Briefing Paper 8.6

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THE ROMA CASE IN THE HOUSE OF LORDS

1. In certain countries of Eastern Europe, notably the Czech Republic and Romania, there are large communities of Roma (gypsies) who have for long been the subject of discrimination by the majority communities in those countries in education, housing, employment and other areas. As a consequence many Roma have left their own countries and sought asylum in the United Kingdom and other Western European countries, claiming that their treatment in their countries amounts to persecution on grounds of race and therefore entitles them to the protection of the international community under the 1951 Convention on the Status of Refugees. A few years ago there was a growing flood of Roma asylum seekers from the Czech Republic, 1200 in 2000 alone, and the UK Government took up its concerns with the Czech government. This resulted in an agreement between the two governments that a British immigration control post could be set up at Prague Airport to screen applicants for visas to allow them to enter Britain. The post began to function in 2001 and as a result there was a dramatic reduction in the numbers of Czech asylum seekers arriving in Britain.
2. The case which culminated in a decision of the House of Lords on 9 December 2004 was started in the High Court by six Czech nationals of Roma ethnic origin, supported by the European Roma Rights Centre, a non-government organisation. They sought judicial review of procedures adopted by the British immigration officials at the airport which resulted in their being refused leave to enter in July 2001. Three of the appellants stated that they intended to claim asylum on arrival in the UK. Two gave other reasons but were in fact intending to claim asylum. The sixth gave other reasons which the immigration officer did not accept. It is uncertain whether her intention was to claim asylum.

3. The main claim made by the appellants was that the refusals of leave to enter were acts of unlawful discrimination against them on grounds of race. They were unsuccessful in the High Court and Court of Appeal but succeeded in their final appeal to the House of Lords. At all three stages it was contended on behalf of the appellants that the discrimination was contrary to Article 3 of the 1951 Refugee Convention, which states that the Contracting States "shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin", but the argument was rejected at all three stages. It was clear from other provisions of the Convention that as the appellants were still in their own country when they were refused, the Convention did not apply. "Refugee" is defined by Article 1A(2) of the Convention as a person who is inter alia outside his country of origin, which clearly these appellants were not.

4. Racial discrimination by a public authority is made unlawful by a number of international treaties to which the UK is a party. The current domestic law is contained in the Race Relations Act 1976, section 1 of which declares inter alia that a person discriminates against another on racial grounds if he treats that other less favourably than he treats or would treat other persons. Specific provision for the application of the Act to public authorities was made by the Race Relations (Amendment) Act 2000. The position of public authorities is set out in sections 19B - E of the 1976 Act, inserted by the 2000 Act. Section 19B states that it is unlawful for a public authority in carrying out any function to do any act which constitutes discrimination. Further provisions of sections 19B and 19C exempt from this certain public authorities, notably the two Houses of Parliament, the various security and intelligence services and the courts. So far as immigration is concerned it is obvious that immigration officers will often have to discriminate, especially on grounds of nationality, eg because nationals of many countries are required to have visas if they are to be allowed to enter the UK. Section 19D accordingly makes a special exception for the carrying out of immigration functions and begins by saying that section 19B, quoted above, "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 functions". "Relevant person" is defined as either a Minister of the Crown acting personally or any other person acting in accordance with a "relevant authorisation" an expression defined, so far as the case under consideration is concerned, as an express authorisation given with respect to a particular class of case by a statutory instrument made under the Immigration Acts.

5. The Home Secretary issued a relevant authorisation, as that expression is explained in the preceding paragraph, in April 2001, shortly before the operation at Prague Airport began. Its title is The Race Relations (Immigration and Asylum) (No. 2) Authorisation 2001 and it has a Schedule listing various nationalities and ethnic origins to which it applies, **including Roma**. It authorises immigration officers inter alia to subject Roma to a more rigorous examination than other persons in the same circumstances, to impose conditions or restrictions on leave to enter granted to them or to refuse to give leave to enter. This might be thought to be a complete answer to any complaint that Roma applying to British immigration officers at Prague Airport were subjected to discriminatory treatment. The whole purpose of the relevant authorisation was to enable immigration officers to treat with a degree of suspicion Roma or other categories of persons of particular national or ethnic origin who on past experience were more likely to be wanting to travel to the UK for the purpose of claiming asylum. But strange as it may seem the Home Office did not rely on the authorisation as a defence against the complaint of discrimination on grounds of race. Their contentions were that the authorisation did not apply to the operation in Prague, that there was no instruction to the immigration officers there to apply it and that in fact there was no discrimination in the way that applications from Roma were processed.

6. According to the speech of Baroness Hale, one of the members of the Appellate Committee which gave the decision in this case, there was no instruction to the immigration officers at Prague to implement the authorisation and the records of individual cases give no indication that the officers thought they were implementing it. However, general instructions from Immigration and Nationality Directorate (IND) appended to the authorisation contain the following passage, included in the instructions by way of explanation of the way the authorisation should be relied on by immigration officers:

> "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."

Later, dealing specifically with the application of the authorisation to officers at posts outside the UK, the instructions state:

> "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 [which included Roma]..Additional statistical or intelligence evidence is not required as Ministers authorised the discrimination in respect of the listed groups."

7. Baroness Hale makes it clear that the Home office did not at any stage in the proceedings seek to rely on the authorisation. At earlier stages in the judicial process the appellants sought unsuccessfully to attack the validity of the authorisation but did not pursue this in the House of Lords. The end result appears to be that the authorisation's validity has not been impugned but for the purposes of their Lordships' judgment was not regarded as relevant, even though Baroness Hale appears to have relied on the two passages quoted in the previous paragraph, both taken from guidance notes issued to immigration officers generally, in reaching a decision adverse to the Home Office. That decision was taken on the basis that the general law as stated in section 19B (1) of the Race Relations Act 1976 applied to the way in which the immigration officers at Prague carried out their duties:

> "It is unlawful for a public authority in carrying out in carrying out any function of the authority to do any act which constitutes discrimination."

So although there was legal provision in the form of the authorisation which could have been used to provide a justification for discriminatory treatment of Roma applying for leave to enter the UK at Prague Airport, the Home Office chose not to rely on it but insisted there had not been any discrimination. There must be at least a suspicion that the reason why the Home Office did not rely on it was that they had failed to give appropriate instructions about record keeping. I infer this from the following passage from paragraph 91 of Baroness Hale's judgment:

> "The officers did not make any record of the ethnic origin of the people they interviewed. The respondents [the Home Office] 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 views 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"

In the following paragraph of her judgment the Baroness continues:

> "Mr Vasil, a Czech Roma working for the ERRC [European Roma Rights Centre, one of the appellants], 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 if 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."

What was sought from the House of Lords was a declaratory judgment. On the basis of this and other evidence of discrimination from the same source, Baroness Hale concluded with a declaration in the following terms, supported by all the other law lords:

> "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."

8. The House of Lords did not consider what the position would have been under the authorisation if it applied. It is strongly arguable that it did apply even though the Home Office chose not to rely on it. The fact that the immigration officers at Prague Airport were not instructed by their superiors to rely on it is surely immaterial. Section 19D of the Race Relations Act 1976 and the authorisation made pursuant to powers which that section confers on the Home Secretary are part of the laws of the United Kingdom and clearly applicable to the operations of all immigration officers wherever they are stationed, at home or abroad. There is nothing in the section or in the authorisation which requires instructions to be given to a particular station before the officers at that station can take advantage of them. I can only assume that the Home Office was severely embarrassed at the disclosure of the lack of proper record keeping described by Baroness Hale and therefore chose not to rely on the authorisation. So far as the Czech Republic is concerned, the matter is now of historic interest only, as the Republic has been a member of the European Union since 1 May 2004 and its citizens no longer need leave to enter the UK or any other Member State. But the question of discrimination will continue to be of major importance in relation to the screening of persons seeking leave to enter from the many other countries of origin of asylum seekers. The judgment must cast doubt on the future utility of the authorisation (or of any other authorisation which might be made under section 19D), even though the House of Lords has not said anything which questions its validity. It would certainly have helped if their Lordships could have made it clear in express words that the validity of the authorisation was not affected by their adverse judgment, even though those words would have been obiter dicta. Much weight attaches to obiter dicta of the House of Lords.*

9. I conclude with the reflection that if the Home Office had given proper instructions to the immigration officers based at Prague Airport about record keeping at interviews and had ensured that those instructions were observed, it could then have relied on the Authorisation and the case would never have reached the House of Lords. The extent of the embarrassment caused to the Home Office by this case may be judged from the fact that the Authorisation referred to in paragraph 5 above was revoked on 11 June 2002 and that there are no other Authorisations under section 19D in force. Officials are now back to being obliged to rely unequivocally on paragraph 2 of the Immigration Rules (HC 395) which states:

> "Immigration Officers, Entry Clearance Officers and all staff of the Home Office Immigration and Nationality Directorate will carry out their duties without regard to the race, colour or religion of persons seeking to enter or remain in the United Kingdom and in compliance with t he provisions of the Human Rights Act 1998."

Harry Mitchell QC

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