HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT

(APPELLANT)

EX PARTE ADAN

(RESPONDENT)

REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT

(APPELLANT)

EX PARTE AITSEGUER

(RESPONDENT)

ON 19 DECEMBER 2000

LORD SLYNN OF HADLEY

My Lords,

I have had the advantage of reading drafts of the speeches of my noble and learned friends Lord Steyn and Lord Hobhouse of Woodborough. I gratefully adopt Lord Steyn's summary of the relevant facts and of the Statutory and Convention provisions involved. In the light of their opinions my own view can be stated more shortly.

It is common ground that if each of the appellants were sent back to the countries from which immediately they came to the United Kingdom, Germany would probably send back Adan to Somalia and France would probably send back Aitseguer to Algeria. Germany would do so because it considered that there was no state or government in Somalia which could carry out the persecution. France because it considered that the "persecution" which he feared was not overrated or encouraged or threatened by the state itself. Thus in each case it was not conduct for which the state was accountable. It is also common ground that the United Kingdom would not send them back directly to Somalia and Algeria respectively if it was accepted that each was outside the country of his nationality owing to "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion (see Geneva "Convention relating to the status of refugees" 1951 Article 1 A). Thus even though the persecution was not threatened by the state or by an agency for which the state was responsible, Adan would not be sent back if the threat was from a rival clan to that to which Adan belonged and if the threat to Aitseguer was from the Groupe Islamique Armé in Algeria.

It appears that the Secretary of State accepts that under Article 33 of the Geneva Convention which provides that the United Kingdom shall not "expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion," such threats may come from agencies other than the state. In other words that what is sometimes called the "protection" theory rather than the "accountability" is adopted. On the basis of the decision of the House [*Adan v. The Secretary of State* [1999] 1 A.C. 293] the Secretary of State's view is not only legitimate but right. He also accepts that for him to send back a person to a state which would itself send the applicant to the country where he feared

persecution would itself be a breach of his obligations. (See re *Musisi ex parte Bugdaycay* [1987] A.C. 514.)

The present case however turns on section 2(2) (c) of the Asylum and Immigration Act 1996 which allows a person who has made a claim for asylum to be removed from the United Kingdom if, inter alia, the Secretary of State certifies that in his opinion

"the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention".

The sole or core question is therefore whether as a matter of law it is open to the Secretary of State to certify that in his opinion that condition has been fulfilled. Can he as a matter of law say that the government of Germany and France would not send Adan or Aitseguer back respectively to Somalia and Algeria "otherwise than in accordance with the Convention", unfortunately there is a lack of uniformity in the interpretation of this provision between states.

As is apparent from the brief facts I have stated Germany and France take a very different view from the United Kingdom as to who as a matter of interpretation can be the perpetrators of the prosecution, a fear of which is relied on by the applicant, though the German and French positions may themselves have differences. It seems thus that if there is no recognised state in the territory (Germany) or no government which tolerates or encourages the persecution (France) the respective government will send the claimants back even if acts are threatened by others which, if done by the state, would amount to persecution within the meaning of the Convention. The reason is that in such cases they do not see that there is any persecution for which the state is accountable. The United Kingdom on the other hand will regard a threat of persecution in the territory on one of the specified grounds by a body other than the state and which is not tolerated or encouraged by the state as constituting a sufficient threat within the Convention.

The question thus narrows□may the Secretary of State say that he is satisfied that the other state will not send the applicant to another country "otherwise than in accordance with the Convention" if the other state adopts an interpretation of the Convention which the Secretary of State rejects but which the Secretary of State accepts is a reasonably possible or legitimate or permissible or perhaps even arguable interpretation.

It is understandable that comity between nations, parties to the Convention, might be seen to encourage that view but in my opinion that view is wrong. The question is not whether the Secretary of State thinks that the alternative view is reasonable or permissible or legitimate or arguable but whether the Secretary of State is satisfied that the application of the other state's interpretation of the Convention would mean that the individual will still not be sent back otherwise than in accordance with the Convention. The Secretary of State must form his view as to what the Convention requires (interpreted if his view is challenged by the courts). His is the relevant view and the relevant obligation is that of the United Kingdom. It seems to me that the Secretary of State may not send back an applicant if the Secretary of State considers that the other state's interpretation would lead to an individual being sent back by that state to a state where he has established a fear of persecution which the Secretary of State finds to be covered by the Convention.

Just as the courts must seek to give a "Community" meaning to words in the Treaty of Rome ("worker") so the Secretary of State and the courts must in the absence of a ruling by the International Court of Justice or uniform state practice arrive at their interpretation on the basis of the Convention as a whole read in the light of any relevant rules of international law, including the Vienna Convention on Treaties. The Secretary of State and the courts of the United Kingdom have to decide what this phrase in this Treaty means. They cannot simply adopt a list of permissible or legitimate or possible or reasonable meanings and accept that any one of those when applied would be in compliance with the Convention.

In my view it is impossible for the Secretary of State to certify that the condition in section 2(2)(c) is satisfied, that the other state would not send the applicant back "in contravention of the Convention", if the interpretation of the other state and its application to particular facts would

result in the Convention being applied in a way which the Secretary of State himself was satisfied was not in accordance with the Convention.

The phrase "otherwise than in accordance with the Convention" does not mean "otherwise than in accordance with the relevant state's possible reasonable, permissible or legitimate view of what the Convention means".

That persecution may be by bodies other than the state, for the purposes of the Geneva Convention, was accepted in *Adan (supra).* Nothing has been said in the present case which suggests that that might be wrong and in my view it was plainly correct. If Article 33 had intended his obligation to be limited to cases where a state carried out or tolerated the persecution, Article 33 would have said so. The Secretary of State must apply that interpretation to the application of section 2 (2) (c) of the 1996 Act as he must to his own obligation under Article 33 of the Convention.

In section 2(2)(c) it is his obligation not to send back the applicant which is in issue. If some other states interpret the Convention differently in a way which he considers not to be in compliance with the Convention he must carry out his obligation in the way in which he is advised or is told by the courts is right. To do so is not in any way contrary to the comity of nations or offensive to other states who interpret it differently and it does not begin to suggest malafides on their part.

There may be cases in which an interpretation adopted by the Secretary of State can be carried out in different ways and in such a case it may well be that the Secretary of State could accept that such other ways were in compliance with the Convention. But the Secretary of State is neither bound nor entitled to follow an interpretation which he does not accept as being the proper interpretation of the Convention.

I have no doubt that the Court of Appeal reached the right conclusion and I therefore agree with Lord Steyn and Lord Hobhouse that these appeals should be dismissed.

LORD STEYN

My Lords,

There are two appeals before the House from decisions on separate applications for judicial review, which were heard together and determined in a single judgment in the Court of Appeal: *Reg. v. Secretary of State for the Home Department, Ex parte Adan; Reg. v. Secretary of State for the Home Department, Ex parte Aitsegeur* [1999] 3 W.L.R. 1274 The central question is whether under section 2(2)(c) of the Asylum and Immigration Act 1996 ("the Act of 1996"), read with the 1951 Geneva Convention relating to the Status of Refugees (1951) (Cmd. 9171), and its Protocol (1967) (Cmnd. 3906) ("the Refugee Convention"), the Secretary of State was entitled to authorise the removal of two asylum seekers to safe third countries on the basis that there is a permissible range of interpretations of protections of the Refugee Convention rather than one autonomous interpretation. The answer to this question turns on the construction of section 2(2)(c) of the Act of 1996 which has been repealed by the Immigration and Asylum Act 1999 ("the Act of 1999").

Adan's asylum application

Stripped of unnecessary detail, the sequence of events was as follows. Adan is a citizen of Somalia. She is now 28 years of age. She claimed asylum in Germany. She told the German authorities that she was a member of a minority clan and that she had been persecuted by majority clans dominant near Mogadishu. On 25 August 1997 the German Federal Office for the Recognition of Refugees rejected her asylum claim and refused her any other form of protection in Germany. She was ordered to leave Germany on pain of deportation to Somalia. She did not exercise her right of appeal against this decision. On 4 October 1997 she arrived in the United

Kingdom and claimed asylum. On 3 February 1998 the Secretary of State asked the German authorities to accept responsibility under the 1990 Dublin Convention for determining Adan's asylum claim. (The full title of this Convention is the Convention determining the State responsible for examining Applications for Asylum Lodged in One of the Member States of the European Communities.) On 19 February 1998 the German authorities accepted responsibility for determining her asylum claim. On the same day the Secretary of State refused her asylum claim without consideration of its merits and certified under section 2 of the 1996 Act that Adan could be returned to Germany.

On 29 April 1998 a judge granted leave to Adan to move for judicial review of the Secretary of State's certificate. On 24 November 1998 the Divisional Court (Rose L.J. and Mitchell J.) dismissed the application: [1999] Imm. A.R. 114. On 22 January 1999 the Court of Appeal granted leave to appeal. By letter dated 23 June 1999, the Secretary of State informed Adan that he would not seek to return her to Germany, regardless of the outcome of the appeal, but that he would himself determine her claim for asylum. This was because the Secretary of State wished to adduce before the Court of Appeal fresh evidence about alternative forms of protection available in Germany. He accepted that he could have obtained such evidence in time to produce it to the Divisional Court. The Secretary of State accepted that it would not be right to seek to return Adan to Germany in reliance on new evidence. But, in the light of over 200 pending cases which raised similar issues, the Secretary of State wanted the Court of Appeal to hear the appeal and admit the further evidence. The Court of Appeal (Lord Woolf M.R., Laws and Mance L.JJ.) admitted further evidence and heard the appeal. On 23 July 1999 the Court of Appeal allowed Adan's appeal: [1999] 3 W.L.R. 1274.

Aitseguer's asylum application

Aitseguer is a citizen of Algeria. He is now 33 years of age. On or about 26 January 1998 he arrived in France. He did not claim asylum in France. On 9 February 1998 he arrived in the United Kingdom and claimed asylum. He claimed to be at risk from the Groupe Islamique Armé and said that the Algerian authorities are unable to protect him. On 12 February 1998 the Secretary of State asked the French authorities to accept responsibility under the Dublin Convention for determining Aitseguer's claim for asylum. On 20 April 1998 the French authorities agreed to do so. On 21 April 1998 the Secretary of State certified under section 2 of the 1996 Act that Aitseguer could be returned to France.

On 15 July 1998 a judge granted leave to apply for judicial review of the Secretary of State's certificate. On 18 December 1998 Sullivan J. quashed the Secretary of State's certificate: [1999] I.N.L.R. 176. Sullivan J. granted leave to appeal. On 23 June 1999 the Secretary of State wrote to Aitseguer in the same terms as contained in his letter to Adan, namely that he wished to adduce further evidence before the Court of Appeal and that he would not send Aitseguer to France but would himself determine his substantive asylum claim, regardless of the outcome of the appeal. The appeal was heard with that of Adan. The Court of Appeal dismissed the Secretary of State's appeal against the order of Sullivan J.

Different interpretations of the Refugee Convention

Article 1A of the Refugee Convention provides, so far as material:

"For the purposes of the present Convention, the term 'refugee' shall apply to any person who . . . (2) [As a result of events occurring before 1 January 1951 and] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence [as a result of such events], is unable or, owing to such fear, is unwilling to return to it."

The words in brackets were deleted by the 1967 Protocol. Article 33(1) provides:

"No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

There is a divergence in state practice concerning the interpretation of the word "persecuted" in article 1A(2). The majority of contracting states, including the United Kingdom, do not limit persecution to conduct which can be attributed to a state. A minority of contracting states, including Germany and France, do so limit it. The two different approaches have been referred to as the persecution theory and the accountability theory. The consequences of adopting one or other of these theories on the fate of refugees are vividly illustrated by the cases before the House.

In the case of Adan the German authorities have taken the view that governmental authority in Somalia has collapsed, so that there is no state to which persecution can be attributed. Adan claims to belong to a persecuted minority clan. She claims to be unaffected by the general exclusion from the Refugee Convention of victims of civil war simpliciter, as she would be able to demonstrate a differential impact: *Adan v. Secretary of State for the Home Department* [1999] 1 A.C. 293, 311B. Aitseguer claims to be a target of the Groupe Islamique Armé in Algeria. The Secretary of State accepts that there is a substantial risk that the French authorities would refuse his asylum claim on the ground that there was no state toleration or encouragement of the threats of this faction against Aitseguer, and therefore no persecution attributable to the Algerian state. The Secretary of State accepts that if Adan and Aitseguer were to be returned to Germany and France respectively, the restrictive view of article 1A(2) encapsulated in the persecution theory, which prevails in Germany and France, will probably cause them to be returned to Somalia and Algeria where they may face torture and death.

The 1993 and 1996 Acts

In the United Kingdom applications for asylum are determined by the Secretary of State. Section 6 of the Asylum and Immigration Appeals Act 1993 provides as follows:

"During the period beginning when a person makes a claim for asylum and ending when the Secretary of State gives him notice of the decision on the claim, he may not be removed from, or required to leave, the United Kingdom."

Section 2 of the Asylum and Immigration Act 1996 creates an exception to section 6 of the Act of 1993. It deals with removal of asylum seekers to "safe third countries" certified as such by the Secretary of State when he is of the opinion that the statutory conditions are satisfied. Section 2 of the Act of 1996 provides, so far as material:

"(1) Nothing in section 6 of the 1993 Act . . . shall prevent a person who has made a claim for asylum being removed from the United Kingdom if -

"(a) the Secretary of State has certified that, in his opinion, the conditions mentioned in subsection (2) below are fulfilled;

. . .

(2) The conditions are -

(a) that the person is not a national or citizen of the country or territory to which he is to be sent;

(b) that his life and liberty would not be threatened In that country or territory by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and

"(c) that the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention.

(3) This subsection applies to any country or territory which is or forms part of a member state . . ."

(My emphasis)

There is a right of appeal against a section 2 certificate: sections 2(1)(b); 3(1). But, where the certified country is a member state of the European Union, the appeal cannot be brought until after the asylum seeker has left the United Kingdom: sections 2(3); 3(2).

The Act of 1999

Section 169(3) of the Schedule 16 to the Immigration and Asylum Act 1999 repealed sections 2 and 3 of the 1996 Act. By section 11 of the 1999 Act, a member state of the European Union with which there are standing arrangements, such as the Dublin Convention, for determining which state is responsible for considering applications for asylum, is to be regarded as a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention. The asylum seeker has a right of appeal on the ground that removal to the member state will contravene section 6 of the Human Rights Act 1998: sections 11(2); 65. The Secretary of State can carry out the removal before the right of appeal is exercised if he certifies that the allegation that the removal would breach the asylum seeker's human rights is manifestly unfounded: sections 11(3); 72(2)(a). These provisions of the 1999 Act came into force on 2 October 2000. The issue raised in the present case may still arise in cases where the proposed removal is not to a member state under standing arrangements: section 12 of the 1999 Act.

The decision in the Court of Appeal

The Secretary of State's principal submission before the Court of Appeal was that under section 2(2)(c) of the Act 1996 it was a sufficient compliance with the statute if he considered that the approach of the third country was a reasonable interpretation of the Refugee Convention open to that country. In a detailed and careful judgment of the court Laws L.J. rejected this submission: [1999] 3 W.L.R. 1274. He held that the Secretary of State had to be satisfied that the practice in the third country was consistent with the true and international interpretation of the Refugee Convention. Article 1(A)(2) of the Refugee Convention extended to persons who feared persecution by non-state agents. Accordingly, the Secretary of State had not been entitled to issue certificates authorising the return of the asylum seekers to Germany and France.

The status of the appeals before the House

The outcome of the two appeals before the House will not affect the cases of Adan and Aitsegeur. But the appeals raise important issues which may require consideration in other cases, including cases of removal to countries outside the European Union. In accordance with the approach set out in *Reg. v. Secretary of State for the Home Department, Ex parte Salem* [1999] 1 A.C. 450 the House gave leave to appeal in the cases of Adan and Aitseguer. Leave was granted in the both cases so that the House could consider whether there is a material difference between a state where governmental authority has collapsed completely (as is the case in Somalia) and a state where governmental authority exists but is too weak to provide effective protection against persecution by non state actors (as is the case in Algeria). It was on this basis that Sullivan J. distinguished the ruling of the Divisional Court in Aitseguer's case from that of Adan. The Court of Appeal held that the two cases were indistinguishable: p. 1299C.

On the other hand, a third case before the Court of Appeal, named Subaskaran, added nothing to the issues and leave was not sought to bring it before the House.

The issues

In the context of a certificate issued under section 2(2)(c) of the Act of 1996 the following issues arise:

(A) Does article 1A(2) of the Refugee Convention have a proper international meaning, the interpretation of which is decided by the court as a question of law, in relation to the consideration of claims of persecution by non-state agents?

(B) If so, what is that international meaning insofar as it is relevant in the present case?

(C) Was the Secretary of State entitled to conclude that:

(i) Germany was a safe third country in respect of asylum claims made by a person from a country where there was no state to protect her from persecution by non-state agents?

(ii) France was a safe third country in respect of asylum claims made by a person from a country where there is a state but it is unable to provide protection from persecution by non-state agents?

(D) Was the Secretary of State entitled to rely on forms of protection other than the grant of asylum which are available in the state to which he is proposing to send the asylum seeker and, if so, by reference to what criteria?

In the circumstances of the two cases before the House issue (A) is the critical issue.

Issue A: Is there an autonomous meaning of article 1A(2)?

The starting point is section 2(2)(c) of the Act of 1996. It provides that one of the indispensable conditions to the granting of a certificate by the Secretary of State authorising the removal of an asylum seeker is that the government of the country to which he is to be sent (the third country) "would not send him to another country or territory otherwise than in accordance with the Convention". And that requires one in the present context to turn back to article 33(1) of the Refugee Convention, which provides that no state "shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". It is accepted, and rightly accepted, by the Secretary of State that it is a long standing principle of English law that if it would be unlawful to return the asylum seeker directly to his country of origin where he is subject to persecution in the relevant sense, it would equally be unlawful to return him to a third country which it is known will return him to his country of origin: *Reg. v. Secretary of State for the Home Department, E*x *parte Bugdaycay* [1987] A.C. 514, at 532D-E. But counsel for the Secretary of State submits that this principle tells us nothing about the particular problem before the House, namely whether there is a true and international meaning of article 1(A)(2) of the Refugee Convention or simply a range of interpretations some of which the Secretary of State may be entitled to regard as legitimate and others not.

Section 2(2)(c) of the Act of 1996 is drafted in plain words. It requires certification by the Secretary of State that the third country would not send the asylum seeker to his country of origin "otherwise than in accordance with the Convention". The section does not express the condition in terms that refer to "the Convention as legitimately interpreted by the (third) country concerned". But that is exactly the meaning which counsel for the Secretary of State invites the House to give to section 2(2)(c). It would involve interpolation not interpretation. And there is no warrant for implying such words. It is noteworthy that such a legislative technique, expressly accommodating a range of acceptable interpretations, is nowhere to be found in respect of multilateral treaties or conventions incorporated or authorised by United Kingdom legislation. Such a remarkable result would have required clear wording. The obvious and natural meaning

of section 2(2)(c) is that "otherwise than in accordance with the Convention" refers to the meaning of the Refugee Convention as properly interpreted.

It follows that the enquiry must be into the meaning of the Refugee Convention approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions. It is necessary to determine the autonomous meaning of the relevant treaty provision. This principle is part of the very alphabet of customary international law. Thus the European Court of Justice has explained how concepts in the Brussels Convention must be given an autonomous or independent meaning in accordance with the objectives and system of the convention: see *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging,* Case 34/82, [1983] E.C.R. 987, 1002, para 9-10; *SPRL Arcado v. SA. Haviland,* Case 9/87, Opinion of Advocate General Slynn, [1988] E.C.R. 1539, 1549; *Athanasios Kalfelis v. Banklaus Schröder Münchmeyer, Hengst and Co. and others*, Case 189/87, [1988] E.C.R. 5565, 5585, para 16; *Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA (TMCS),* Case C-26/91 [1992] E.C.R. 1-3967, 3993, para. 10. Closer to the context of the Refugee Convention are human rights conventions where the principle requiring an autonomous interpretation of convention concepts ensures that its guarantees are not undermined by unilateral state actions. Thus the European Court of Human Rights has on a number of occasions explained that concepts of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) must be given an autonomous meaning, e.g. concepts such as "civil right" and "criminal charge". The decisions articulating this idea are too numerous to cite but I would mention one recent example, namely *Chassagnou and Others v. France,* App.s Nos. 25088/94, 28331/95, 28443/95, April 29, 1999, 7 Butterworth H.R. Cas. 151 as well as the clear analysis in *Grosz, Beatson and Duffy, Human Rights: The 1998 Act and the European Convention,* 2000, C0-07, at pp. 165-166.

In *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (UK) Ltd.* [1978] A.C. 141, 152, Lord Wilberforce observed that a treaty should be interpreted "unconstrained by technical principles of English law, or by English legal precedent, but on broad principles of general acceptation"; see also *H & Others (Minors) (Abduction: Acquiescence)* [1998] A.C. 72, 87. The rules governing the interpretation of treaties are articles 31 (General rule of interpretation) and article 32 (Supplementary means of interpretation) of the Vienna Convention on the law of Treaties (1980) (Cmnd. 7964), which codify already existing public international law: *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251, 282D. It is common ground that there are no relevant supplementary means of interpretation to be considered in regard to the Refugee Convention and I will therefore not set out article 32. But article 31 is important in the present context. It reads as follows:

"(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

(2) The context of the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument relating to the treaty.

(3) There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended".

It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty. If there is disagreement on the meaning of the Refugee Convention, it can be resolved by the International Court of Justice: article 38. It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court of Justice is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.

There were contrary arguments presented by counsel for the Secretary of State. The most important were the following. First, that the objective of the legislative changes effected by the Act of 1996 show that it is inherently unlikely that Parliament intended that the Secretary of State, when considering whether to issue a certificate under section 2, should be required to proceed on the basis that there is only one true interpretation of the Refugee Convention. I would reject this contention. The subject of the Refugee Convention is fundamental rights. It is fair to assume that if Parliament had intended to introduce in 1996 the relativist and imprecise notion of "the Convention as legitimately by the third country concerned," which tends to undermine the protections guaranteed by the Refugee Convention, it would have made such legislative intent clear by express words. Secondly, counsel was able to rely on observations in the Court of Appeal in *Kerrouche v. Secretary of State for the Home Department* [1997] Imm. A.R. 610, 615 and *Iyadurai v. Secretary of State for the Home Department* [1998] Imm. A.R. 470, at 476, which tend to support the idea of a range of permissible meanings of the Refugee Convention. For the reasons I have given I do not accept that in this respect the law was correctly stated in these cases. Thirdly, counsel for the Secretary of State placed great reliance on the fact that on 4 March 1996 the member states of the European Union agreed a Joint Position on the harmonised application of the definition of the term "refugee" in article 1 of the Refugee Convention. Paragraph 5.2 of the Joint Position States:

"Persecution by third parties

Persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in article 1A of that Convention, is individual in nature and is encouraged or permitted by the authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate. The persons concerned may be eligible in any event for appropriate forms of protection under national law".

Counsel put too much weight on this document. Laws L.J. convincingly explained in his judgment that the argument treats what is necessary as if it were sufficient for the purpose of ascertaining the true interpretation of section 2(2)(c) of the Act of 1996 read with article 1(A)(2) of the Convention. I agree. Fourthly, counsel for the Secretary of State painted a picture that if his argument was rejected, the Secretary of State was charged with an impossible task. He said:

"For the Secretary of State to be required to assess the details of the judgments of the appellate courts of other EU States, and form a judgment on whether they are consistent with the 1951 Convention, with that judgment subject to reassessment by the courts of this country by way of judicial review, would impose a complex and time-consuming task that is inconsistent with, and would substantially frustrate, the objective of the 1996 Act to implement the principles in the Dublin Convention and speedily return asylum seekers to other EU States for the merits of their claims to be considered."

The sky will not fall in. If there is one autonomous meaning of the Refugee Convention, the task of the Secretary of State will in some ways be simplified. He need only consider and apply the true interpretation of the Refugee Convention rather than a multiplicity of potential issues about the legitimacy of particular interpretations by other countries. Fifthly, counsel for the Secretary of State raised a matter which did cause me concern at one stage, namely whether the view I have adopted contains an implicit criticism of the judicial departments of Germany and France. I certainly intend no criticism of the interpretations adopted in good faith in Germany and France. Unanimity on all perplexing problems created by multilateral treaties is unachievable. National courts can only do their best to minimise the disagreements. But ultimately they have no choice but to apply what they consider to be the autonomous meaning. Here the difference is fundamental and cannot be overcome by a form of words. The House is bound to take into account the obligations of the United Kingdom government and to apply the terms of section 2(2)(c) of the Act of 1996.

In my view the contention of the Secretary of State is in conflict with the logic of treaty law, and in particular the logic of the Refugee Convention, and finds no support in the language of the Act of 1996. The Court of Appeal correctly concluded that there is only one true interpretation of article 1A(2) of the Refugee Convention. It is as I have explained an autonomous interpretation as befits a basic concept in the Refugee Convention.

Issue (B): What is the relevant autonomous meaning of the Refugee Convention?

In *Adan v. Secretary of State for the Home Department* [1999] 1 A.C. 293 the House of Lords authoritatively rejected the persecution theory and adopted the accountability theory. Lord Lloyd of Berwick held, at p. 306A-B, that the protection of the Refugee Convention extends to:

"the important class of those who are sometimes called 'third party refugees,' i.e. those who are subject to persecution by factions within the state. If the state in question can make protection available to such persons, there is no reason why they should qualify for refugee status. They would have satisfied the fear test, but not the protection test. Why should another country offer asylum to such persons when they can avail themselves of the protection of their own country? But if, for whatever reason, the state in question is unable to afford protection against factions within the state, then the qualifications for refugee status are complete. Both tests would be satisfied."

Although not relevant to the cases before the House, I draw attention to the fact that Lord Lloyd of Berwick qualified his ruling as follows, at 311B:

"I conclude from these authorities, and from my understanding of what the framers of the Convention had in mind, that where a state of civil war exists, it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show what Mr. Pannick calls a differential impact. In other words, he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare."

Three Law Lords, (Lord Goff of Chieveley, Lord Nolan and Lord Hope of Craighead) agreed with the opinion of Lord Lloyd of Berwick and Lord Slynn of Hadley gave a separate judgment which on the material point is to the same effect: p. 302D.

It is important to recognise that in *Adan* Lord Lloyd of Berwick made clear that the enquiry related to the autonomous meaning of the Refugee Convention. He said, at p. 305C-D:

"I return to the argument on construction. Mr. Pannick points out that we are here concerned with the meaning of an international Convention. Inevitably the final text will have been the product of a long period of negotiation and compromise. One cannot expect to find the same precision of language as one does in an Act of Parliament drafted by parliamentary counsel. I

agree. It follows that one is more likely to arrive at the true construction of article 1A(2) by seeking a meaning which makes sense in the light of the Convention as a whole and the purposes which the framers of the Convention were seeking to achieve rather than by concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach."

And Lord Slynn of Hadley approached the matter in the same way. The conclusions in *Adan* were endorsed by the House in *Horvath v. Secretary of State for the Home Department* [2000] 3 W.L.R. 379.

On the supposition that article 1A(2) must be given one autonomous interpretation counsel for the Secretary of State accepted that the holding in *Adan* represents that interpretation. It is unnecessary therefore to travel over the same ground again. Two points in amplification of the judgments in *Adan* must, however, be mentioned. First, it is accepted that the United Kingdom view is shared by the majority of states. It also appears to be gaining ground. Secondly, the Handbook on Procedures and Criteria for Determining Refugee Status, 1979, published by the U.N. High Commission for Refugees ("UNHCR"), states in paragraph 65:

"Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."

(My emphasis)

Under articles 35 and 36 of the Geneva Convention, and under article II of the Protocol of 1967, the UNHCR plays a critical role in the application of the Refugee Convention: compare the Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428(V) of 14 December 1950, para. 8. Contracting states are obliged to co-operate with UNHCR. It is not surprising therefore that the UNHCR Handbook, although not binding on states, has high persuasive authority, and is much relied on by domestic courts and tribunals: *Aust, Modern Treaty Law and Practice, 2000, 191.*

The relevant autonomous meaning of article 1(A)(2) of the Refugee Convention is therefore as explained in *Adan.* Like the Court of Appeal I would hold that there is no material distinction between a country where there is no government (like Somalia) and a country when the government is unable to afford the necessary protection to citizens (such as Algeria). Both are covered by article 1A(2).

Issue C: Was the Secretary of State's certification lawful?

On the stark and clear cut facts on which the House has been asked to consider the two appeals I conclude that the Secretary of State wrongly proceeded on the twin assumption that there is a band of permissible meanings of article 1A(2) and that the practice hitherto adopted in Germany and France falls within the permissible range. The Secretary of State materially misdirected himself. His decisions must be quashed. It is only necessary to add that cases under the Refugee Convention are always particularly fact-sensitive. Where the position is less straight forward different considerations may arise.

Issue D: Alternative Protection in France and Germany

It was sensibly agreed between counsel that the House is not in a position to express any opinion on alternative procedures for the protection of asylum seekers in Germany and France. I do not therefore propose to say anything about this aspect.

Disposal

For these reasons I would dismiss both appeals.

LORD HUTTON

My Lords,

Article IA(2) of the 1951 Geneva Convention relating to the status of Refugees defines a "refugee" as any person who

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

Article 33 of the Convention provides:

"1. No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

The United Kingdom has accepted this obligation under the Convention and Parliament recognised the primacy of the Convention when a person claims asylum in the United Kingdom in enacting the Asylum and Immigration Appeals Act 1993. Section 1 provides:

"the 1971 Act" means the Immigration Act 1971;

"claim for asylum" means a claim made by a person (whether before or after the coming into force of this section) that it would be contrary to the United Kingdom's obligations under the Convention for him to be removed from, or required to leave, the United Kingdom; and "the Convention" means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol to that Convention."

Section 2 provides:

"Primacy of Convention

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

Section 6 gave protection to persons making a claim for asylum and provided:

"During the period beginning when a person makes a claim for asylum and ending when the Secretary of State gives him notice of the decision on the claim, he may not be removed from, or required to leave, the United Kingdom."

Where a refugee claimed asylum in more than one Member State of the European Communities difficulties arose as to which State was responsible for examining the claim in order to determine whether the claimant should be granted asylum in discharge of the obligations imposed by the Geneva Convention. A particular problem arose of "forum-shopping" by asylum seekers. The Dublin Convention 1990 entered into by the Member States was intended to make provisions for these difficulties and one of the recitals in the Preamble states:

"Aware of the need, in pursuit of this objective, to take measures to avoid any situations arising, with the result that applicants for asylum are left in doubt for too long as regards the likely

outcome of their applications and concerned to provide all applicants for asylum with a guarantee that their applications will be examined by one of the Member States and to ensure that applicants for asylum are not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum;"

The Articles of the Dublin Convention give effect to the intent stated in the Preamble and article 3 provides:

"1. Member States undertake to examine the application of any alien who applies at the border or in their territory to any one of them for asylum.

2. That application shall be examined by a single Member State, which shall be determined in accordance with the criteria defined in this Convention. The criteria set out in articles 4 to 8 shall apply in the order in which they appear.

3. That application shall be examined by that State in accordance with its national laws and its international obligations."

Sections 2 and 3 of the Asylum and Immigration Act 1996 were enacted in the light of the Dublin Convention. Section 2 provides:

"(1) Nothing in section 6 of the 1993 Act (protection of claimants from deportation etc.) shall prevent a person who has made a claim for asylum being removed from the United Kingdom if

(a) the Secretary of State has certified that, in his opinion, the conditions mentioned in subsection (2) below are fulfilled;

(b) the certificate has not been set aside on an appeal under section 3 below; and

(c) except in the case of a person who is to be sent to a country or territory to which subsection (3) below applies, the time for giving notice of such an appeal has expired and no such appeal is pending.

(2) The conditions are

(a) that the person is not a national or citizen of the country or territory to which he is to be sent;

(b) that his life and liberty would not be threatened in that country or territory by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and

(c) that the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention.

(3) This subsection applies to any country or territory which is or forms part of a member state, or is designated for the purposes of this subsection in an order made by the Secretary of State by statutory instrument.

(7) In this section 'claim for asylum' and 'the Convention' have the same meanings as in the 1993 Act."

Section 3 gives a right of appeal against a certificate issued under section 2(1), but section 3(2) provides:

"A person who has been, or is to be, sent to a country or territory to which section 2(3) above applies shall not be entitled to bring or pursue an appeal under this section so long as he is in the United Kingdom."

My Lords, the context in which the cases of the two applicants, Ms. Adan and Mr. Aitseguer, come before the courts of this country is that there are two different approaches to the meaning of "persecution" under the Geneva Convention. One view ("the accountability theory") is that conduct can only amount to persecution within the meaning of article 1A(2) of the Geneva Convention if a state can be regarded as accountable for it. On this view the Geneva Convention

does not apply where, in the country in which persecution is feared, the state is too weak to provide effective protection, or the state has collapsed. The other view ("the persecution theory") is that persons are entitled to protection as refugees if not given protection against persecution in their own country, irrespective of whether this is due to a lack of power in the state or due to encouragement or toleration of the persecution by the state. It is clear from the speech of Lord Lloyd of Berwick, with which Lord Goff of Chieveley, Lord Nolan and Lord Hope of Craighead concurred, in *Adan v. Secretary of State for the Home Department* [1999] 1 A.C. 293, 306B, that in the United Kingdom the proper construction of the Geneva Convention requires the acceptance of the persecution theory.

The Secretary of State accepts, however, that the courts of Germany and of France adopt the accountability theory and interpret the Geneva Convention as being concerned with the relation between an individual and his or her State, so that international protection under the Covenant only applies if the claimant's country is responsible for, or complicit in, the persecution of its own citizens.

In relation to Ms. Adan, the German authorities have taken the view that government authority in Somalia has collapsed, so that there is no State to which persecution can be attributed. In relation to Mr. Aitseguer, the Secretary of State accepts that there is a real risk that the French authorities will take the view that there is no State toleration or encouragement of the violent activities of the Groupe Islamique Armé which Mr. Aitseguer fears, and therefore no persecution attributable to the Algerian State. Accordingly the Secretary of State accepts that there is a real risk that if Ms. Adan were sent to Germany the German authorities (including the German court), applying the accountability theory, would reject her claim for asylum and send her back to Somalia. He also accepts that there is a real risk that if Mr. Aitseguer were sent to France, the French authorities (including the French court) applying the accountability theory, would reject his claim for asylum and send him back to Algeria.

The essence of the reasoning of the Court of Appeal [1999] 3 W.L.R. 1274, is set out at 1295-1296:

"Because the scope of the definition of 'refugee' in article 1A(2) is a matter of law, it is in our judgment not appropriate to investigate the reasons of history or culture why some states - here, Germany and France - adopt one construction and the courts of the United Kingdom (and other signatory states) adopt another. This involves no disrespect to the French and German jurisdictions. In *Iyadurai's* case [1998] Imm. A.R. 470, 473 Lord Woolf M.R. (in a passage we have already set out), citing *Kerrouche's* case [1997] Imm. A.R. 610, referred to 'the absence of some supranational court which is capable of giving authoritative interpretations to the provisions of the Convention and Protocol which are binding on the signatory countries.' That being the position, if the Secretary of State gives a certificate in any case where the scope of article 1A(2) is in question, the courts of this country have no choice but to arrive at an authoritative interpretation themselves. If they did not do so, they would abrogate their elementary responsibility to supervise the Secretary of State's decisions for error of law: their duty here is the same as where the Secretary of State's appreciation of purely municipal provisions is in question. It is true that article 38 of the Convention provides for references to be made to the International Court of Justice at the Hague. We understand that no such reference has ever been made. In any event it seems clear that (in contrast to the position under article 234, formerly 177 of the E.C. Treaty (O.J. 1992 C. 224, p. 6) in relation to the law of the European Union) the court has no power itself to refer, whether at the request of a party or of its own motion. In these circumstances our courts are bound to find the true interpretation of article 1A(2) for themselves, and to apply it in the exercise of their supervisory jurisdiction of decisions arrived at by the Secretary of State touching section 2(2)(c) of the Act of 1996.

"From all these considerations it follows that the issue we must decide is whether or not as a matter of law, the scope of article 1A(2) extends to persons who fear persecution by non-state agents in circumstances where the state is not complicit in the persecution, whether because it is unwilling or unable (including instances where no effective state authority exists) to afford

protection. We entertain no doubt but that such persons, whose case is established on the facts, are entitled to the Convention's protection. This seems to us to follow naturally from the words of article 1A(2): "*is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;*" and this involves no technical or over-legalistic reading of the provision. This interpretation is supported by the approach taken in paragraph 65 of the *U.N.H.C.R. Handbook.* We have described the *Handbook's* genesis, to which we attach some importance. While the *Handbook* is not by any means itself a source of law, many signatory states have accepted the guidance which on their behalf the U.N.H.C.R. was asked to provide, and in those circumstances it constitutes, in our judgment, good evidence of what has come to be international practice within article 31(3)(*b*) of the Vienna Convention."

And at p. 1296, after referring to the 1967 Protocol to the Geneva Convention, the court states:

"It is clear that the signatory states intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view the Convention has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the European Convention on Human Rights is so regarded. Looked at in this light, the Geneva Convention is apt unequivocally to offer protection against non-state agent persecution, where for whatever cause the state is unwilling or unable to offer protection itself."

Mr. Pannick Q.C., on behalf of the Secretary of State, submitted that notwithstanding that the courts of the United Kingdom apply the persecution theory and the courts of Germany and France apply the accountability theory, the Secretary of State was entitled to be of the opinion that Germany would not send Ms. Adan to Somalia "otherwise and in accordance with the Convention", and that France would not send Mr. Aitseguer to Algeria "otherwise than in accordance with the Convention".

Mr. Pannick advanced four main submissions which I summarise as follows:

1. Section 2(1)(a) of the 1996 Act requires the Secretary of State to form an opinion whether, in relation to a particular asylum-seeker, the government of another State would act in accordance with the Convention. The sub-section should not be construed as requiring the Secretary of State to reach a conclusion on what is a difficult and disputed issue of international law. Parliament could not have intended the Secretary of State to decide whether or not the decision of a German court or a French court on an application for asylum in that country was correct in law.

2. Moreover, having regard to the principle of comity under which the courts of one country are very slow to adjudicate upon the actions or decisions of another country or its courts acting within the territory of that country, Parliament could not have intended that the Secretary of State or the courts of this country might, in effect, have to make a decision that an action by the German or French governments or a ruling by a German or French court was wrong in law.

3. The purpose of section 2 was to give effect to the arrangements made in the Dublin Convention, and those arrangements were intended to ensure that where a refugee sought asylum in more than one Member State, his or her application for asylum would be considered only by one state, and under those arrangements the applications of Ms. Adan and Mr. Aitseguer were to be heard and determined respectively by Germany and France.

4. Mr. Pannick also placed reliance on paragraph 5.2 of the Joint Position of 4 March 1996 of the Member States on the harmonized application of the definition of the term "refugee" in Article I of the Geneva Convention:

"Persecution by third parties

Persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A of that Convention, is individual in nature and is encouraged or permitted by the authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in

accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate. The person concerned may be eligible in any event for appropriate forms of protection under national law".

He submitted that the wording of the statement shows that it was accepted that the Convention did not give protection to asylum-seekers unless there was complicity by the State in the persecution which they feared.

My Lords, I consider that Mr. Pannick's second submission relating to comity is of limited weight as the purpose of an English court in determining applications such as the present ones is not to pass judgment on the validity of a decision of a French or German court but to decide if the English Secretary of State has acted lawfully in deciding to remove a claimant for asylum from England.

The Preamble to the Joint Position states:

"Having established that the Handbook of the United Nations High Commissioner for Refugees (UNHCR) is a valuable aid to Member States in determining refugee status;"

and I think that the weight of Mr. Pannick's fourth submission is reduced by the observations in the Handbook. Paragraph 65 states:

"Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."

And paragraph 98 states:

"Being *unable* to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution."

However, I consider that the first and third arguments advanced on behalf of the Secretary of State are of considerable weight. Where it is agreed between states that a particular legal issue under an international convention, which could arise for determination in a number of the states, be determined by one of them, it can be strongly argued that the issue should be resolved in accordance with the legal doctrines of that state and that a government minister of another state would not be required to form and express an opinion whether or not the decision of a court of that other state was correct in its interpretation of the convention.

There is a further consideration, however, which has to be taken into account. On the Secretary of State's case, section 2 of the 1996 Act constitutes a diminution in a human right given to an asylum-seeker by an international convention incorporated into the law of the United Kingdom by a United Kingdom statute. Under the law of the United Kingdom, as decided by this House in *Adan v. The Secretary of State for the Home Department*, an asylum-seeker is entitled to the protection to Article 33 notwithstanding that the state in whose territory he fears persecution is not complicit in that persecution. This is an important human right and, because the courts of Germany and France will rule that Article 33 does not give this right, the effect of section 2, if the construction contended for by the Secretary of State were held to be correct, would be to take away that right from Ms. Adan and Mr. Aitseguer. This was recognised by Lord Bridge of

Harwich in his speech in *Reg. v. Home Secretary, Ex parte Bugdaycay* [1987] A.C. 514, 532C where, giving a different illustration, he stated:

"Suppose it is well known that country A, although a signatory to the Convention, regularly sends back to its totalitarian and oppressive neighbour, country B, those opponents of the regime in country B who are apprehended in country A following their escape across the border. Against that background, if a person arriving in the United Kingdom from country A sought asylum as a refugee from country B, assuming he could establish his well-founded fear of persecution there, it would, it seems to me, be as much a breach of article 33 of the Convention to return him to country A as to country B. The one course would effect indirectly, the other directly, the prohibited result, i.e. his return "to the frontiers of territories where his life or freedom would be threatened.""

My Lords, Parliament can enact a provision which takes away a right given by the Geneva Convention and incorporated into the law of the United Kingdom by the 1993 Act. But in deciding whether section 2 has this effect I consider that the House should apply the principle stated by Lord Hoffmann in *Reg. v. Home Secretary, Ex p. Simms* [1999] 3 W.L.R. 328, 341F:

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

In the present case I think that the words "otherwise than in accordance with the Convention" in section 2(2)(c) are ambiguous in the context in which they appear; they could mean "otherwise than in accordance with the Convention as interpreted by the United Kingdom", or they could mean "otherwise than in accordance with the Convention as interpreted by the country to which he is to be sent". Therefore in my opinion the important human right given by Article 33 cannot be taken away by those words. Accordingly I would dismiss the two appeals.

LORD HOBHOUSE OF WOODBOROUGH

My Lords,

I agree that these appeals by the Secretary of State should be dismissed as proposed by my Noble and learned friend Lord Steyn. I agree with his conclusions and the substance of what he has said.

These appeals by the Secretary of State arise from the judicial review of two certificates which he issued purportedly pursuant to s.2 of the Asylum and Immigration Act 1996. This section, since repealed, permitted the Secretary of State to order the removal of an asylum seeker from the United Kingdom to a third country if the Secretary of State was prepared to certify that in his opinion three conditions have been fulfilled. These conditions are that -

(a) The person is not a national or citizen of the country to which he is to be sent,

(b) His life and liberty would not be threatened in that country for a Convention reason, and

(c) The government of that country would not send him to another country or territory otherwise than in accordance with the Convention. (s.2(2))

The issue raised by these applicants relates to the proper interpretation of the third of these conditions, s.2(2)(c).

It is accepted that condition (c), like condition (b), relates to Article 33(1) of the Convention which provides that no Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened for a Convention reason. It is also accepted that Article 33 can be breached indirectly as well as directly. Thus for a country to return a refugee to a state from which he will then be returned by the government of that state to a territory where his life or freedom will be threatened will be as much a breach of Article 33 as if the first country had itself returned him there direct. This is the effect of Article 33 and has been further established as a matter of English law by your Lordships' House in *Re Musisi, ex parte Bugdaycay* [1987] AC 514 at 532, per Lord Bridge: "the one course would effect indirectly, the other directly, the prohibited result".

Thus, s.2 was designed to provide a scheme whereby the Secretary of State could return an asylum seeker to the country from which he had entered the United Kingdom without breaching the Convention and without having first to determine whether or not he was a "refugee" as defined by the Convention. The section provides an authority under English law for the Secretary of State to do something which otherwise English law would preclude him from doing. At the material time the prohibition was contained in s.6 of the Asylum and Immigration Appeals Act 1993, to which s.2 of the 1996 Act cross-refers and creates an exception. But the exception is conditional and the Secretary of State must be able to certify that the conditions are in his opinion fulfilled. If the Secretary of State misconstrues the Act and as a result certifies that the conditions are fulfilled when as a matter of law they cannot be, his purported exercise of his power is *ultra vires* under the statute and on an application for judicial review can be quashed. The applicants say that that is the position here.

The practical problem that has arisen is that different countries within the European Union have interpreted the Convention differently. The difference relevant to the present applications is in the interpretation of the definition of "refugee" in Article 1 of the Convention. As my noble and learned friend has already explained, there is a difference of opinion between one group of countries, among which are Germany and France, and another group, which includes the United Kingdom. The two groups adopt different interpretations of what persecution entitles an asylum seeker to say that he is unable, or fears, to avail himself of the protection of his own country. It is fair to say that, internationally, the view adopted by the group which includes the United Kingdom is generally preferred and is supported by the UNHCR. But it is likewise accepted by the United Kingdom Government that the view of the former group of countries is one which is held in good faith. The scheme of the Convention is that any such differences should be referred to and resolved by the International Court of Justice under Article 38. However there is no prospect that the presently relevant difference (which has existed now for many years) will be resolved in that way.

So long as such differences continue to exist, the intention of the Convention to provide a uniformity of approach to the refugee problem will be frustrated and the scheme of the international response will remain grossly distorted. It is both contrary to the intention of the Convention and productive of the most severe abuses that there should be such a premium on making a claim for asylum on the North side of the English Channel as opposed to on the South side. The evidence in the present case discloses that only 5% of would-be refugees from Algeria are granted asylum if they make their application in France, whereas 80% of such applicants are successful if applying in the United Kingdom. It is in no way a criticism of the Government of the United Kingdom that it should try to find a solution to this problem. However Parliament in 1996 passed legislation which did not leave the Secretary of State with a free hand. His freedom to act was subject to the statutory conditions.

Section 2 is as I have stated a provision of English law binding upon the Secretary of State. He is likewise bound by the law of England as to what is and is not "in accordance with the Convention". In *Adan v The Secretary of State* [1999] 1 AC 293 at 306, Lord Lloyd with the agreement of your Lordships' House unequivocally upheld the United Kingdom's interpretation of Article 1 saying "if for whatever reason the state in question is unable to afford protection against factions within the state, then the qualifications for refugee status are complete." So, to

return a would-be refugee to a state where the state was unable to protect his life or freedom is in English law not in accordance with the Convention. It has been suggested that this was a specifically English interpretation and not in accord with what was described as the "international" meaning of Article 1. This is not correct. As is demonstrated by authorities such as *Fothergill v Monarch Airlines* [1981] AC 251, particularly at pp.281-3 per Lord Diplock, when an English court construes an international convention it adopts the same techniques of construction and interpretation as would an international tribunal. It is true that there has not been any decision of the International Court of Justice which would be authoritative under Article 38 but, in the absence of a decision of that court, the decision of your Lordships' House in *Adan* remains, for the purposes of English law and the construction and application of s.2 of the 1996 Act, the determinative decision.

The facts of the present cases are not in dispute. Because of the interpretation which their governments and judiciary place upon Article 1, the expectation is that neither Germany nor France would recognise either of the applicants as refugees. They would therefore not come within the protection of Article 33 in those countries. The result of this is that there is a strong probability that, if returned to Germany or France, these two individuals will be returned respectively to Somalia and Algeria where their lives and freedom will be threatened for Convention reasons. The Secretary of State issued his certificates being aware of and accepting these facts. His reason for certifying that condition (c) was satisfied was that he felt at liberty, notwithstanding the decision of the House of Lords in the first *Adan* case, to treat the German and French interpretation of Article 1 as being "in accordance with" the Convention.

My Lords, the Secretary of State was not at liberty to do this. The Act is a provision of English law. It must be construed in accordance with English law, that is to say, as determined by the *Adan* decision. The Secretary of State was in error.

The argument of behalf of the Secretary of State on these appeals contended for a different view based upon the submission that there were a range of interpretations which could be legitimately be adopted of Article 1 and the Convention and that the adoption of any of these in good faith would satisfy the requirement that the relevant person should not be sent to another country otherwise than in accordance with the Convention. In support of this submission counsel relied upon *Kerrouche v Home Secretary* [1997] IAR 610 and *Iyadurai v Home Secretary* [1998] IAR 470. These authorities certainly favour the submission made. In *Kerrouche*, Lord Woolf said at p.615:

"The difference in an approach to the interpretation of the Convention and Protocol has to be of such significance that it can be said that in making a decision affecting the position of a particular applicant for asylum, the third country would not be applying the principles of the Convention. For this to be the position, the third country's approach would have to be outside the range of tolerance which one signatory country, as a matter of comity, is expected to extend to another. Unless the interpretation adopted by the 'safe' country was sufficiently different from that in English law to be outside the range of possible interpretations, the difference need not concern the authorities in this country."

In *Iyadurai*, Lord Woolf expressed similar views, again with the agreement of the other members of the Court of Appeal, and, at p.476, having characterised the question as being "whether the language used by the courts of another jurisdiction means that although they are purporting to apply the Convention they are not in fact doing so", said

"It is only if the meaning placed on the Convention by the other municipal court is clearly inconsistent with its international meaning, that the courts in this country are entitled to conclude that the approach of the other municipal court involves a contravention of the Convention."

My Lords, it will be apparent from what I have already said that I do not agree with the analysis which is implicit in these statements. The question is not one of comity but is one of satisfying the conditions laid down by the 1996 Act, as a matter of English law, before the Secretary of State is at liberty, under English law, to order the removal of the asylum seeker without having

first determined whether or not he is a refugee. In Convention terms, it is a question of the United Kingdom performing *its* obligation under Article 33: *Musisi* (*sup.*). It is this on which the Secretary of State has to satisfy himself so that he can issue the statutory certificate. If he cannot properly be so satisfied, he is not, as a matter of English law, entitled to issue the certificate.

There are two further points which arise from what was said by Lord Woolf and Buxton LJ in *Iyadurai*. First, the Court of Appeal rejected a submission that a decision of the United Kingdom courts could be determinative of the interpretation of the Convention for the purposes of s.2 of the 1996 Act: indeed the Court of Appeal rejected the proposition that the Convention could have any autonomous meaning. Whilst it is correct that any such decision would always need to be evaluated in order to see whether it was a decision which involved construing the Convention as an international instrument and not a collateral decision on some question of domestic law (even though occasioned by some question arising from the Convention), if it is a decision coming into the former category it must be respected and applied unless it can be shown to have been wrong. In the present case, the Secretary of State has not argued that *Adan* was wrongly decided.

Secondly, there are cases where, unlike in the present case, the position is not clear cut. The facts may not have been established; they may be disputed. This is exactly the type of situation to which the drafting of s.2 using the words "in his opinion" and "would" is directed. But it may similarly involve an exercise of judgment to predict what will be the decision of the courts of the country to which it is proposed to return the relevant person. Will those courts decide that he may be returned to the country from which he originally fled? If so will such a decision be capable of being described as in accordance with the Convention. Under the Act it is the Secretary of State who has to make this assessment and express his opinion. It is for the applicant for judicial review to establish that the certificate issued by the Secretary of State cannot have been properly given applying the statutory criteria. The language of Lord Woolf draws upon the test for *Wednesbury* unreasonableness. If the certificate expresses opinions which the Secretary of State could reasonably hold and does not disclose that he has, or must have, made an error of law, the applicant for judicial review will fail. He will not have established that there has been an illegality or that the statutory power has been exceeded. It is not to be assumed that a country which has agreed to and adopted the Convention will then act otherwise than in accordance with its obligations under the Convention. It is certainly not to be assumed that this will occur from the existence of differences of emphasis or from differences which can only be discovered by a meticulous comparative examination.

Thus, my Lords, much of what has been said on this topic in previous decisions of the Court of Appeal I would agree with but it does not justify refusing to recognise that the wording of the Convention must at the end of the day have a meaning ascribed to it and it may be the task of a court to give its decision upon what that meaning is or, if the meaning has already been decided by an earlier authoritative decision, to give effect to that meaning. It is not right to say that there can only be a range of meanings.

The Court of Appeal in the present case was constrained by what had been said in the earlier Court of Appeal judgments by which they were bound. The cases of *Kerrouche* and *Iyadurai* should not be treated as authoritative save to the limited extent I have recognised. I agree with the decision of the Court of Appeal in the present case and the substance of its reasoning. The question raised by these appeals is whether the Secretary of State's certificates disclose an error of law. On the agreed facts they do and the Applicants were entitled to the remedy of judicial review.

LORD SCOTT OF FOSCOTE

My Lords,

I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Steyn and Lord Hobhouse of Woodborough. I agree with them and for the reasons they give I would dismiss these appeals.