relation to the individual claimants is, as the judge said, adduced in order to establish or support a case that the Prague operation has been carried out in a discriminatory fashion. It is also important to appreciate that on the judge's findings the evidence does not go so far as to prove that that operation did in fact have the result that Romani passengers were as a class refused leave to enter the UK where others

would not have been. Naturally one cannot fail to suspect that that was the case and to scrutinise the facts with some care, in the light of the "massive differential" (Burton J at para 59) between the numbers and proportion of Romani applicants refused leave by comparison with non-Romani persons. In para 74 of his judgment Burton J set out in detail his reasons for concluding that it had not been proved that such a discriminatory result occurred. In para 65 of his judgment in the Court of Appeal Simon Brown LJ (with whom the other members of the court agreed on this issue) upheld his conclusions. Notwithstanding one's natural concerns, I have not been persuaded by anything in the admirable arguments presented to us that those conclusions were incorrect.

111. I do, however, find myself in agreement with Laws LJ concerning the stereotyping of Roma in the manner in which the immigration officers at Prague Airport examined the would-be passengers. It was accepted by the members of the Court of Appeal, who themselves raised the point and requested argument upon it, that immigration officers brought a greater degree of scepticism to bear on applications from Roma for leave to enter than on applications from other persons, and that they consequently tended to question them for longer periods and more intensively. The correctness of this proposition was not disputed before your Lordships.

112. That may well be understandable in light of the experience of the officers, that a large preponderance of asylum claims came from Roma and that there was a propensity among those people to make false claims. As Lady Hale has mentioned in para 90 of her opinion, many people would regard it as nothing more than an application of ordinary common sense to treat Romani applicants in that way, given the officers' regular experience of dealing with them (and assuming in the officers' favour that they were doing no more than attempting conscientiously to ascertain which applications were genuine).

113. But it is at that very point that discrimination law as it has been developed requires particular care in the approach to a class of persons whose members are strongly suspected of advancing large numbers of false claims. As Hartmann J said in the High Court of Hong Kong in a regularly quoted sentence in *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690 at para 86, "what may be true of a group may not be true of a significant number of individuals within that group". It is not legitimate to apply a stereotype and commence with the assumption that applicants from Roma may be

making false claims and that for that reason their claims require more intensive investigation. An officer who does so has, as Laws LJ, in my opinion correctly, said at para 109 of his judgment, "applied a stereotype; though one which may very likely be true". The point is that it may not be true, and it is in law discriminatory to subject all applicants from Roma to longer and more intensive questioning because so many of them have been known in the past to merit such treatment. What the officers must do is treat all applicants, whatever their racial background, alike in the method of investigation which they carry out until in any individual case sufficient reason appears to prolong or intensify the examination.

114. I accordingly cannot agree with the reasoning of the majority of the Court of Appeal on this issue and prefer that of Laws LJ. I would agree with the terms of the declaration proposed by Lady Hale, but I would emphasise that it is on the limited basis that it is directed to the discriminatory treatment of Roma in the length and method of interrogation.