Asylum and Immigration Tribunal

IM (Sufficiency of protection) Malawi [2007] UKAIT 00071

THE IMMIGRATION ACTS

Heard at Field House
On 13 February 2007

Before

C M G Ockelton, Deputy President, Asylum and Immigration Tribunal
Senior Immigration Judge Storey

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Leventakis, ACS Solicitors
For the Respondent: Mr M Blundell, Home Office Presenting Officer

1) The only authoritative decision in the case of Bagdanavicius is that of the House of Lords [2005] UKHL 38. Nevertheless Lord Brown's speech in that judgment left undisturbed the propositions set out by Auld LJ in the Court of Appeal [2003] EWCA Civ 1605, which were themselves merely a summary of established principles of case law on sufficiency of protection.

2)As [55] (6) of Auld LJ's summary makes clear, the test set out in Horvath [2001] 1 AC 489 was intended to deal with the ability of a state to afford protection to the generality of its citizens.

3) In stating that "[p]rotection shall be regarded as generally provided…", the wording of reg 4(2) of the Persons in Need of International Protection Regulations (the Protection Regulations) SI 2525/2006 closely mirrors the test set out in Horvath.

DETERMINATION AND REASONS

1. The appellant is national of Malawi. This is a reconsideration of a determination of Immigration Judge Hall notified following a hearing on 5 April 2006 dismissing his appeal against a decision dated 17 February 2006 refusing to grant asylum and a decision of 22 February 2006 to refuse leave to enter.

2. The basis of the appellant's claim was that he was a computer engineer who ran a business based in Blantyre, Malawi selling general electronic merchandise. When importing goods into Malawi he paid freight charge duties, surtax, excise and other miscellaneous charges. On 19 September 2005 he received threatening phone calls from officials of the Malawi Revenue Authority (MRA) alleging that there were discrepancies in his importation paperwork. The appellant asked the MRA to contact the clearing agencies because he had paid all the duties. However, the threats continued and MRA officials visited his shop saying that unless he made further payments they would make difficulties for him. He was called to the MRA offices for an interview. Afterwards the appellant complained to the Commissioner of the MRA, a man who had recently been appointed by the new President of Malawi. As a result of the appellant's complaints, a new joint MRA/Anti Corruption Bureau (ACB) task force was set up. The corrupt MRA officials who had been threatening the appellant were arrested as a result of a sting operation which took place on 2 November 2005 when he handed money to them when they came to his shop. In November 2005, approximately five days after this operation, the appellant received threatening phone calls. They warned that they were aware of the movement of the appellant and his family and would harm them. The appellant reported the matter to the ACB and the police. He also informed his lawyer.

3. On 6 December 2005 the appellant was called to the police station. It was explained to him that an individual had turned himself in to the police with the story that he had been paid a large sum of money by the National Intelligence Bureau (NIB) to assassinate him. The individual, known as “Jayjay” had decided he did not want to go through with it. The appellant was subsequently informed by a junior police officer that his circumstances were “politically connected” and that the police would not be providing any protection to him. The appellant continued to complain to the police that he and his family were in danger, but still received no protection. Accordingly the appellant and his family decided to flee Malawi, departing on 20 December 2005. Since arrival in the UK he has learned that the prosecution against the MRA officials has been dropped.

The Evidence

4. In support of his claim the appellant produced before the immigration judge a number of documents. They included a number of newspaper reports. One was the Daily Times of Friday 4 November 2005, which reported the arrest of three MRA officials by the Anti Corruption Bureau (ACB) for soliciting bribes from a “Blantyre based businessman” in a sting operation. A report from The Nation of the same date contained a similar account, adding that the three corrupt officials “will be charged under the Corrupt Practices Act”. The appellant also produced a certificate of registration issued by the MRA showing that he traded as Abacus Systems at an address in Blantyre. There was a

letter from the appellant dated 12 December 2005 addressed to his lawyers in Malawi asking that they correspond with the ACB on his behalf in respect of the MRA corruption threats. This letter referred, inter alia, to the appellant being told at the Blantyre police station on 6 December 2005 about the informant known as "Jayjay" who had gone to the police stating he had been paid MK 30,000 by an NIB officer to kill the appellant or cause harm and injury to his wife and children, with a promise of MK 150,000 more on completion of the killing.

5. Other items of evidence adduced by the appellant before the immigration judge included three which were date stamped by the Officer-in-Charge, Blantyre Police Station. The first was dated 16 December 2005. It stated that the appellant had reported to them that from 10 November 2005 up to the present he had been receiving anonymous phone calls in which threats were made to kill or badly injure him. It continued:

> "Seeing this after reporting the matter to the police the police carried out investigations in order to know and have those people but up to now nothing good has come out.
>
> However enquiries are still in progress to track down the culprits."

6. There was also a statement by the appellant declared before the same Officer-in-Charge dated 18 December 2005 detailing the anonymous phone calls and threats he began to receive from 10 November 2005 and related events. It ended with the words "I am asking the police to help me in this very serious matter".

7. The third document bearing the date stamp for the Officer-in-Charge at Blantyre Police Station was dated 25 April 2006, well after the time the appellant had left Malawi and arrived in the UK. This reiterated that the appellant had begun to receive anonymous phone calls making threats on 10 November 2006. It said police enquiries through telephone networks had produced no results. Unlike the previous letter from the Officer-in-Charge, which had made no mention of the hit man ("Jayjay") incident, this letter set matters out as follows:

> "However while the enquiries was (sic) in progress, someone by the name of Mr J.J. Sachilo, a businessman of Banque, Township in the City of Blantyre approached the police and told them that he was hired by Mr Phiri and Mr Benga, both full particulars not known to injure or kill the report and the Secretary of State giving K30,000 living (sic) the balance of K120,000 which he was promised to be given after the work. Seeing the police carried out some investigations so that he can arrest the said culprit but up to now they are still at large.
>
> However the investigations are still in progress to track down the culprit."

8. In his 5 April 2006 statement and elsewhere the appellant stated that these documents from the police station did not give a true or complete picture. The police, he said, were still under the control of the United Democratic Front (UDF) and the previous President. They pretended impartiality "but very

clearly refused me protection". They refused to post a guard at his house despite clear information that he was an assassination target. They refused to place him and his family under protective custody. "They wanted me to be a sitting duck", he wrote. Their unwillingness to protect him could be seen from the indifference they showed in response to the information they received from the hit man. The latter had told them that the NIB had said they would drop burglary charges against him if he killed or injured the appellant. Initially the police said they were looking into the matter, "but when they realised the NIB was doing this under the orders of the old President they withdrew all support and protection". He considered that their subsequent letter (dated March 2006) saying that despite their best attempts they could not find the persons responsible, could not be taken at face value.

> "So you see the national authorities not only can not provide me with protection but instead they are the agents of persecution (those parts of the government belong to the old President) and the MRA who is DPP controlled has no authorities in these matters."

9. Another item of evidence was a statement from the appellant's wife. She stated that the original MRA officials who had attempted to extort money from the appellant had been put into those posts "in order to protect the interests of UDF". Her husband, she stated, had been targeted because of his open support and friendship with Kazuni 'Roger' Kumwenda, who is President of the National Solidarity Movement (NSM or NASOMA), a political party which supported the country's current President (Bingu Wa Mutharika), who was facing great opposition from the United Democratic Front (UDF), the party of the former President Bakili Muluzi.

10. Her statement added that any business who openly supported a party that opposed the UDF faces serious harm. When her husband sought protection:

> "[N]o support of protection was given either to me or my husband, even though we were main witnesses in a very high profile matter. The Regional Police Headquarters simply told my husband to remain at home for a week until advised. This was a very difficult time for me, as I had my little daughter and teenage son in school and I was heavily pregnant, and the anxiety was getting the best of me. We just decided to stop my daughter from attending school."

11. In regard to what she had heard about the hit man who had gone to a smaller police station, having decided not to go through with his contract to kill or injure them, she said that "when these revelations were transferred to the HQ, the investigation of the NIB was dropped". She added that:

> "… a junior Police officer in confidence informed my husband that this issue became politically connected because if my husband and I succeeded to stand as witnesses – the matter would implicate the hierarchy of UDF, so our lives were in danger as the Police could not provide any protection, and their excuse was that it was approaching the festive season and they were understaffed.
>
> It was then after that my husband sent an official letter of complaint to the Police indirectly through the ACB on 12 December 2005. On 16 December 2005, we received a letter from the Police that omitted any reference to anyone that was involved to kill him – then my husband's lawyers demanded a recorded statement

> and a Police clearance report of my husband. Seeing that the Police could not offer any protection and the information had reached us that the MRA officers were also released by Police."

12. The immigration judge found the appellant's account plausible and "backed up by compelling documentary evidence". He stated that he accepted the factual basis of this claim "subject to what I set out below".

13. The immigration judge set out his qualifications to acceptance of the appellant's account at paragraph 35. Bearing in mind that the appellant had relied on a letter from the police saying enquiries were "still in progress", the immigration judge stated that the issue was whether the Malawi government was able to provide him with sufficient protection against reprisals claimed to be targeted against him by the NIB. Having utilised the summary of principles relating to protection as set out by Auld LJ in Bagdanavicius [2003] EWCA Civ 1605, he concluded that the appellant should be seen as reasonably likely to receive sufficient protection. He did not doubt, as he made clear in paragraph 36, that the threats against the appellant were politically motivated:

> "I accept, for the purposes of this determination, that corruption has and does exist in Malawi and that the appellant's previous political activities and in particular those supporting Mr Kumwandas of NASOMA, will have marked the appellant as an opponent of the UDF."

14. However, he specifically did not accept that the evidence produced by the appellant demonstrated that the police would be unwilling or unable to protect him against such threats. The appellant, he said:

> "acted prematurely and seeks to claim asylum in the United Kingdom in circumstances in which the effectiveness of the Malawi police and or the agencies to provide the appellant with protection was not tested. The appellant had provided no evidence of his claim that a burglar was engaged by the NIB to kill the appellant beyond the reported statements of the burglar himself which cannot be taken by me to be reliable evidence of the involvement of the NIB acting in a wholly criminal and illegal manner. Such a charge against a government law agency is a serious one to make and requires cogent evidence to be produced in its support before I am able to conclude that the claim is made out even to the relatively low standard of a reasonable degree of likelihood. On the other hand it is clear to me that due process of law does exist in Malawi. The police report makes that clear. The corrupt MRA officials were arrested and subjected to court proceedings. And the newspaper articles relied on by the appellant confirm that they are cracking down on corruption. It may well be that the MRA officials have now been released but such release could result from the appellant's inability to give evidence because he is now in the United Kingdom …
>
> There is an absence of evidence from the appellant as to lack of willingness of the Malawi police services to continue with the investigations or why the MRA officials were released by the ACB which gives rise to an incomplete set of facts necessary for the appellant to demonstrate that the authorities in Malawi were failing the appellant to the degree laid down in Bagdanavicius."

Grounds for Reconsideration

15. The appellant's grounds for reconsideration, as amplified by Mr Leventakis, were threefold. First it was submitted that the immigration judge had failed to

take into account several important aspects of the evidence relating to the willingness and ability of the authorities to afford the appellant protection. He had failed to note that the police and the NIB were under the control of the UDF and the former President and were therefore neither willing nor able to afford effective protection to persons targeted by the NIB. He had also failed to take proper cognisance of the following: the fact that the police had refused to place the appellant and family in the witness protection programme despite the fact that they were being targeted and the trial of the corrupt MRA officials was approaching; that it was elements within the NIB who had obtained the services of the would-be assassin; and the fact that the police had told the appellant that they would not assist him because "his problem was political". Secondly it was contended that the immigration judge had failed to bring to bear relevant principles of case law relating to the protection issue, in particular the principle ([55](6)) identified by the Court of Appeal in Bagdanavicius [2003] EWCA Civ 1605 that the authorities of a country could be expected to provide additional protection where the circumstances "reasonably required it". Pursuant to this principle the immigration judge's approach should have been to ask whether the appellant's circumstances were such as to reasonably require the authorities to afford him "additional protection" over and above that given to citizens generally. Had he asked this question the answer he would have been obliged to give was that the appellant's circumstances did require additional protection. The final ground criticised the immigration judge for relying (or relying unduly) on the fact that the appellant had been able to leave Malawi using his own passport.

16. In a memorandum sent to the parties on 13 November 2006 the Tribunal indicated it wanted the parties' submissions on (1) whether, as the appellant's representatives contended, the Court of Appeal's conclusions in Bagdanavicius survived the speeches of the House of Lords in the same case: [2005] UKHL 38; (2) the implications for the issue of protection of the Persons in Need of International Protection Regulations (SI 2525/2006) (hereafter "the Protection Regulations"), in particular reg 4.

17. Auld LJ's summary of conclusions in the Court of Appeal judgment in Bagdanavicius was set out at [54]-[55] in the following terms:

> "54. Summary of conclusions on real risk/sufficiency of state protection
>
> *The common threshold of risk*
>
> 55.
>
> 1) The threshold of risk is the same in both categories of claim*;* the main reason for introducing section 65 to the 1999 Act was not to provide an alternative, lower threshold of risk and/or a higher level of protection against such risk through the medium of human rights claims, but to widen the reach of protection regardless of the motive giving rise to the persecution.
>
> *Asylum claims*

2) An asylum seeker who claims to be in fear of persecution is entitled to asylum if he can show a well-founded fear of persecution for a Refugee Convention reason *and* that there would be insufficiency of state protection to meet it; Horvath[2001] 1 AC 489].

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

4) Sufficiency of state protection, whether from state agents or non-state actors, means a willingness *and* ability on the part of the receiving state to provide through its legal system a reasonable level of protection from ill-treatment of which the claimant for asylum has a well-founded fear; Osman [v UK (1999) 1 FLR 193], Horvath, Dhima [[2002] EWHC 80 (Admin), [2002] Imm AR 394].

5) The effectiveness of the system provided is to be judged normally by its systemic ability to deter and/or to prevent the form of persecution of which there is a risk, not just punishment of it after the event; Horvath; Banomova [[2001] EWCA Civ 807]. McPherson[[2001] EWCA Civ 1955] and Kinuthia [[2001] EWCA Civ 2100].

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

Article 3 claims

7) The same principles apply to claims in removal cases of risk of exposure to Article 3 ill-treatment in the receiving state, and are, in general, unaffected by the approach of the Strasbourg Court in *Soering*; which, on its facts, was, not only a state-agency case at the highest institutional level, but also an unusual and exceptional case on its facts; Dhima, Krepel [[2002] EWCA Civ 1265] and Ullah[[2004] UKHL 26].

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

9) In most, if not all, Article 3 cases in this context the concept of risk has the same or closely similar meaning to that in the Refugee Convention of "a well-founded fear of persecution", save that it is confined to a risk of Article 3 forms of ill-treatment and is not restricted to conduct with any particular motivation or by reference to the conduct of the claimant; Dhima, Krepel; Chahal v UK (1996) 23 EHRR 413].

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

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

inflict article 3 ill-treatment to a breach of a duty to take positive protective action against such ill-treatment by non-state actors; Svazas.

12) An assessment of the threshold of risk appropriate in the circumstances to engage Article 3 necessarily involves an assessment of the sufficiency of state protection to meet the threat of which there is a such risk - one cannot be considered without the other whether or not the exercise is regarded as "holistic" or to be conducted in two stages; Dhima, Krepel, Svazas[[2002] EWCA Civ 74].

13) Sufficiency of state protection is not a guarantee of protection from Article 3 ill-treatment any more than it is a guarantee of protection from an otherwise well-founded fear of persecution in asylum cases - nor, if and to the extent that there is any difference, is it eradication or removal of risk of exposure to Article 3 ill-treatment; Dhima; McPherson; Krepel.

14) Where the risk falls to be judged by the sufficiency of state protection, that sufficiency is judged, not according to whether it would eradicate the real risk of the relevant harm, but according to whether it is a reasonable provision in the circumstances; Osman.

15) Notwithstanding such systemic sufficiency of state protection in the receiving state, a claimant may still be able to establish an Article 3 claim if he can show that the authorities there know or ought to know of particular circumstances likely to expose him to risk of Article 3 ill-treatment; Osman.

16) The approach is the same whether the receiving country is or is not a party to the ECHR, but, in determining whether it would be contrary to Article 3 to remove a person to that country, our courts should decide the factual issue as to risk as if ECHR standards apply there - and the same applies to the certification process under section 115(1) and/or (2) of the 2002 Act."

18. As regards issue (1), Mr Leventakis submitted first of all that the speeches of the House of Lords in Bagdanavicius effectively upheld the summary of basic principles set out by Auld LJ in the Court of Appeal's judgment. Paragraph 30 of Lord Brown's speech appeared to confirm [55](1)-(6) of Auld LJ's summary. Even if it were thought that the opinion of Lord Brown superseded what was stated by Auld LJ concerning Article 3, that still left intact [55](1)–(6) of Auld LJ's summary, which dealt with protection under the Refugee Convention. As regards issue (2), he submitted that regulation 4 of the Protection Regulations reflected the existing UK case law on protection, including the summary set out by Auld LJ in Bagdanavicius.

19. Mr Blundell submitted that we should regard the Court of Appeal's judgment in Bagdanavicius as superseded in all respects by the House of Lords' judgment in the same case. The point set out by Auld LJ at [55](6) and heavily relied upon by the appellant's representatives did not in fact reflect UK case law: there was no UK case law directly applying Osman v UK (1998) 29 EHRR 245 to asylum-related appeals.

20. As to the appellant's particular case, Mr Leventakis contended that on the evidence accepted by the immigration judge his circumstances were akin to those analysed by the Court of Appeal in Svazas [2002] EWCA Civ 74. The appellant had contacted the authorities and the hit man should be seen as

having been complicit with the authorities (at least to begin with). The mere fact that the hit man said he had been paid was enough to show that the police should have afforded the appellant additional protection. Even though the appellant's political party (NASOMA) was aligned with President Binga wa Mutharika's political party (the Democratic People's Party (DPP)), the government was not a unified one and the former head of security was still in control of the police and security forces. The appellant was due to be a witness in a trial resulting from his exposure of the corrupt officials. The appellant had suffered threats against himself and his family. These threats had started shortly after he had exposed the corrupt officials. He was still receiving threats in late October/early November. Indeed paragraph 6.5 records that the threats continued until 16 December 2005. Even if nothing happened to him in the last two months before he left, that did not mean he was not in danger.

21. Mr Blundell submitted that this was not, as Mr Leventakis suggested, a "state collusion" case. Rather it was a "rogue actor" case. There was no evidence that a prosecution of the corrupt tax officials had gone ahead or would go ahead. The evidence indicated that that appellant had sought police protection and that the police were investigating.

Our Assessment

22. We find no merit in the first ground for reconsideration.

23. It was the immigration judge's emphatic finding that the background evidence before him did not bear out that there was an insufficiency of protection in Malawi or that the police would be unwilling or unable to protect the appellant against those who had threatened him. He clearly did not accept that the police and the NIB were under the control of the UDF. We find that it was entirely reasonable of the immigration judge not to accept that the authorities lacked either willingness or ability to protect the appellant. At paragraph 32 the immigration judge pointed out:

> "32. The objective material relied on by the appellant is poorly presented. There is no proper page numbering and there appears to be no accreditation of the various reports that are in the bundle. The bundle commences with a copy of ten pages taken from the US Department of State Country Report on Human Rights Practices in Mali, situated on the northwest of the African continent as opposed to Malawi, the appellant's country of origin which is of course situated in the southeast of the continent. Then there are a series of pages taken from the Internet relating to Malawi and apparently written by a number of different authors about whom I have no information. These articles relate to the relationship between President Mutharika and former President Muluzi and the power struggle which is said to exist between them. There is reference to the rejection of the first woman police chief. There is a report of suspension of the Malawi Parliament on 26 October 2005 after violent protests. There is reference to President Mutharika facing a threat of impeachment. The appellant relies on these articles and publications to demonstrate that the campaign against corruption is in danger of being ineffective. The report relating to the rejection of the woman police chief refers to court proceedings and which appointment was apparently rejected by parliament. It appears from the report that the process by which the nominee was rejected passed through the democratic and judicial procedures as set out by the

> Constitution of Malawi. The report relating to the suspension of Malawi Parliament in October 2005 refers to the speaker of parliament suspending the sitting because of violence resulting from difficulties between President Mutharika and former President Muluzi. The Country of Origin Report of 2006 confirms that the UDF won a majority in the parliament when President Mutharika was elected.'

24. Whilst this summary acknowledges that the balance of political power in Malawi is a complex one , we can see nothing in the major country reports to which it refers (the US State Department Report 8 March 2006 and the Home Office COI Report for 2006) to support the appellant's contention that the immigration judge should have concluded that the background evidence before him showed that the police or the NIB continued to be controlled by the UDF, even now that President Binga wa Mutharika had come to power.

25. The appellant has sought to argue that the immigration judge should have recognised that UDF domination of the NIB was borne out by the cutting from the People's Daily Online dated 8 June 2005 stating that the President had decided to shut down the NIB 'in order to restructure it' following allegations that some intelligence officers were involved in a failed attempt to assassinate him. However, in our view, all this cutting in fact shows is that the President had taken steps to restructure the NIB: nothing has been adduced to show that his steps were unsuccessful. Furthermore, the US State Department Report of 8 March 2006 (submitted by the appellant) made no mention of UDF control in its analysis of the police and the security apparatus. Nor did the COI Report for 2006: see Section 5.28 – 5.36, Section 6A and Section 6C.

26. Also noteworthy is that the broad picture contained in the background country materials before the immigration judge in terms of the general human rights situation in Malawi was that since the political transformation into multi-party politics in 1994, incidents of serious human rights abuses in Malawi had decreased and the most present current issues were poverty, hunger and HIV/AIDS rather than human rights violations by the government and law enforcement agencies. There was, it is true, said to be an enduring culture of corruption and a problem of scarce resources and lack of institutional capacity, but evidence for the political domination of the police and the NIB by the UDF was entirely lacking.

27. So far as the balance of power between the political parties is concerned the bye-elections held in late 2005 which resulted in victory for the DPP, founded by President Bingu Wa Mutharika, were seen as a vote of confidence for the President and a blow for the (UDF).

28. Accordingly we consider the immigration judge was quite entitled to find that the appellant's claims regarding the UDF control of the police and the NIB were not borne out by the background evidence.

29. Turning to the immigration judge's assessment of the appellant's particular circumstances, we find that he was quite entitled to conclude that the Malawi police were taking steps to protect the appellant which were sufficient to amount to effective protection. Whilst the immigration judge accepted that the

appellant had been told by one policeman he would not be protected, he expressly did not accept that this indicated that the police generally lacked the will or ability to protect him. Thus the appellant's assertion that "the police" had told the appellant they would not be assist him because "his problems were political" blurred an important distinction between an individual (junior) policeman's assertion and the position of the Malawi police as a body. Likewise, although the immigration judge did accept that it was the appellant's subjective belief that "there were elements within the NIB who had obtained the services of the would-be assassin" he plainly did not accept that this belief was objectively based. That in our view was a reasonable assessment of the evidence before him. Thus, on the facts of this case, the immigration judge was quite entitled to reject the appellant's contention that there was state complicity with those individuals who had targeted him.

30. What about the contention that the immigration judge should have found that Malawi authorities had failed to protect the appellant since they had not put him and his family in a witness protection programme? It is not a necessary condition for there to be effective protection within the meaning of the Refugee Convention that a state operates a formal witness support programme. In certain countries the problems posed by criminal organisations may be such that a witness support programme of some kind is integral to there being effective protection. However, even in such countries, for there to be a finding of ineffective protection, it would have to be shown that there was a systemic failure in the way that country's criminal justice system dealt with a category of persons such as informer or whistleblowers. Thus, in the context of Jamaica, Scott-Baker LJ noted in Atkinson [2004] EWCA Civ 846 that:

> "22. In the present case, therefore, the question is whether the state of Jamaica is both willing and able to provide reasonable protection to the appellant. The evidence does not raise any real doubt about *willingness* to provide such protection: the real focus is on its *ability* to do so. The difficult question is where to draw the line that defines what an appropriate standard is. It is not enough that some individuals will be failed by the state's criminal justice system, not enough that the state has not been effective in removing risk. There has in my judgment to be a systemic failure that relates at the very least to a category of persons of whom the individual under consideration is one. In this case the focus is on informers or perceived informers or those who in some way are the target of the gangs or the dons who head them. In my view it is no answer that a state is doing its incompetent best if it nevertheless falls below the appropriate standard. One has to ask whether the state is failing to perform its basic function of protecting its citizens. Does the writ of law run or not?"

31. In this case the background materials before the immigration judge did not demonstrate that there was a systemic failure of state protection in relation to informers or whistleblowers in Malawi and the very fact that in response to the appellant's reports the Malawi government set up a task force and went on pursuing inquiries against those who had threatened him and his family very much points to the contrary.

32. We turn to the appellant's second ground, which maintained that the immigration judge failed to apply the principles set out by Auld LJ in Bagdanavicius, [55] (6) in particular. We find no such failure on the part of the

immigration judge. At paragraph 35 he expressly referred to this principle, stating that a claimant may still be able to show a well-founded fear of persecution:

> "if he can show that [the system's] authorities know, or ought to know circumstances particular to his case giving rise to his fear but are unlikely to provide the additional protection his particular circumstances reasonably require".

33. In our view his subsequent evaluation at paragraphs 36-39 shows that he also applied this principle. The Malawi officials who had threatened the appellant had been arrested and detained and, when these threats continued, the police had pursued further investigations. The immigration judge also took into account background evidence that the authorities were cracking down on corruption. There was, he noted, "an absence of evidence ..." as to lack of willingness of the Malawi police services to continue with the investigations". He considered the evidence that the MRA officials concerned had since been released and decided that this was most likely to have occurred as a result of the appellant leaving Malawi. Mr Leventakis made mention at several points of the appellant's view that the NIB was still very much under the control of the former President's party. However, as we have seen, that was not borne out by the evidence which was before the immigration judge.

34. The third ground for reconsideration took issue with the immigration judge counting against the appellant that he left Malawi using his own passport unhindered. However, in the first place we do not consider that the immigration judge placed any great reliance on the fact that the appellant was able to leave Malawi freely and without interference using his own passport. He mentions it only once early in paragraph 35 prior to going on to address what he referred to as the "central issue", which concerned the issue of whether the Malawi authorities would be able to provide sufficient protection to him. Secondly, we do not see that the immigration judge was wrong to treat it as a factor of some, albeit limited relevance, since it was evidence which tended to indicate that there was no state complicity with those threatening the appellant.

The status of Auld LJ's summary of case law at [55] of Bagdanavicius

35. In the light of our conclusion that the immigration judge was quite entitled to conclude that the appellant had failed to show that the authorities in Malawi were either unwilling or unable to protect him, it is not strictly necessary for us to determine the two matters on which we sought submissions. However, since we heard submissions on them, we consider it desirable that we state our conclusions regarding them.

36. The first matter concerned the current status of the Court of Appeal's judgment in Bagdanavicius [2003] EWCA Civ 1605. It is true that Lord Brown's speech does not expressly disapprove anything said in the Court of Appeal's judgment. He preferred to decide the question before the House on a different basis. Equally, however, Lord Brown's speech does not expressly approve anything said below. So far as precedent is concerned, the position is

straightforward: the only authoritative decision in the case of Bagdanavicius is that of the House of Lords.

37. Since by the time the immigration judge heard this appeal the House of Lords had also published its judgment (on 26 May 2005) in the case of Bagdanavicius, [2005] UKHL 38, he should have noted this fact.

38. Nevertheless, we do not consider this gave rise to any legal error on his part, since the passages he drew on from the judgment of Auld LJ in Bagdanavicius were no more than a summary of existing principles of case law. Lord Brown's speech in no way sought to oust those principles: it only sought to lay to rest one line of argument which had been raised against them (Mr Nichol QC's submission that in order to avoid expulsion on Article 3 grounds an appellant need establish only a real risk of harm on return and not also that the receiving country would fail to discharge the positive obligation inherent in Article 3 to provide a reasonable level of protection: see [11]-[13]).

39. It follows that the corpus of established principles relating to sufficiency of protection under the Refugee Convention still includes that conveniently summarised by Auld LJ, including that set out at [55](6). We emphasise this particular subparagraph because at one point Mr Blundell appeared to submit to the contrary, venturing to say that there was no support to be found in other authorities for [55](6). Leaving aside the fact that acceptance of [55](6) was specifically acknowledged by Counsel for the Secretary of State in Bagdanavicius [2003] EWCA 1605 (see [39]), we cannot agree with Mr Blundell's submission on this point. We acknowledge that Auld LJ's analysis does not link this subparagraph to any specific cases. However, in our view, the reasoning underlying [55](6) is not hard to find in the cases which Auld LJ expressly drew on. In Horvath [2001] 1 AC 489 the House of Lords settled that the correct approach to the issue of sufficiency of protection was to consider whether there was a system in place which makes violent attacks by the persecutors punishable and which displays a reasonable willingness to enforce that law on the part of the law enforcement agencies. At [60] Lord Clyde stated:

> "…There must be in place a system of domestic protection and the machinery for the detection, prosecution and punishment of actions contrary to the purposes which the Convention requires to have protected. More importantly, there must be ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case". ….

40. Post-Horvath the courts and Tribunals soon faced the problem of having to clarify whether the test set out in Horvath was intended to be a universal one, i.e. one intended to apply in every individual case, or was rather a general one, intended only to cover the ability of a state to afford protection to the generality of its citizens. Although not stated in this precise way, it seems to us that the answer given both by the Tribunal and the Court of Appeal was that the test was a general one.

41. In Kacaj v Secretary of State for the Home Department [2002] EWCA Civ 314, cited with approval in Dhima, the Immigration Appeal Tribunal said:

> "21. It may be said that it is no consolation to an applicant to know that if he is killed or tortured, the police will take steps to try to bring his murders or assailants to justice. He is concerned with the risk that he may be killed or tortured and, if the authorities cannot provide effective protection to avoid that risk, there will be a breach of the Convention if he is returned. Practical rather than theoretical protection is needed. We see the force of that contention, but in our view it fails to recognise that the existence of a system should carry with it a willingness to do as much as can reasonably be expected to provide that protection. In this way, the reality of the risk is removed. Since the result will be similar, namely persecution or a violation of a human right, it would be wrong to apply a different approach. We do not read *Horvath* ... as deciding that there will be a sufficiency of protection whenever the authorities in the receiving State are doing their best. *If this best can be shown to be ineffective, it may be that the applicant will have established that there is an inability to provide the necessary protection. ...*" (emphasis added).

42. In Noune [2000] EWCA Civ 306 Schiemann LJ noted at [5] that "the Tribunal in the case before it had approached the case by applying the test to be found in Horvath ..., a decision of this court subsequently affirmed on appeal...." In that decision, he noted, Stuart-Smith LJ had said at paragraph [22] that:

> "There must be in force in the country in question a criminal law which makes the violent attacks by the persecutors punishable by sentences commensurate with the gravity of the crimes. The victims as a class must not be exempt from the protection of the law. There must be a reasonable willingness by the law enforcement agencies, that is to say the police and the courts, to detect, prosecute and punish offenders. It must be remembered that inefficiency and incompetence is not the same as unwillingness, unless it is extreme and widespread."

43. At [28] Schiemann LJ continued:

> "However, there are a number of considerations in the present case which, giving it the most anxious scrutiny which the law requires..., make us reluctant to affirm the decision of the Tribunal and agree that this appellant should be sent to Algeria without more ado.
>
> 1. The Tribunal had to decide this case before the decision of the House of Lords in Horvath. As a study of the many judgments and speeches in that case shows, the law in relation to persecution by non-state actors was unsettled and difficult to understand. It may be that the Tribunal, applying the test formulated by Stuart-Smith LJ which we have quoted (which was approved by Lord Clyde but not by the majority in the House of Lords), considered that where the law enforcement agencies are doing their best and are not being either generally inefficient or incompetent (as that word is generally understood, implying lack of skill rather than lack of effectiveness) this was enough to disqualify a potential victim from being a refugee. That is certainly a possible reading of the Lord Justice's words. If that was the reading adopted by the Tribunal, we consider that it erred as a matter of law. Unfortunately, although wholly understandably, the acceptance by the Tribunal of the test formulated by the appellant before it - that there had to be in place a justice system that provided reasonable protection in practical terms - does not clearly indicate whether it had indeed read Stuart-Smith LJ's words in the manner indicated above.
>
> 2. The crucial question before the Tribunal was whether there was a reasonable likelihood of her being persecuted for a Convention reason if she were to be

> returned to Algeria in the future. The failure by the appellant in 1992 and 1995 to do more by way of endeavouring to secure protection from the police or the Post Office who employed her is not as such relevant to that question. The Tribunal appears to have concentrated exclusively on the past rather than on the time of any return to Algeria by the appellant. We observe that there was nothing before the Tribunal to suggest either that the appellant would, if she were returned by this country, be welcomed back to her former job in the Post Office or that former Post Office employees were likely to be given an enhanced measure of protection.
>
> 3. The evidence before the Tribunal supported its view that there was not a total collapse of the state's protective machinery. What there was was better than nothing. But this does not answer the question which the Tribunal had to answer, namely, whether there was a reasonable likelihood that the Appellant would be persecuted for a Convention reason. There seems to us to be a danger that the Tribunal considered the total collapse of the state's protective machinery to be a prerequisite for a successful claim to refugee status. If it did adopt that view, it was in error."

44. Much the same point was made by Scott Baker LJ in Atkinson at [37] in relation to a subcategory of citizens of Jamaica, namely informers:

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

45. Another way of putting the effect of the above authorities is as follows. A state's protection has to be wide enough to cover the ordinary needs of its citizens for protection. Protection may still be insufficient, to prevent persecution in a particular case or in a particular subcategory of cases, if an individual's (or subcategory of person's) needs for protection are out of the ordinary or exceptional. However, recognition that a person's (or subcategory of person's) individual circumstances may require "additional protection" has an important limit. As emphasised in Horvath, protection is a practical standard. In Lord Clyde's words at [60], "no-one is entitled to an absolutely guaranteed immunity. That would go beyond any realistic practical expectation".

Regulation 4 of the Protection Regulations

46. That brings us to the other issue on which we sought submissions, relating to the implications for case law of reg 4 of the Protection Regulations. Given the limited response we received from the parties regarding this issue, we will confine ourselves to noting just one feature of this regulation.

47. By virtue of a Practice Direction from the President of the AIT issued on 9 October 2006, we are obliged to apply the measures introduced by the UK Government to implement the EU Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L304/12 of 30.9.2004 (hereafter

"the Directive") to all pending appeals, of which this is one. So far as we are concerned they consist in the Protection Regulations and the Immigration Rules (as amended by Cm 6918).

48. The Protection Regulations set out, inter alia, definitions of acts of persecution (reg 5), actors of persecution or serious harm (reg 3) and actors of protection (reg 4). Regulation 4 in its material parts provides:

> "1) In deciding whether a person is a refugee or a person eligible for humanitarian protection, protection from persecution or serious harm can be provided by:
>
> (a) the State; or
>
> (b) any party or organisation, including any international organisation, controlling the State or a substantial part of the territory of the State.
>
> (2) Protection shall be regarded as generally provided when the actors mentioned in paragraph 1(a) and (b) take reasonable steps to prevent the persecution or suffering of serious harm by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the person mentioned in paragraph (1) has access to such protection.
>
> **…".**

49. This wording is substantially the same as the text of Article 7 of the Directive save that the wording of reg 4(2) omits the phrase "inter alia" immediately before "by operating" (Article 7(2) states that "Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection").

50. The one feature of reg 4 which we consider the facts of this case highlight is that the wording of reg 4(2) reinforces the same point which we take to have been made by post-Horvath case law. The wording of this subparagraph is unmistakeably defeasible: "[p]rotection shall be regarded as *generally* provided …" (emphasis added). It is not stated that the taking of "reasonable steps to prevent the persecution … by operating an effective legal system …" will amount to provision of adequate protection in every case, although it is said that it will in the generality of cases. If there be any doubt that post-Horvath case law sets out the correct legal test for protection, then what we can now say is that that doubt has been dispelled by reg 4(2) whose wording closely mirrors that of the test set out in Horvath as we have construed it. Since 9 October 2006 it is reg 4, of course, which now contains the law which we have to apply.

51. For the above reasons we conclude that the immigration judge did not materially err in law. Hence his decision to dismiss the appellant's appeal must stand.

Signed Date
Senior Immigration Judge Storey