FC3 1999/6323/4 and QBCOF 1999/0082/4

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH (CROWN OFFICE DIVISION)
(MR JUSTICE LAWS AND MR JUSTICE SULLIVAN)

Royal Courts of Justice
Strand
London WC2

Friday 23 July 1999

B e f o r e:
THE MASTER OF THE ROLLS
(LORD WOOLF)
LORD JUSTICE LAWS
LORD JUSTICE MANCE
- - - - - -
T H E Q U E E N

- v -

THE SECRETARY OF STATE FOR THE DEPARTMENT
Respondent
(EX PARTE LULOMAR ADAN) Appellant

and

QBCOF 1999/6078/4

T H E Q U E E N

-v-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent
(EX PARTE SITTAMPALAN SUBASKARAN) Applicant

and

QBCOF 1999/0040/4

T H E Q U E E N

-v-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant
(EX PARTE HAMID AITSEGUER) Respondent
- - - - - -

(Transcript of the Handed Down Judgment of
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MR N BLAKE QC and MS S HARRISON (Instructed by Messrs E Edwards Son & Noice, East Ham, London, E6 1DQ) appeared on behalf of Adan.

MR D PANNICK QC and MR S KOVATS (Instructed by The Treasury Solicitor, London, SW1H 9JS) appeared on behalf of the Secretary of State for the Home Department as respondent in cases 1999/6323/4, 1999/0082/4 and appellant in case 1999/0040/4.

MR A NICOL QC and MR M HENDERSON (Instructed by Messrs Howe & Co, Ealing, London, W5 2BS) appeared on behalf of the Aitseguer.

MR M GILL and MR C WILLIAMS (Instructed by Messrs Genga & Co, Wembley, Middx, HAO 2AJ) appeared on behalf of Aitseguer.

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J U D G M E N T
(As approved by the Court)

- - - - - -

Friday 23 July 1999

JUDGMENT

This is the judgment of the court, prepared by Laws LJ.

INTRODUCTORY

These three cases raise an important question concerning the functions of the Secretary of State under the Asylum and Immigration Act 1996. They involve three asylum seekers. Each claims that he/she will be persecuted if returned to his country of origin: not by authorities of the State, but by others - "non-State agents". Two of the three arrived in the United Kingdom having first passed through Germany. The other had first passed through France. They claimed asylum here, but the Secretary of State decided (under statutory powers which we will set out) to return them respectively to France and Germany for substantive consideration of their claims. They assert that the laws of those countries are such that their applications for asylum will not be properly dealt with there, and accordingly that France and Germany are not safe third countries to which they may lawfully be returned. They say that France and Germany do not recognise persecution by non-State agents as qualifying for protection under the 1951 Geneva Convention on the Status of Refugees, at least if the State itself is not in any sense complicit in the persecution; and so, if they were returned to France and Germany, even if their cases were established on the facts, they would be liable to be returned to their countries of origin to face the very persecution they fear.

However on 23 June 1999 the Secretary of State notified the legal representatives of all three asylum seekers that he now intended to consider their asylum claims on their substantive merits, and thus not to return them to Germany or France. The asylum seekers were, perhaps unsurprisingly, content that this course be adopted. At the outset of the hearing the court indicated that it was prepared to consider and decide the substance of the appeals notwithstanding that from the individuals' point of view they had become academic. We shall give our reasons below for doing so.

Lul Adan is a citizen of Somalia. On 8 August 1997 she sought asylum in Germany. That application was refused on 25 August 1997 and she was required to leave Germany voluntarily or be forcibly deported to Somalia. On 5 October 1997 she arrived in the United Kingdom and claimed asylum here. Her case was that she was a member of a minority clan in Somalia, and feared persecution by the USC, who had killed members of her clan, and she herself had been abducted. The USC was an armed camp which had overthrown President Barre in January 1991. Mogadishu had been divided between the USC and another armed camp, the SNF. All forms of legitimate government in Somalia had broken down. On 3 February 1998 the Secretary of State issued a request to Germany, under the material provisions of the Dublin Convention, to accept responsibility for considering Lul Adan's asylum claim, and Germany did so on 13 February 1998. On 19 February 1998 the Secretary of State refused her asylum application and certified that she was returnable to Germany as a safe third country.

Hamid Aitseguer is a citizen of Algeria. He travelled to France in January 1998, and thence to the United Kingdom where he arrived on 9 February 1998. He claimed asylum on arrival. His case was that terrorists opposed to the Algerian government had exacted protection money from his father, having threatened to bomb the family cafe and kill the staff. He had been threatened by Islamic fundamentalist groups when he was working as a teacher in a technical college. Later he found that

his name had been placed on a "hit list" by Islamic terrorists. Other people on the list were later killed. Later still he witnessed a bomb explosion at a pumping station where he was working. He gave other details. In short he would be at risk of his life in the hands of the terrorists if returned to Algeria, and there was no possibility of seeking effective protection from the State authorities there. On 12 February 1998 the Secretary of State requested the French authorities to accept responsibility for determining his claim, and they did so on 20 April 1998. On 21 April 1998 the Secretary of State refused his asylum claim and certified that he was returnable to France as safe third country.

Sittampalan Subaskaran is a Sri Lankan Tamil asylum-seeker. On 11 August 1997 he claimed asylum in Germany. That was refused on 22 October 1997. A notice of appeal to the Dresden Administrative Court was issued on his behalf but he left Germany before the appeal was heard. He arrived in the United Kingdom on 19 February 1998 and applied for asylum here. In June 1998 the Dresden Administrative Court dismissed his appeal in his absence, holding that "the action is unfounded since the plaintiff does not have a right to be recognised as a person entitled to political asylum". His case for asylum here was that he feared persecution by the LTTE (the "Tamil Tigers") if he were returned to Sri Lanka. They had earlier demanded money of him, required him to dig bunkers for them, extorted 100,000 rupees from his father, and pressurised him to join them at a time when the Sri Lankan army was approaching Madukulam. He was also detained by the army and forced to identify LTTE members. Later he was detained again, in Colombo, where he was hung upside down and subjected to other violent ill-treatment. On 14 August 1998 the Secretary of State refused his asylum claim and certified that he was returnable to Germany (which had accepted responsibility for the examination of his claim under the Dublin Convention).

On 29 April 1998 Turner J granted leave to move for judicial review to Lul Adan, but on 24 November 1998 the Divisional Court (Rose LJ and Mitchell J, reported at [1999] IAR 114) dismissed her application and refused leave to appeal. Leave was subsequently granted by this court on 22 January 1999. On 18 December 1998 Sullivan J allowed Aitsegeur's motion for judicial review, quashed the Secretary of State's certificate, and granted leave to appeal (reported at [1999] INLR 176). In Subaskaran's case Laws J refused judicial review leave at first instance on 4 November 1998, after hearing argument *inter partes* in court. He did so without taking any view as to the merits in principle of the "non-State agents" point *vis-a-vis* Germany, but because he considered on the material before him that the applicant's case barely raised a "non-State agents" argument on the facts. On 9 February 1999 this court granted Subaskaran's renewed application for judicial review leave and directed that the substantive proceedings be heard in the Court of Appeal. This direction has given rise to an issue touching this court's jurisdiction, which it is convenient to address at once.

THE JURISDICTION OF THE COURT OF APPEAL

At an interlocutory hearing in this court on 11 June 1999 a submission was made, by Mr Nicol QC for Aitsegeur, that the Court of Appeal lacked the jurisdiction to entertain the substantive judicial review in Subaskaran's case, and that after granting leave it was accordingly obliged to remit the matter for hearing in the Crown Office List. Mr Nicol had understandable tactical reasons for raising this issue at the time, but they have fallen away since the Secretary of State's decision not to remove the appellants to France and Germany. However it seemed to this court that the matter was of some considerable importance, and we invited argument upon it from Mr Nicol and from Mr Gill for Subaskaran. We are grateful to both counsel for their assistance on the point, and also to Mr Pannick QC for the Secretary of State.

It is uncontested that an applicant who has been refused leave (now permission) to apply for judicial review after a hearing at first instance, other than in a criminal cause or matter, may renew his application to the Court of Appeal. Order 59 Rule 14(3) provides:

> "Where an ex parte application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal ex parte within 7 days after the date of the refusal."

Mr Nicol submitted that the jurisdiction to issue the prerogative orders is conferred by s.29 of the Supreme Court Act 1981 upon the High Court, to which by s.31 applications for judicial review are to be made. No such jurisdiction is conferred on the Court of Appeal. The Court of Appeal, which (unlike the High Court) is a creature of statute, exercises only an appellate jurisdiction. By persuasive authority of the Privy Council in *Kemper* [1998] 3 WLR 630 the grant of permission upon a renewed application under Order 59 Rule 14(3) constitutes the exercise of such an appellate jurisdiction; but, said Mr Nicol, if the Court of Appeal then proceeds to entertain the substantive judicial review proceedings, its doing so cannot be characterised as anything other than the exercise of an original jurisdiction which it does not possess.

With great deference we see no reason to doubt the conclusion expressed by Lord Hoffman for the Privy Council in *Kemper* at 641G that "a renewed application to the Court of Appeal under RSC Ord. 59, r.14(3) is a true appeal with a procedure adapted to its ex parte nature". We express no view as to the implications, if any, for the status of a renewed application for leave to their Lordships' House. In *Re Poh* [1983] 1 WLR 2 the House held that it lacked the jurisdiction to entertain such an application in light of the principle laid down in *Lane v Esdaile* [1891] AC 210. *Lane v Esdaile* was fully analysed in *Kemper*, and it is fair to say that the Privy Council had difficulties with the decision in *Re Poh*.

Whatever the position as regards *Re Poh*, in our judgment Mr Nicol's argument as to this court's consideration of substantive judicial review proceedings after it has granted permission is mistaken. In *R v Industrial Injuries Commissioner ex p. AEU* [1966] 2 QB 21 the Court of Appeal had given leave to a trade union to apply for an order of certiorari to quash a decision of the Commissioner, after refusal by the Divisional Court. The substantive application was listed to be heard by the Court of

Appeal, in accordance with what was then the established practice. But when the case came on counsel for the Commissioner took a preliminary objection. He submitted that only the Divisional Court could entertain the motion for a certiorari and that since there was no order from which the applicant could appeal, the Court of Appeal was being invited to exercise an original jurisdiction which it did not possess. Reliance was placed on the then Order 59 Rule 5(1):

> "When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made by notice of motion to a Divisional Court of the Queen's Bench Division..."

This argument was rejected. It was held that Order 59 Rule 5(1) applied only to cases where the Divisional Court had itself granted leave. There was no rule of court dealing with the position where leave was granted by the Court of Appeal. Accordingly recourse should be had to s.32 of the Supreme Court of Judicature (Consolidation) Act 1925:

> "The jurisdiction vested in the High Court and the Court of Appeal respectively... shall be exercised in the manner provided... by rules of court, and where no special provision is contained... in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained."

That section (as Mr Nicol pointed out in his written note on the point) did not confer jurisdiction on the Court of Appeal, but presupposed it. However it is plain from the judgments in *Ex p. AEU* that there was a pre-existing jurisdiction in the Court of Appeal to entertain applications for the prerogative orders where it had itself granted leave. Before the coming into force of the Administration of Justice (Miscellaneous Provisions) Act 1938, where the Divisional Court refused a rule *nisi*, appeal lay to the Court of Appeal; and if on appeal the rule was granted, the practice was for the Court of Appeal to proceed to hear argument on the rule, as was illustrated by *R v Drinkwater ex p. Conway* (1906) JP 1; 22 TLR 12. The Act of 1938 abolished the prerogative writs (s.7) and substituted procedures for applications to be made for prerogative orders, with a requirement of leave (s.10). The relevant provisions refer to the High Court, and make no reference to the jurisdiction of the Court of Appeal. But it was held in *Ex p. AEU* that the earlier undoubted jurisdiction to hear the substantive case survived: see *per* Lord Denning MR at 28E-G, Davies LJ at 29E-G.

Accordingly Mr Nicol's argument could only succeed if he were able to show that the decision in *Ex p. AEU* has been overruled by statute. He submitted, correctly, that s.32 of the Act of 1925 was repealed by the Supreme Court Act 1981 (Schedule 7) and not replaced. However s.15(2) of the 1981 Act provides:

> " Subject to the provisions of this Act, there shall be exercisable by the Court of Appeal -
> (a) all such jurisdiction (whether civil or criminal) as is conferred on it by this or any other Act; and
> (b) all such other jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of this Act."

Mr Nicol pointed to the subsection's opening words, "Subject to the provisions of this Act". But there is nothing elsewhere in the statute to curtail the pre-existing jurisdiction of the Court of Appeal vouchsafed by *Ex p. AEU.* Ss.29 and 31 do not purport to confine the judicial review jurisdiction to the High Court to the exclusion of the Court of Appeal, any more than it was so confined by s.7 of the Act of 1938.

We would add that their Lordships' reasoning in *Kemper* demonstrates the continuing parallel between this court's jurisdiction before 1938 and today. In the earlier period, there was a "true" appeal against the Divisional Court's refusal of a rule *nisi*; now, following *Kemper*, a renewed application for permission under Order 59 Rule 14(3) constitutes a "true" appeal against the High Court's refusal.

For all these reasons this court in our judgment possesses the jurisdiction to entertain Subaskaran's substantive judicial review.

ADJUDICATION UPON AN "ACADEMIC" ISSUE

We turn next to give our reasons for our preparedness to entertain these cases, notwithstanding the Secretary of State's decision not to remove the appellants to France or Germany. In *R v Secretary of State ex p. Salem* [1999] AC 450 the outcome of an appeal to the House of Lords, which concerned the time at which a claim for asylum was "determined" by the Secretary of State within the meaning of certain regulations, had become academic *vis-a-vis* the appellant because he had been granted refugee status by an adjudicator between the hearing of the case in the Court of Appeal and its being listed in their Lordships' House. However it was contended before their Lordships that the point in question was one of general importance. Lord Slynn of Hadley (with whom their other Lordships agreed) cited at p.46 two earlier cases in which the House had declined on principle to hear appeals which involved no live issue between the parties: *Sun Life Assurance v Jervis* [1944] AC 111 and *Ainsbury v Millington* [1987] 1 WLR 379. He continued:

> "These cases, however, concern disputes between parties as to private rights - in the *Sun Life* case as to the terms of an insurance policy, in *Ainsbury v Millington* as to the parties' rights to the occupation of property initially held under a joint tenancy." (456A-B)

Lord Slynn then referred to two cases in the public law field, *R v Dartmoor Prison Board of Visitors ex p. Smith* [1987] QB 106 and *Abdi v Secretary of State* [1996] 1 WLR 298. In both the proceedings were moot so far as the appellant was concerned by the time they came to be heard, respectively in the Court of Appeal and the House of Lords. But in each the court consented to deal with the legal merits of the issue raised in the appeal because they raised points of importance which in the public interest ought to be decided. Lord Slynn continued at 456G - 457B:-

> "My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. The decisions in the *Sun Life* case and *Ainsbury v Millington* (and the reference to the latter in r 42 of the Practice Directions Applicable to Civil Appeals (January 1996) of your Lordships' House) must be read accordingly as limited to disputes concerning private law rights between the parties to the case.
>
> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

We were told by Mr Pannick on instructions that there are no less than 218 other cases in which applications for judicial review have been filed in the Crown Office, 194 relating to Germany and 24 to France, in which it is sought to be asserted that the Secretary of State is not entitled to treat those jurisdictions as safe third countries by reason of their approach to persecution by non-State agents. In some permission to apply has been granted; others are awaiting a decision on the application for permission. It is likely that there are yet further cases pending in the Home Office in which the Secretary of State has not yet made his own decision, and perhaps others where the administrative decision has been made but no judicial review papers have yet been lodged.

It is quite plain to us that these appeals raise a question of general importance, namely whether the Secretary of State is entitled to treat France and Germany as "safe third countries" in relation to asylum seekers who assert a fear of persecution by non-State agents in their country of origin, where the State is not complicit in the persecution alleged. This is an issue which may be considered and decided irrespective of the facts of these particular cases. The material which the court must examine in order to do so consists in our domestic legislation and case law, the Geneva Convention together with other materials which throw or are said to throw significant light on the Convention's true interpretation, and documentation showing the legal position in France and Germany *vis-a-vis* persecution by non-State agents. All this is available to us. Given the number of cases in the pipeline in which, we understand, the issue is raised, it is in our judgment in the public interest that we should determine it in these proceedings. We conceive that our doing so well conforms to the approach outlined by Lord Slynn in the passage from his speech in *Salem* which we have set out. We should however note that there is one dimension of the issue upon which, in our judgment, the court can only enter upon a narrow and partial basis in the absence of a concrete *lis* between an asylum seeker and the Secretary of State. It concerns Mr Pannick's argument that even if we were to conclude that the Secretary of State may not lawfully be satisfied that Germany and France are safe third countries in light of their approach to the Convention, nevertheless he is entitled to be so satisfied on the footing that those countries offer alternative forms of protection in non-State agent cases which are in fact adequate when measured against the Convention's requirements. We shall explain the limits of our approach to this question and the reasons for it in due course.

As a footnote it is perhaps worth noticing that in another third country case, *Ex p. Canbolat* [1997] 1 WLR 1569, to which we shall refer below in dealing with the substantive arguments on these appeals, the Secretary of State had accepted that the applicant should not be removed from the United Kingdom without her application for asylum being determined here on its merits; but this court dealt with the appeal as a matter of principle: see 1572D-E.

***

In order to appreciate precisely the nature of the issues which fall for decision, it is first convenient to set out the relevant legal materials.

THE DOMESTIC LEGISLATION

S.1 of the Asylum and Immigration Appeals Act 1993 defines a "claim for asylum" as meaning "a claim made by a person... 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" as the 1951 Geneva Convention and its Protocol. S.2 provides that nothing in the Immigration Rules shall lay down any practice which would be contrary to the Convention. S.6 provides:

> "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."

S.2 of the Asylum and Immigration Act 1996 provides so far as

relevant:

> "(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;
>
> (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 [sc. of the European Union], 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."

S.3 gives a right of appeal against a certificate issued under s.2(1), but by s.3(2):

> "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."

THE 1951 GENEVA CONVENTION ON THE STATUS OF REFUGEES AND THE 1967 PROTOCOL

> Article 1A of the Convention provides:
> "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 square brackets in Art.1A(2) were repealed by the 1967 Protocol, thus removing the end-date of 1 January 1951 before which events had to be shown to have happened which caused the asylum applicant to leave his country of nationality. The Protocol's preambles recite:

> "*Considering* that the Convention... covers only those persons who have become refugees as a result of events occurring before 1 January 1951,
>
> *Considering* that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,
>
> *Considering* that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951".

> Article 1F of the Convention provides in part:

"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
...
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee..."

Chapters II ("JURIDICAL STATUS"), III ("GAINFUL EMPLOYMENT"), and IV ("WELFARE") confer a series of what may very broadly be called social rights upon refugees in the country of refuge. These rights are undoubtedly substantial; by way of example, Art.22 requires the same treatment to be accorded to refugees with respect to elementary education as is accorded to the State's nationals, and Art.23 requires the same access to be given to refugees to "public relief and assistance" as the State's nationals receive. In addition provisions contained in Chapter V ("ADMINISTRATIVE MEASURES") confer rights relating to such matters as freedom of movement (Art.26), identity papers (Art.27), travel documents (Art.28) and the expedition of naturalisation procedures (Art.34). It is unnecessary to set out all these provisions. Their relevance is to a general point made by the appellants to the effect that other means of protection offered by France and Germany are no lawful substitute for Convention rights because they deny all the advantages of status within the country of refuge which the Convention itself confers.

Art.33.1 is of prime importance:
"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."

Art.38 provides:

"Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute."

THE VIENNA CONVENTION ON THE LAW OF TREATIES

Art.31 of the Vienna Convention is headed *General rule of interpretation.* It provides in part:

"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 for 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 connexion with the conclusion of the treaty and accepted by the other parties as an instrument related 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."

Art.32 is headed *Supplementary means of interpretation*:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

THE UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS

The Preamble to the Convention notes "that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of Refugees, and [recognizing] that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner". The UNHCR Handbook was published in 1979 upon the request (as its Preface shows) of the Executive Committee of the High Commissioner's Programme "to consider the possibility of issuing - for the guidance of Governments - a handbook relating to procedures and criteria for determining refugee status". Paragraph 65, headed *"Agents of persecution"*, reads:

> "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."

THE JOINT POSITION OF THE EUROPEAN UNION ADOPTED ON 4 MARCH 1996

This document, upon which Mr Pannick for the Secretary of State placed considerable reliance, was entered into by the Member States under Art.K.3(2)(a) read with Art.K.1(1) of the Treaty on European Union (the Maastricht Treaty). By Art.K.1(1) Member States are to regard asylum policy as a matter of common interest. Art K.3(2)(a) provides:

> "The Council may -
>
> - on the initiative of any Member State or of the Commission, in the areas referred to in Article K.1...
>
> (a) adopt joint positions..."

The Joint Position contains these recitals:

> "Having established that the Handbook of the... UNHCR is a valuable aid to Member States in determining refugee status;
>
> Whereas harmonised application of the criteria for determining refugee status is essential for the harmonisation asylum policies in the Member States".

Then the Joint Position proceeds to state:

> "The guidelines set out below for the application of criteria for recognition and admission as a refugee are hereby approved.
>
> These guidelines shall be notified to the administrative bodies responsible for recognition of refugee status, which are hereby requested to take them as a basis without prejudice to Member States' caselaw on asylum matters and their relevant constitutional positions.
>
> This joint position is adopted within the limits of the constitutional powers of the Governments of the Member States; it shall not bind the legislative authorities or affect decisions of the judicial authorities of the Member States."

The guidelines are then set out. Para. 5.1 states:

> "Persecution is generally the act of a State organ..."

Para. 5.2, which is headed *Persecution by third parties*, figured large in the course of argument. It reads:

> "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."

Para. 6, headed *Civil war and other internal or generalized armed*

conflicts, states in part:

"Reference to a civil war or internal or generalized armed conflict and the dangers which it entails is not in itself sufficient to warrant the grant of refugee status...

In such situations, persecution may stem either from the legal authorities or third parties encouraged or tolerated by them, or from *de facto* authorities in control of part of the territory within which the State cannot afford its nationals protection."

THE RESPECTIVE APPROACHES OF THE FRENCH, GERMAN AND ENGLISH COURTS TO PERSECUTION BY NON-STATE AGENTS

On the material before us the position in France and Germany as regards persecution by non-State agents is as follows. Both subscribe to what has been called the "accountability" theory of interpretation of the Geneva Convention. The United Kingdom and, we understand, a majority of the other contracting States (including a majority of those in Europe, together with the United States, Canada, and Australia) subscribe to the "protection" theory, which is also supported and advocated by the UNHCR, as para. 65 of the Handbook shows. Put shortly, the "accountability" theory limits the classes of case in which a claimant might obtain refugee status under the Geneva Convention to situations where the persecution alleged can be attributed to the State. German law requires an asylum seeker to show that he fears persecution (on a Convention ground) by the State, or by a quasi-State authority. If he relies on persecution by non-State agents, it must be shown to be tolerated or encouraged by the State, or at least that the State is unwilling to offer protection against it. The German courts hold that the Convention has no application in cases where there is no effective State authority, as in a situation of civil war. At p.2 of his recent advice given on 17 May 1999, Professor Hailbronner states:

"Attribution requires that a state either supports, encourages or tolerates persecution emanating from non-state actors, or that the state is not willing or "able" to provide adequate protection. The "inability" to provide necessary protection, however, cannot be interpreted in the sense of a factual inability of a state having lost control in parts of its territory..."

The position in France is similar but not identical. In *Aitsegeur* [1999] INLR 176, 187, Sullivan J at first instance summarised the position in this way:

"In German law an applicant for asylum falls outside the Convention if there is no de jure or de facto state authority and thus no possibility of protection. In French law an applicant for asylum falls outside the Convention if the de jure or de facto state authority is unable to provide protection."

Thus the distinct approach in France is to deny refugee status in cases where there is a functioning State authority in the country of feared persecution, but it is unwilling to afford protection.

The English courts have looked at the matter quite differently. In *Adan v Secretary of State* [1999] AC 293 their Lordships' House had to consider the case of a Somali national. The House held that killing and torture incidental to a clan and sub-clan based civil war did not give rise to a well founded fear of being persecuted within the meaning of article 1A(2) where the asylum-seeker was at no greater risk of such ill-treatment by reason of his clan or sub-clan membership than others at risk in the war; a "differential impact" had to be shown. However Lord Lloyd of Berwick went on to state:

"It was also common ground that article 1A(2) covers four categories of refugee: (1) nationals who are outside their country owing to a well founded fear of persecution for a Convention reason, and are unable to avail themselves of the protection of their country... (304C)

If category (1) were confined to refugees who are subject to state persecution, then I can well see that such persons would, ex hypothesi, be unable to avail themselves of state protection. On that view the words would indeed serve no purpose. But category (1) is not so confined. It also includes 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. " (305H - 306C) (emphasis added)

This accords with other jurisprudence in the English jurisdiction. Our courts recognise persecution by non-State agents for the purposes of the Convention in any case where the State is unwilling or unable to provide protection against it, and indeed whether or not there exist competent or effective governmental or State authorities in the country in question. This is what has been called the "protection" theory. It is, as we have said, shared by a majority of the States signatory to the Convention and the UNHCR.

We should say at this stage that a great deal of distinguished academic and other material was placed before us as to the respective positions taken by France and Germany in relation to persecution by non-State agents. It includes a series of opinions provided for the Secretary of State by Professor Kay Hailbronner of the University of Konstanz, an opinion of Dr Goodwill-Gill, Professor of International Refugee Law at Oxford, a paper from Dr Reinhard Marx of Frankfurt, and other academic writings including a detailed paper by Professor Vermeulen and others of the University of Nijmegen Centre for Migration Law. There are also guidelines issued by the French Judicial Affairs Department, and some reports of case-law. We have read all these materials. They include much information as to the background of Germany's interpretation of the Convention, and its association with the notion of political persecution in that country's constitution. There are also documents containing some exposition of the French position. All these materials command our respect, which we certainly acknowledge. However for reasons which we will explain below it is neither necessary nor appropriate to set them out *in extenso* or to discuss their merits.

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THE ISSUES IN THE CASE

We may now turn to determine the issues arising for decision. S.2(2)(c) of the 1996 Act is in contention in these cases. The asylum seekers contend that the Secretary of State has in each case given an unlawful certificate because he has misunderstood what is meant by the words in the subsection "in accordance with the Convention". They submit that s.2(2)(c) requires the Secretary of State, if he is to issue a lawful certificate, to interpret the Convention correctly; if he gives a certificate under a false apprehension of the meaning of any relevant Convention provision, he is subject to judicial review on the ordinary ground of illegality. Within this broad submission, however, there are two different strands of argument. Mr Pannick QC for the Secretary of State takes a third and quite different position.

The first argument

The first argument with which we shall deal was espoused in terms by Mr Gill for Subaskaran. It is to the effect that the Secretary of State may only lawfully certify that s.2(2)(c) is fulfilled if he is satisfied that the third country in question will apply the same interpretation of the Convention as has been vouchsafed by the English courts. As we have shown, it is plain that the English courts have recognised that persecution by non-State agents may qualify under the Convention, as much in cases where there is no effective State authority as where there is. The approach by the French and German courts is, equally plainly, at variance with the English jurisprudence.

As it seems to us, this submission as formulated by Mr Gill puts the matter too narrowly and is inconsistent with earlier authority of this court. (In fairness, we should say that Mr Gill took his cue on this part of the case from a suggestion put by a member of the court in the course of argument.) In *Kerrouche v The Secretary of State for the Home Department* [1997] Imm AR 610 the objection taken to the Secretary of State's decision to return the appellant to France was that France took a narrower view of what constituted a political crime than the courts of this country, for the purposes of Art.1F(b), which we have set out. In that case it was submitted that France's interpretation would result in Art.1F(b) being given greater scope in France than in this country, thus widening the class of persons from whom under Art.1F Convention protection would be withdrawn. The appeal was dismissed. Lord Woolf MR said at 615:

> "The difference in 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 asylum seeker 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. While it is highly desirable that there should be a harmonised approach to the interpretation of an international document such as the Convention, until that harmonisation is achieved, one signatory must allow another signatory a margin of appreciation before treating that other country as being one which did not fulfil its obligations to adhere to the principles of the Convention...
>
> 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* [1998] INLR 472 Lord Woolf MR accepted that the reference to "margin of appreciation" was not happily chosen given the expression's association with the ECHR jurisprudence. *Iyadurai* was also concerned with the Secretary of State's power to return an asylum applicant to a putative safe third country, in this case Germany. The objection was that the German courts applied a higher standard of proof to the establishment of an asylum claim than is required here. In this jurisdiction it was settled by the House of Lords in *Sivakumaran* [1988] AC 958 that the claimant had to show no more than "a reasonable degree of likelihood" (per Lord Keith of Kinkel at 994) that he would be persecuted for a Convention reason if returned to his country of origin. Though others of their Lordships put the test somewhat differently, it is clear (certainly it has always been accepted) that the standard of proof in question is lower than the conventional balance of probabilities applicable in civil litigation. A common formulation, distilled from *Sivakumaran*, is that the applicant must show a real, as opposed to a merely fanciful risk. In *Iyadurai*

the evidence was that the German courts required a "clear probability" to be established, although there too there were differing formulations. Dismissing the renewed application for judicial review of the Secretary of State's decision, Lord Woolf MR said at 479:

> "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. It is when the approach of the other municipal court departs from the Convention to this extent that any difference in language between that which is adopted in the other country and that which would be adopted in this country becomes significant. Whether the differences are significant to this extent is in the first place under section 2 for the Secretary of State, but if the court here comes to the conclusion that the approach of the other municipal court is clearly inconsistent with the Convention then this will strongly suggest that the opinion of the Secretary of State is flawed."

On these authorities, the Secretary of State in the execution of his functions under the statutes of 1993 and 1996 is not concerned merely to ascertain whether the third country in question interprets the Convention consistently with the English jurisprudence. That is, with respect, by no means surprising. Quite aside from any general question of comity between the courts of signatory States, the Convention is not an instrument whose every particular may be expected to possess a tight, unitary interpretation. In *Adan* [1999] AC 293, Lord Lloyd said at 305C-D:

> "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... 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. But having said that, the starting-point must be the language itself."

This reasoning is of a piece with a further passage from the judgment of the Master of the Rolls in *Iyadurai* at 473, citing *Kerrouche*:

> "In *Kerrouche v The Secretary of State for the Home Department* [1997] Imm AR 610 the objection which was taken in relation to France (which failed) was that France took a narrower view of what constituted a political crime than the courts of this country. This Court did not regard that factor as being decisive in determining whether France was a safe third country in the terms of the Convention. It said:
>
> "Although it is desirable that the approach to the interpretation of the Convention and Protocol should be the same in all countries which are signatories, this is not a realistic expectation in 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. ...the fact that a particular country adopts an approach to the Convention which involves a difference in emphasis in the interpretation of one or more provisions from that which would be adopted under English law does not necessarily involve that country being regarded as one which does not adhere to the principles of the Convention and Protocol when, as in the case of France, it contends that it does do so..."""

We should note also this further passage at 475:

> "[T]he Secretary of State is not required to become deeply involved in a comparative analysis of the law of different signatories to the Convention and the third country can be complying with the Convention even though it expresses its approach in different language to that which would be used in this country."

This latter statement affords one of the reasons why we do not think it right to embark upon any detailed scrutiny of the scholarly materials before us relating to the French and German positions. The Secretary of State's duty to direct himself correctly as to the municipal law which binds him does not require that he undertake any deep comparative analysis of the jurisprudence of other signatory States; accordingly, in determining whether he has or has not applied the law correctly the court in the exercise of its supervisory jurisdiction should not itself do so.

It is in our judgment plain on the authorities that the question in a case such as this is not whether the putative safe third country interprets or applies the Convention precisely as the English courts do, and so far as Mr Gill sought to submit the contrary we would reject his argument.

The second argument

The next strand in the asylum seekers' submissions, however, possesses much greater force. It was to the effect that the Secretary of State cannot lawfully deploy s.2(2)(c) unless he is satisfied that the third country in question will apply the Convention's "international meaning", as it was put by the Master of the Rolls in *Iyadurai*. Other expressions were used in the course of argument, such as the Convention's "core values". The underlying notion is that the essential classes of case covered by Art.1A(2) cannot be the subject of legitimate disagreement.

On the face of it, however, this is not a straightforward concept to apply. In the Convention we are dealing with an objective legal text imposing compulsory obligations upon its signatories. One might suppose that there is no aspect of its interpretation which may properly be a matter of legitimate disagreement. Yet this court has held in *Kerrouche* and *Iyadurai* that differences in approach to the Convention's application adopted by other States, less favourable to the asylum seeker than the approach taken here, did not on the facts of those cases suffice to condemn the Secretary of State's decisions to return the applicants to the countries in question. Equally, those authorities demonstrate that there may exist a class of case in which the third country's approach to the Convention lies outside its "international meaning" or "outside the range of tolerance which one signatory country, as a matter of comity, is expected to extend to another". Where is the dividing line to be found between those instances where the third country's application or interpretation of the Convention falls beyond this range of tolerance, or violates the treaty's international meaning, and those where it does not? The difficulty is perhaps exemplified in a dictum of Buxton LJ in *Iyadurai* at 486D:

> "It is not possible for a national court to determine a single interpretation of the Convention that binds all other countries. The question for the English jurisdiction, in a case where the likely conduct of a court in a third country is in issue, is whether the decision of that court will be contrary to the terms of the Convention."

This with respect begs the question, what amounts to a decision which is contrary to the terms of the Convention.

In our judgment a distinction of principle falls to be drawn between the *interpretation* of the Convention and its *application*. The duty of the Secretary of State, in performance of his function under s.2(2)(c) of the Act of 1996, is to examine the practice in the third country in question in order to decide (a) whether it is consistent with the Convention's true interpretation, and (b) whether, even if so consistent, it nevertheless imposes such practical obstacles in the way of the claimant as to give rise to a real risk that he might be sent to another country otherwise than in accordance with the Convention. (a) is a matter of law; and if the Secretary of State mistakes the law, he is reviewable on illegality grounds as surely as if he erred in the construction of a municipal statute. (b) is a matter of fact; and the Secretary of State's decision upon it therefore falls to be reviewed only upon *Wednesbury* grounds, although the test is modified by the need for "anxious scrutiny" in asylum cases: see *Ex p. Bugdaycay* [1987] AC 514, per Lord Bridge of Harwich at 531, and in the particular context of s.2(2)(c) *Ex p. Canbolat* [1997] 1 WLR 1569 at 1579A-C, and *Iyadurai* at 484B-C per Buxton LJ.

The case of *Canbolat*, decided in this court, is in this context instructive. The complaint was that there was material to show that French officials, charged with the duty of considering asylum claims, had persistently ignored such claims or failed to deal with them properly. Lord Woolf MR giving the judgment of the court referred to s.2(2)(c) of the Act of 1996 and said:

> "The language of the condition is unqualified. This is the statutory test. It is a test imposed as a requirement of overriding the protection which would otherwise be provided by section 6 of the Act of 1993. Clearly it is necessary to treat the test as not being totally unqualified. It must be subject to the implication that it is permissible to grant a certificate when there exists a system which will, if it operates as it usually does, provide the required standard of protection for the asylum seeker. No country can provide a system which is 100 per cent effective. There are going to be aberrations. All that can be expected and therefore all that Parliament could have intended should be in place prior to the grant of a certificate was a system which can be expected not to contravene the Convention. What is required is that there should be `no real risk that the asylum seeker would be sent to another country otherwise than in accordance with the Convention'". (1577G-H).

The court added at 1579H:

> "It is also important to bear in mind that it is for the Secretary of State to evaluate the material. If the Secretary of State could properly come to the decision which he did on that material, then this court cannot intervene".

Canbolat was an "application" case; the judicial review went to the Secretary of State's appreciation of the question whether on the facts French practice gave rise to the "real risk" to which the court referred - (b) above. There was no suggestion that on the relevant facts French domestic law espoused an incorrect interpretation of the Convention; that would have engaged (a) above.

Iyadurai was also an "application" case. The Convention does not prescribe the standard of proof which an asylum seeker must meet in order to establish his claim. It is for the signatory States to evolve and apply their own legal procedures, including such matters as the standard of proof, for the determination of asylum claims in accordance with the Convention's true or "international" interpretation. Consistently with the reasoning in *Canbolat*, if the Secretary of State concluded that those procedures in any given case were such as to breach the "real risk" test he would no doubt decline to certify. Where he does certify and the certificate is impugned on the footing that he ought to have concluded that the "real risk" test was breached, the court by judicial review will supervise his decision on what may be called the enhanced *Wednesbury* basis, in line with *Bugdaycay* and its application in the later cases.

Kerrouche as we have said was concerned with the sense given by the French authorities to the notion of a political crime for the purpose of Art.1F(b) which, where it applies, deprives the refugee of the Convention's protection. "Political

crime" is not defined in the Convention. It is an expression which is capable of a range of meanings, as the jurisprudence in extradition cases demonstrates. In our judgment here, too, it is for the signatory States to conclude as a matter of fact what they will regard as amounting to such a crime. The Secretary of State in deciding whether to grant a certificate in a case where there is material to show that the third country in question will or may treat the claimant as a political criminal, will of course examine the factual material available and arrive at a pragmatic judgment as to whether or not the approach taken by the third country lies within a reasonable range, bearing in mind, no doubt, that local conditions may promote a more, or less, restrictive sense of the expression "political crime". Again his decision would fall to be supervised on the enhanced *Wednesbury* basis. *Kerrouche*, then, also falls to be regarded as an "application" case.

In all these instances, and no doubt others could be multiplied, both the Secretary of State and our courts will accord a proper respect to the system and practice of the third country in question, subject in the case of the Secretary of State to his duty to see that the "real risk" test is not breached, and in the case of the courts to their duty to exercise a secondary judgment upon the same issue. There is, if not a margin of appreciation, at any rate a margin of discretion enjoyed by the signatory States in their application of the Convention.

But they must *apply* the Convention. If a signatory State were to take a position which was as a matter of law at variance with the Convention's true interpretation, and act upon it, it could not be regarded as a safe third country: not merely because the "real risk" test was breached (though it certainly would be) but because in the particular case the Convention was not being applied at all. The essence of the Convention's protective measures is to be found in Art.1A(2), which defines "refugee" (and in the prohibition of *refoulement* in Art.33). The scope of the definition, which did not fall to be considered in *Canbolat*, *Kerrouche* or *Iyadurai*, must be a matter of law, not fact. Otherwise the protection offered by the Convention would in effect be reduced to a discretionary exercise by the signatory States. But the Convention's very purpose is plainly to afford international protection to persons falling within objectively defined classes. And the Vienna Convention, whose relevant provisions we have cited, would be set at nought. Its provisions imply that every treaty falling within its scope has to be interpreted in accordance with objective canons of construction. The jurisprudence in the highest courts of Canada, Australia, and England in dealing with the meaning of "particular social group" within Art.1A(2) has consistently treated the question as one of legal principle: see *Chan v Canada* [1995] 3 RCS 593 (Supreme Court of Canada), *A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 (High Court of Australia), and *Shah* [1999] 2 WLR 1015 (House of Lords).

The notion of a "range of possible interpretations", an expression deployed in *Kerrouche*, is apt to an "application" case. But where what is in question is the scope of Art.1A(2), which as we have said is a matter of law, the expression needs to be treated with care. There may be - indeed has been - dispute as to the nature and gravity of ill-treatment required to be shown to constitute "persecution" (as to which Professor Hathaway's writings have rightly been regarded by our courts as offering considerable illumination). What may be regarded as persecution is likely to vary, to some extent at least, from time to time and place to place. There may be dispute as to whether a particular set of beliefs and practices constitute a "religion" for the purposes of Art.1A(2). Here also there cannot be a rule which is entirely set in stone. Even such disputes, though they touch Art.1A(2), may be regarded as going to the application of the Convention. But the identification of the essential classes of person entitled to the Convention's protection remains, categorically, a matter of law.

Because the scope of the definition of "refugee" in Art.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* the Master of the Rolls (in a passage we have already set out), citing *Kerrouche*, 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 Art.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 Art.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 Art.234, formerly 177, of the Treaty of Rome 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 Art.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 s.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 Art.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 Art.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 UNHCR 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 UNHCR was asked to provide, and in those circumstances it constitutes, in our judgment, good evidence of what has come to be international practice within Art.31(3)(b) of the Vienna Convention.

This view of Art.1A(2) is sought to be contradicted by the proposition that the historical *matrix* of the Geneva Convention shows that the evil it was designed to confront was that of persecution by the State. Certainly it is plain that in the years immediately following the Second World War - the Convention was made in 1951 - State persecution was perceived as a terrible vice which fell to be countered by the civilised international community: witness not only the Geneva Convention, but also the European Convention on Human Rights and Fundamental Freedoms, the Universal Declaration of Human Rights, and the very institution of the United Nations. But this argument as to the scope of Art.1A(2) is in our judgment deprived of all its force by the 1967 Protocol to the Convention, whose preambles we have set out. 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 protect against non-State agent persecution, where for whatever cause the State is unwilling or unable to offer protection itself.

The argument for the Secretary of State

Mr Pannick QC for the Secretary of State urges what is altogether a different position. He submitted that where (as in these cases) the third country in question is a Member State of the European Union, the Secretary of State cannot be criticised for treating it as a safe destination for the purposes of s.2(2)(c) *whatever* its approach to persecution by non-State agents, provided that it is consistent with the terms of the Joint Position of the Council of the European Union, whose relevant terms we have set out. He was at pains to emphasise that his case was not that the positions adopted by France and Germany were necessarily correct, or in any way "preferable" to the stance of this country's courts. He submitted that so far as the court was concerned to find an "irreducible core minimum" (as it was put in argument) of the rights which the Convention guaranteed, such a minimum is recognised and vouchsafed by the Joint Position, in particular by reference to para. 5(2) which we have cited.

The Joint Position, which was referred to in *Adan* in the House of Lords, commands respect as an attempt by the Member States of the European Union to agree, at least, a common base position for the Convention's application. But in our judgment it cannot bear the weight placed upon it by Mr Pannick in the context of the Secretary of State's duty in relation to s.2(2)(c) of the Act of 1996. First, it is clear from the terms of Art.K of the Maastricht Treaty that such joint positions are not taken within any area of Community legal competence. There is thus no question of the United Kingdom being bidden by Community law to apply or adopt the Joint Position in relation to the Secretary of State's discharge of his responsibilities under s.2 of the Act of 1996. Nor, in fairness, did Mr Pannick submit so much. Secondly, the Joint Position cannot in our judgment be treated as an agreement or instrument for the purpose of Art.31(2)(a) or (b) of the Vienna Convention, nor as a subsequent agreement within Art.31(3)(a), nor yet as significant evidence of State practice for the purpose of Art.31(3)(b). In truth, it constitutes an agreement to disagree. There is no consensus as to the position relating to persecution by non-State agents. The extent of the Member States' agreement as to the substance of Convention rights is found in para.5(1), "Persecution is generally the act of a State organ", the opening words of para.5(2), "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", and para.6, "Reference to a civil war or internal or generalized armed conflict and the dangers which it entails is not in itself sufficient to warrant the grant of refugee status". The first two of these references represent positions from which, with deference, no remotely reasonable interpretation of the Convention could depart. The third, consistent as it is with the decision of their Lordships' House in *Adan*, takes matters no further forward for present purposes.

In reply Mr Blake QC cited *Antonissen* [1991] 2 CMLR 373, a decision of the European Court of Justice, to support the proposition that "political agreements" between Member States are strictly irrelevant to the proper interpretation of subordinate Community instruments. In a helpful letter submitted to the court after the close of argument Mr Pannick countered this with other authority. In our judgment it is unnecessary to enter into this secondary debate. Leaving aside the obvious point that the Convention is not a measure of Community legislation, we are clear that the Joint Position cannot in any event assist Mr Pannick. It states no more than a minimum necessary stance. The error in Mr Pannick's argument is that it treats what is *necessary* as if it were *sufficient* for the purpose of ascertaining the true interpretation of Art.1A(2) of the Convention. The argument might be right if the Joint Position possessed such a status, whether by virtue of Community law or the Vienna Convention, that the courts of the signatory States (at least within the European Union: though that would be problematic - the Member States of the European Union are a minority of the States signatory to the Convention) were obliged to treat it as an authoritative text as to what Art.1A(2) requires. But the very terms of the Joint Position themselves disavow any such status: the guidelines are "without prejudice to Member States' caselaw on asylum matters" and the Joint Position "shall not... affect decisions of the judicial authorities of the Member States".

So far as Mr Pannick sought to uphold the Secretary of State's certificates on wider grounds, his argument falls foul of the distinction between interpretation and application which we have explained. Mr Pannick sought to rely on the passage in *Canbolat* at 1579H which we have set out: "If the Secretary of State could properly come to the decision which he did on that material, then this court cannot intervene". But once it is clear that the question is as to the scope of the Art.1A(2) definition of "refugee", no appeal to the *Wednesbury* principle is in point; the court is dealing with law, not fact. Mr Pannick's argument, elegant as it was, confuses the two.

The judgments below

In the Divisional Court in *Lul Adan*. Rose LJ said (transcript, p.15B-H):

> "The Secretary of State's certificate was... one which he was entitled to issue because he was entitled to take the view that the German approach is a permissible interpretation of the Convention. He was entitled to rely on Professor Hailbronner's views...
>
> In my view... it is not shown that the meaning placed on the Convention by the German court is `clearly inconsistent with its international meaning' (per Lord Woolf in *Iyadurai* 479A & C). There is, to put it no higher, an international division of view with Germany and other European States in an apparent minority position. Canada probably represents a majority. England is in neither of these camps. This, as it seems to me, provides no basis for concluding that the German approach is `clearly inconsistent with the Convention'."

With respect the first part of this reasoning, like Mr Pannick's argument, treats the case as if it fell to be decided by reference to the *Wednesbury* principle. The second part proceeds upon the premise that there may be a range of permissible views as to the scope of the classes of persons who by Art.1A(2) are in principle to be treated as refugees. But this in our judgment is erroneous for the reasons we have given.

In *Aitsegeur* Sullivan J was bound to dismiss the application unless he was able to distinguish the Divisional Court's decision in *Lul Adan* or was prepared to depart from it. In fact he distinguished it:

> "While there cannot be persecution on the `accountability' view if there is no state authority to be held accountable because of civil war, where there is a state authority, but it is unable to provide effective protection, it may nevertheless be held accountable even by adherents to the `accountability' view, as shown by the German Federal Administrative Court decision decisions cited by Vermeulen and Professor Hailbronner." (transcript, 30B-D)

While in our judgment *Aitsegeur* was in truth indistinguishable from *Lul Adan*, Sullivan J arrived in the event at the right result. However he did so by a route which in part at least deployed a *Wednesbury* approach:

> "In the present case there is no equivalent to Professor Hailbronner's report to explain, or to justify, the approach to third party persecution adopted under French law...
>
> Having considered the material before the Secretary of State, I have been unable... to find any justification for the proposition that in the absence of a civil war where there is still an `official authority' or a `state', the inability of that authority or state to provide protection from persecution by third parties cannot found a claim to refugee status under the Convention...
>
> On the material before me I am satisfied that the French approach to third party persecution in circumstances where there is still a state, but it is unable to offer protection, is clearly inconsistent with the international meaning of the Convention; or to use the phraseology in *Kerrouche*, it is `outside the range of possible interpretations'." (31E-33G)

Given the use of the expression "range of possible interpretations" in *Kerrouche*, it is in fairness unsurprising that Sullivan J reasoned in the way he did. We have already made observations about the notion of such a possible "range" in a case touching Art.1A(2). There is, on the Convention's proper "international" interpretation, no space for differing views as to the entitlement to protection of persons who can demonstrate a well-founded fear of persecution by non-State agents and who have no access to State protection.

Other means of protection

We have already referred to Mr Pannick's argument that even if we were to conclude that the Secretary of State may not lawfully be satisfied that Germany and France are safe third countries in light of their approach to the Convention, nevertheless he is entitled to be so satisfied on the footing that those countries offer alternative forms of protection in non-State agent cases which are in fact adequate when measured against the Convention's requirements. We propose to deal with this aspect of the appeals very shortly, since (as we indicated in the course of argument) it seems to us clear that the efficacy of these other measures cannot sensibly be judged otherwise than in the setting of a concrete case.

It is clear that there exist procedures, both in France and Germany, to which an unsuccessful asylum seeker may potentially have access, whereby he may avoid removal to the country where he asserts a fear of persecution if he is able to satisfy various conditions. Mr Pannick submitted that these procedures themselves sufficed, or at least might suffice, to show that France and Germany would not send an asylum claimant to another country "otherwise than in accordance with the Convention" within the meaning of s.2(2)(c). One of the arguments advanced by the asylum seekers to refute Mr Pannick's contention (and there were several) was that even if all else were equal, these other procedures do not afford anything like the basket of social rights within the country of refuge which are guaranteed to a refugee by the Convention in those measures contained in Chapters II, III, IV and V which we have summarised: indeed some of the alternative procedures in question would appear to deny access to the most basic social provision to the claimant who brings his case within them.

In our judgment the Secretary of State, in administering s.2(2)(c) of the Act of 1996, is only concerned with the question whether there exists a real risk that the third country will *refoule* the putative refugee in breach of the Convention: that is, in breach of Art.33. This follows, in our judgment, from the words of the subsection. The Secretary of State is not concerned to see that the claimant will or may enjoy the social rights to which we have referred if he is permitted to stay in the third country. We would not, however, exclude the possibility that such a claimant might in the third country be faced with so destitute an existence, if he were wholly excluded both from the right to work and from any access to social provision, and possessed no other resources upon which he might call, that he would be driven to return to the country of feared persecution even though he had successfully claimed such rights of residence in the third country as are offered by these other forms of protection.

Any deeper judgment as to the efficacy of the other forms of protection can only be arrived at, as we have said, where it arises as a live issue in a concrete case.

CONCLUSION

For the reasons we have given, the Secretary of State was in our judgment not entitled to give the certifcates which he did in these cases.

We apprehend that no formal order is required by way of relief, but if (in order to preserve the position in relation to any possible appeal) it is desired that an order be made we would be prepared to grant a declaration in the terms of the foregoing paragraph.

Order: Appeal allowed with costs in case of Adan.

Appeal dismissed with costs in cases of Subaskaran and Aitseguer. Declaration on terms stated in judgment. Legal Aid Assessment.