Appeal No:CC-16979-2001

RD (Sufficiency of Protection-IFA-Roma) Poland CG [2002] UKIAT 00983

Immigration Appeal Tribunal

Date heard: 18/1/2002
Date notified: 4/4/2002

Before:
Mr A R Mackey (Chair)
Mr N Kumar JP
Mr R Baines JP
SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant
ROBERT DAWGIERT (+3)
Respondent

Determination and Reasons

Representation:
For the appellant:Ms C Cooper, Home Presenting Officer
For the claimant:Mr M O'Donnell of Counsel representing Herwald Seddon Solicitors
1. The Secretary of State appeals, with leave, against a decision of an Adjudicator (Mrs D Taylor). In that determination the Adjudicator allowed an appeal by the claimants against the decision of the Secretary of State who had refused leave to enter, asylum and rights under the European Convention on Human Rights 1950 (ECHR).
The Adjudicator's decision:
2. The determination, which was promulgated 8 October 2001, accepted that the claimants, Polish Roma from the town Kielce, did have a well founded fear of persecution on returning to Poland for reasons of their ethnicity. The Adjudicator also found that the claimants had suffered significant trauma and that it would be unduly harsh to expect them to relocate.
3. The claimants' credibility was accepted. The Adjudicator found that the claimants had reported attacks on themselves and their property to the local police on approximately 20 occasions but there had been no progress. She stated:
"The police, unable or unwilling mattered little to Mr Dawgiert, did not offer him protection. It is clear that there is in Poland a system in place but it was not operated by the police in Kielce."
4. She then went on to consider whether, as she puts it, the claimants should have moved to another area of Poland "before seeking surrogate protection of the international community". In this regard her findings were that the Roma in Poland were a small community and reside in restricted areas and it would be difficult to blend in coming from outside and the community. Also they faced disproportionately high unemployment and had been hit hard by economic changes and restructuring more than ethnic Poles. She referred to a Tribunal decision in Franczak (00TH/02394) where the Tribunal had before it a report from a Professor "Bacton" who believed that internal flight would be difficult because those who flee to another area in Poland would be seen as troublemakers. She noted a comment from the Tribunal in that decision which stated:
"In this case we take into account the severity of the ill treatments suffered by the respondents, the country information, in particular that the Polish government have not been able to control or prevent violence against Roma in some areas, and find that the authorities had been and are still likely to be unwilling to afford protection to these respondents."
5. (Franczak was also an appeal by the Secretary of State against the decision of the Adjudicator. The Tribunal dismissed that appeal on 24 October 2000.)
6. The Adjudicator had also taken into account the House of Lords' decision in Horvath [2000] 3A11 ER 577 and relevant comments made by this Tribunal in Kacaj and Harakel.
The appellant's submissions:

7. In the grounds of appeal submitted by the Secretary of State four items are concentrated on. These are;
a. Failure of the Adjudicator to address properly the reason for refusal of the claimants' case by the Secretary, as outlined in the refusal letter on 7 February 2001, where it was stated; "In order to bring yourself within the scope of the United Nations Convention, you have to show that these incidents were not simply random actions of individuals but were a sustained pattern or campaign of persecution directed against you which was knowingly tolerated by the authorities, or that the authorities were unable, or unwilling, to offer you effective protection." It was submitted that the Adjudicator appeared to rely on the contents of a local newspaper, that had been produced which had reached the conclusion that a system, in place to protect the Roma community, "is not operated by the police in Kielce". The objectivity and methodology employed in the research in this article was submitted as an unknown quantity and thus too much reliance had been placed on it by the Adjudicator. This submission is expanded to the claim that no police force can provide total protection and there was no substance in claims that the police were just going through the motions or that it would have been reasonable, "to expect some progress had been made." Ms Cooper submitted that the Adjudicator had been persuaded by these claims but had failed to give explanations why she concluded the police did not offer effective protection.
b. The Adjudicator had failed to provide adequate reasons why she found it unduly harsh for the claimant and his family to relocate within Poland. Beyond this, it is submitted that there has been an apparent failure by the claimant to approach national authorities when not satisfied at the local level.
c. The Adjudicator had relied on the Tribunal decision in Franczak whereas the Secretary would rely on the more recent Polish Roma case of Andrasz (01/TH/02224).
d. It would have been desirable for the Adjudicator to have provided more detailed reasons for allowing the appeal under Article 3 rather than simply stating that it followed from the appeal being allowed on asylum grounds.
8. In addition to the latest CIPU report on Poland Miss Cooper placed before us a copy of a decision of the Court of Appeal in Wierzbicki [2001] EWCA Civ 830 and the decision of the Tribunal in Andrasz (01TH/02224). She submitted that the Wierzbicki decision was of general application and specifically referred us paragraph 22 of the Tribunal decision in Andrasz.
9. Andrasz is a decision where, after considering a failure of police action in Poland in respect of various incidents that happened to Mr Andrasz, (also a Polish Roma), it states:
"22. There was a limit to how far the best police forces can pursue offenders who can not be identified; this is precisely why protection for ordinary people must depend on the general effectiveness of the criminal justice system. In this case, there is nothing to suggest that gypsies in Poland face nearly the same level of public prejudice as in the Czech Republic. So far as they do have problems, there is no reliable material before us to show that the criminal justice system generally (as distinct from police in particular localities, referred to at paragraph 6.59 of the Home Office Country Assessment, above) is either unwilling or unable to address them effectively. In our view the evidence before us does not show there would be any real risk of breach of human rights if this family were returned to Poland, and this appeal too must be allowed."[We note this appeal by the Secretary of State was only on ECHR grounds which had been allowed by the Adjudicator.]
10. Miss Cooper submitted that these conclusions in Andrasz were directly relevant to the case before us. As with Mr Andrasz, in the current case, the claimants had reported various attacks on them and their property to the police and the police were investigating. Beyond this she submitted that each claim needed to be fact dependent and with the failure of the police in Kielce to provide results on their complaints it was reasonable to expect that the claimants to have complained to higher authorities, beyond merely the local police.
11. She submitted, relying on the CIPU report 6.65 to 6.68, that the problems for Roma in Poland were taken seriously by the police and government authorities and that there was a "sufficiency of protection" available in Poland to these claimants. The Secretary of State did not agree that this claimant had a well founded fear of persecution in his home district and that the sufficiency of protection extended to that area as well as the rest of Poland. Therefore the decision of the Adjudicator was an unreasonable one and unsustainable one. She

stressed that it was her submission that because there was sufficiency of protection across the whole of Poland the issue of internal flight or internal protection alternatives did not need to be specifically covered because of the general sufficiency of protection offered by the state in Poland.
12. In relation to Franczak she submitted that we should not place too much reliance on this decision as the report of Professor "Bacton" was actually not before the Adjudicator in this claimant's case.
The respondents' submissions:
13. Mr O'Donnell submitted that we needed to be convinced that the Adjudicator's findings were unsustainable and constituted an error of law. He conceded that there was not an adequate coverage of the country information in the decision as might be desired, but that it was sufficient. There was a clear finding that these claimants would suffer persecution on return to their home area in Poland. He submitted the claim by the Secretary of State that the claimants could have gone to a higher authorities in Poland beyond the local police was unreasonable. Given there had been a lack of action by the local police, he submitted it was logical that this would undermine the faith of the claimant in reporting any matters to the authorities.
14. It was submitted that the Adjudicator had gone into the appropriate legal leading decisions that needed to be considered at paragraphs 17 and 18 of the determination. Whilst the investigation into those cases could have been better done, it did not, in his submission, amount to an error of law that made the decision unsustainable.
15. In relation to the internal flight / internal protection alternative (IFA/IPA) he submitted that the conclusions of the Adjudicator were not in error and that the unduly harsh test derived from the leading decision in Robinson [1998] Imm AR 568, had clearly been applied and that it was also appropriate for the Adjudicator to follow the decision in Franczak and Professor's Bacton's comments. He stressed, in particular, the trauma that would be suffered by the dependent children if they had to return and that we should note the medical report in that regard that had been before the Adjudicator. The consideration of the children he submitted showed that it would be unduly harsh in this instance to expect the claimant and his family to relocate elsewhere in Poland.
16. He concluded therefore that the appeal should be dismissed as the Adjudicator's decision fell well short of being unsustainable.
17. The issues
We found the issues before us to be:
"A. Was the conclusion of the Adjudicator that the claimants had a well founded fear of persecution for a convention reason in their home district sustainable on an analysis of the relevant law and country information that was before the Adjudicator?
B. If the answer to issue one is "no" is there sufficient evidence available before this Tribunal to reach conclusions on the issue of a prospective fear of persecution on return to the claimants' home district?
C. If there is a well founded fear of persecution locally by the claimants is the Adjudicator correct in her conclusion that an internal flight alternative (IFA/IPA) is not available to these claimants because it would be unreasonable or unduly harsh to expect them to relocate to other parts of Poland?
D. If the claimants are not found to have a well founded fear of persecution in their home district or there is an IFA available are there still any remaining obligations on the United Kingdom under the ECHR to which these claimants are entitled?
18. Assessment
Turning to issue one. The Adjudicator accepted the credibility of the claimants and the respondent did not make any specific attack on their truthfulness. From this, after taking into account the decisions in Franczak and noting the comments in the leading decisions of Horvath and Kacaj the Adjudicator went on to find that the claimants had been subjected to sustained attacks on them personally and to their property, by skinheads in their home district and that despite reporting these to the police they had been unable, or unwilling, to be offered effective protection against the skinhead attacks. While reaching this conclusion, the Adjudicator however did state that it was clear a "system" of protection is available in Poland.

She did not define what that "system" is but stated that it did not operate for these claimants in Kielce.
19. The Secretary of State submits that this finding is in error as although the claimants may have a subjective fear of persecution from skinheads (non state actors) on return to their home district this is not persecution within the meaning of the Refugee Convention. This is because there has not been a failure of state protection by the authorities in Poland as there is a police and criminal justice system available to provide protection to a level that can be reasonably expected to overcome the real risks of harm to these claimants from non state actors.
20. This generalised submission by the Secretary of State appears to be that if there is "sufficiency of protection" available in a country such as Poland then, logically followed through, there is no place for consideration of an IFA. We consider that this submission must be rejected.
21. Unfortunately the leading decisions in Shah and Islam and later in Horvath (and quite recently a High Court decision (Administrative Court) in Hari Dhima v Immigration Appeal Tribunal (CO/2392/2001), delivered 5 February 2002 by Lord Justice Auld and Mr Justice Ouseley), which have all developed and considered the issue of a "sufficiency of protection", by non state actor cases, have not gone on to consider the implications of this legal reasoning in relation to the well settled jurisprudence in relation to the IFA/IPA which is set out in the leading decisions of Robinson [1997 Imm AR 568] and Karanakaran [2000] Imm AR 271.
22. Because of the findings we reach as to the flaws in this Adjudicator's determination, and our own conclusions based on the objective country information, it has not been necessary for us to go on and determine whether the concepts of "sufficiency of protection" or "systems of protection" involve conclusions which must be reached only on a national basis (thus making the IFA/IPA question irrelevant) or whether they permit of localised failures in protection and consideration of the IFA/IPA.
23. Our own prima facie view is that if the formula adopted by Lord Hoffman in Shah and Islam which states that Persecution = Serious harm + Failure of state protection (for non state actor claims) is accepted as a starting point, there are serious potential IFA/IPA application problems if a failure of state protection is only assessed on a national or state wide basis and does not allow of localised failures in state protection. If it is only a national test, as appears , if by implication, to be indicated by several of their Lordships in Horvath, then IFA/IPA consideration becomes irrelevant once a national sufficiency of protection is established. If the Lord Hoffman formula is adopted, it would appear, there is thus no "persecution" at the local level as there is no failure of state protection. We do not consider that this was an intended result. However it would appear important for the future that a starred decision, or higher court, should at some stage in the near future address the issue of IFA/IPA and how the Robinson and Karanakaran tests should be applied in relation to findings of "sufficiency of protection" where there appear to be localised failures, and potential "protection" is available by internal relocation.
24. Returning to the terms of this Adjudicator's determination we find that the conclusions reached at paragraphs 22 and 23 are in error. The Adjudicator concluded that the claimants " have been subjected to sustained attack in their home area" however the Adjudicator immediately moved on to the issue of the IFA without consideration of whether these claimants faced a reasonable likelihood of serious harm on return to their home district, regardless of whether there was a system of protection available to them or otherwise. Simply stated the prospective fear on return has been overlooked. While the finding of past serious harm is highly relevant it is only an indicative factor and not conclusive of a future real risk.
25. On the basis of the somewhat limited country information before us we do however consider we are able to reach a sustainable conclusion on the well-foundedness of the fear of serious harm to this family on return to their home district and we return to this later in the decision.
26. We also find that the conclusions of the Adjudicator were unsustainable in relation to the treatment of the IFA/IPA. Having found that there was a "system" of effective protection in place in Poland, "that was not operated by the police in Kielce" the Adjudicator did not carry out an analysis or balancing of that protection and its impact on these claimants. She merely

proceeded to conclude that it would be unduly harsh for them to relocate to another part of Poland based on statements relating to the Roma community facing disproportionately high unemployment and that in moving to another part of Poland they would be seen as "troublemakers". We consider that these findings internally inconsistent. Having found that there is "effective protection" in other parts of Poland, and indeed similar findings were reached in both Franczak and Andrasz, then it is prima facie inconsistent to conclude that it would be "unduly harsh" to expect the claimants to relocate to other parts of Poland. As is spelt out clearly in the leading decisions of Horvath, and Shah and Islam, the central concept of the Refugee Convention is that of "surrogate protection". Thus where there is "effective protection" available concluded on objective evidence, it is extremely difficult to see how it can then be argued, that applicants, such as these claimants, are placed in an unreasonable or unduly harsh position by expecting them to relocate. The subjective elements, clearly involved in tests "unreasonableness" or it being "unduly harsh", would, in our view, need to be very strong and persuasive before the objective assessment of "effective protection" should be overridden. An overemphasis on the subjective analysis in IFA/IPA situations is not, in our view, consistent with the fundamental objectives of the Refugee Convention, which seek to provide protection from "well founded fear" not subjective fear.

27. While we agree that this may appear to be a gloss on the test of Linden JA in Thirunavukkarasu [1993] 109 DLR (4th) 682, as adopted by Brooke LJ in Robinson at 578, we consider that tying the IFA/IPA assessment back to the underlying concept of protection and an objective human rights based assessment of persecution, is clearly consistent with the later decisions of House of Lords in Horvath and Shah and Islam. This does not mean that unreasonableness or unduly harsh situations should not be considered but that these should be carried out against the backdrop of findings in relation to sufficiency or meaningful protection. We also note that such an approach is, on the face of it, more consistent with the recent academic considerations of Professor Hathaway and others in the so called "Michigan guidelines" (Michigan Journal of International Law. Vol 21:131) and the growing use of the term "internal protection alternative" rather than the older terms of "internal flight alternative" or "relocation". Consideration of the subjective and objective elements involved in IPA/IFA is also made in the New Zealand Refugee Status Appeals Authority decisions Refugee Appeal 71427/1999 (16 August 2000) and Refugee Appeal 71684/99 (29 October 1999).

28. We have adopted the approach of considering the IFA/IPA against the backdrop of findings on sufficiency of protection in Poland as well as the accepted Robinson test, later in this decision.

29. Do the claimants have a well founded fear of persecution in their home district?

As stated the country of origin information in relation to Poland discriminatory treatment of the Roma community in Poland is prevalent and official assistance is not as fulsome as might be desired. The same issue was faced by this Tribunal in both Franczak and Andrasz. The latest reports appear to be: those by Mark Braham in March 1993 to the UNHCR, a Helsinki Human Rights Foundation report in 1997, CIPU paragraphs 6.64 ? 66 and the United States State Department reports of February 2000 and 2001. These commentaries all indicate that while there are reports of discrimination and abuse, particularly by skinheads against the Roma population, the Polish government does have in place a criminal justice system to deal with such abuses and the national government does not discriminate against Roma overtly. The country information also recognises that some local officials are known to discriminate against Roma and that the judiciary often lacks resources. The report of Professor Bacton, or "Acton" as referred to in Franczak, must be set against this objective country information. On the totality of the evidence presented to the Adjudicator, where credibility of the claimants was accepted, we must agree that there have been several instances of discrimination by skinheads against these claimants in their home district. Whether these have reached the level of being persecutorial, as sustained or systemic attacks on core human rights, we have doubts. In this case, it is not necessary for us to be determinative as we consider that even if these claimants may be able to establish, to a reasonable degree of likelihood, that they would suffer serious harm on return to their home district the failure of state protection, essential additionally, in non-state actor claims, has not been established even locally. The evidence before the Adjudicator shows that the claimants made several complaints to the

police. However it does not indicate that the police were unwilling to assist them, nor that they would be "unwilling" in the future. The fact that the culprits may never have been caught does not indicate the police were unwilling to protect the claimants. It equally could indicate insufficiency of identification or lack of resources to carry out prosecutions. We consider therefore that the conclusion of the Adjudicator that the police did not offer the claimants effective protection in their home district was a highly dubious one on the evidence before her.

30. Indeed, as noted the claimants did not take the matter to higher authorities as would have appeared logical when there was little result locally. Again it is unnecessary for us to reach firm conclusions on this point as we consider, based on the totality of the country information, that these claimants can move to another part of Poland where they can access meaningful protection. The country information indicates that there is a criminal justice system in place and whilst the Romany community, which numbers about 40,000, faces disproportionately high unemployment to that of ethnic Poles, the national government does not overtly discriminate against Roma. We agree with the conclusions, set out at paragraph 22 by Mr Freeman in Andrasz set out above. We also concur with and follow the conclusion on sufficiency of protection for Polish Roma in Wierzbicki.

31. We have also gone on to consider, set against the objective findings in relation to sufficiency of protection in Poland, the application of the more subjective tests set out in Robinson and Karanakaran that is whether it would be unreasonable or unduly harsh to expect these claimants to relocate to another part of Poland. In this regard we have considered the evidence relating to these claimants found by the Adjudicator and set out in their initial application. It is clear that the family have suffered discrimination and some trauma from the specific attacks made on them by skinheads, but looking to the future, as we must, because of the sufficiency of protection available in other parts of Poland we consider that even if it were accepted they have a well founded fear of persecution on return to their home district, which we do not, there are clearly other sites within Poland where they could relocate and access meaningful state protection. Beyond this we find no evidence of conditions in other parts of Poland that they would suffer serious harms or conditions that would force them back to the site of possible persecution in Kielce. While their economic prospects may not be as good as they would be remaining in this country or as many other Poles, there is nothing in the country information that indicates they could not access the same level of welfare, health and education as other Poles. As stated the national government does not discriminate overtly against Roma. For these reasons we do not consider that it would be unreasonable or unduly harsh to expect these claimants to locate to another site of protection within Poland, away from Kielce.

33. For the above reasons the claimants are not refugees within the meaning of Article 1 A (2) of the Refugee Convention 1951. As with the conclusions in Andrasz, we do not consider for these claimants there would be a real risk of a breach of human rights if they were returned to Poland.

33. Decision:

The appeal is allowed in the above terms.

A R Mackey