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 p 154): "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

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