R v SECRETARY OF STATE FOR THE HOME DEPARTMENT EX PARTE IYADURAI

Court of Appeal
Lord Woolf MR, Auld and Buxton LLJ
10 June 1998

*Asylum - 'Safe third country' - Whether Secretary of State entitled to issue certificate tinder s 2 of the Asylum and Immigration Act 1996 for removal of asylum-seeker to Germany - Standard of proof in Germany for establishment of asylum claim - Extent to which signatories to United Nations Convention relating to the Status of Refugees 1951 may differ in its interpretation - Dublin Convention 1990 - Asylum and Immigration Act 1996, s 2-Statement of Changes in Immigration Rules (HC 395), para 345*

The applicant. a Sri Lankan Tamil, travelled to Germany where his claim for asylum was refused. He then left Germany and arrived in the UK on 18 September 1997 and claimed asylum. On 28 January 1998 the Secretary of State issued a certificate under s 2 of the Asylum and Immigration Act 1996 directing his removal to Germany without substantive consideration of his claim to asylum on the basis that Germany was a 'safe third country' which had accepted that it was the responsible State under the Dublin Convention 1990[1] for examining the asylum claim. The applicant sought judicial review. On 19 March 1998 Jowitt J refused leave to move at the invitation of the parties and without hearing argument thus enabling the matter to proceed expeditiously to the Court of Appeal for the determination of some of the questions raised in the abortive appeal of *R v Secretary of State for the Home Department ex parte Demiraj and Ethemi*[2] Before the Court of Appeal the applicant contended that under German law he was required to establish his claim to asylum by showing a clear' or 'considerable probability' of persecution which was a higher standard of proof than was required by the proper interpretation of Art 1A(2) of the United Nations Convention relating to the Status of Refugees 1951 and 1967 Protocol. Both sides relied on expert evidence from German lawyers. On 27 April 1998 the Court of Appeal, having heard argument, granted leave to move for judicial review and proceeded to determine the substantive application for judicial review.

**Held** - dismissing the application -

(1)The decision under s 2 of the Asylum and Immigration Act 1996 was one for the opinion of the Secretary of State. Such an opinion would be subject to a more rigorous examination by the courts than the simple *Wednesbury* approach: the more substantial the interference with human rights, the more the court would require by way of justification before it could be satisfied that the decision was reasonable in the *Wednesbury* sense. However, the court's role was nevertheless limited to supervision. doing no more that inquiring whether the Secretary of State had: (a) taken adequate steps to inform himself of the position in the third country; (b) properly considered the information available to him-. and (c) come to an opinion which is consistent with that information, recognising that it is his responsibility to evaluate the material which is available to him.

*R v Secretary of State for the Home Department and Immigration Officer, Waterloo International Station ex parte Canbolat followed.*

(2)In considering the issue raised by s 2(2)(c) of the 1996 Act, namely whether the third country would send the applicant to another country 'otherwise than in accordance with the [1951] Convention', the important question for the Secretary of State was not whether the 'third country' formulated its test for the grant of refugee status in precisely the same language as that adopted by the UK but whether, on the material available to the Secretary of State, the 'third country' should be regarded by him as properly giving effect to the 1951 Convention. This exercise involved examining the approach in the 'third country' against the proper international interpretation of the provisions of the 1951 Convention. The Secretary of State was not required to become deeply involved in a comparative analysis of the law of different signatories to the 1951 Convention or to subject the approach adopted in other States to an over-technical comparison. The 'third country' could be complying with the 1951 Convention although it expressed its approach in different language to that which would be used in the UK.

(3)Given the style in which the 1951 Convention was drafted, it was inevitable that there would be differences of emphasis and linguistic distinctions between how the 1951 Convention was

approached among the signatory States. Although it was not appropriate to speak in terms of a 'margin of appreciation' in respect of the interpretation of the 1951 Convention, the UK courts were only entitled to conclude that the approach adopted by a 'third country' involved a contravention of the 1951 Convention if the meaning placed on the 1951 Convention by that country was clearly inconsistent with its international meaning; only then would any difference in language between that which is adopted in the 'third country' and that which would be adopted in the UK become significant. Whether any differences are significant to that extent was in the first place for the Secretary of State to decide under s 2 of the 1996 Act, but if the court comes to the conclusion that the approach in the 'third country' was clearly inconsistent with the 1951 Convention then that would strongly suggest that the Secretary of State's opinion was flawed. *Re H (Abduction: Acquiescence) distinguished.*

*R v A Special Adjudicator ex parte Kerrouche considered.*

(4)The Secretary of State had complied with his duty to take reasonable steps to inform himself of the position in Germany by obtaining opinions from a German expert. On the basis of those responses, the Secretary of State had been entitled to conclude that the German authorities did not adopt an approach which was outside the range of responses of a Contracting State acting in good faith to implement its obligations under the 1951 Convention. The differences between the German approach and the UK approach were not of a scale which would rule out their attribution to linguistic difficulties. Accordingly, the Secretary of State's certificate was not open to challenge.

**Statutory provisions considered**

Asylum and Immigration Appeals Act 1993, s 6

Asylum and Immigration Act 1996, s 2

**Immigration Rule referred to in judgment**

Statement of Changes in Immigration Rules (HC 395), para 345

**International Treaties, Conventions and documents referred to in judgment**

United Nations Convention relating to the Status of Refugees 1951 and 1967 Protocol, Arts 1A(2), 38

**Cases referred to in judgment**

*Fernandez v Government of Singapore and Others [1971] 1 WLR 987, [1971] 2 All ER 691, HL*

*H (Abduction: Acquiescence), Re [1997] 2 WLR 563. [1997]1 FLR 872, HL*

*R v A Special Adjudicator ex parte Kerrouche 19981 INLR 88, CA*

*R v Secretary of State for the Home Department and Immigration Officer, Waterloo International Station ex parte Canbolat [1997] INLR 198, sub nom R v Secretary of State for the Home Department and Another ex parte Canbolat [1997] 1 WLR 1569, CA*

*R v Secretary of State for the Home Department ex parte Adan [1998] INLR 325, sub nom Adan v The Secretary of State for the Home Department [1998] 2 WLR 702, HL*

*R v Secretary of State for the Home Department ex parte Bugdaycay [ 1987] 1 AC 514, [1986]1 WLR 155, [1986] 1 All ER 458, CA*

*R v Secretary of State for the Home Department ex parte Demiraj and Ethemi [19981 INLR 451, QBD*

*R v Secretary of State for the Home Department ex parte Sivakumaran [1988] 1 AC 958, [198812 WLR 92, [1988] 1 All ER 193, [19881 Imm AR 147, HL*

*T v Secretary of State for the Home Department [ 19961 AC 742, [199612 WLR 766, [199612 All ER 865, HL*

**International case referred to in judgment**

*San Giorgio Case 199182 [198315 ECR 3595, ECJ*

*Mr. M. Gill and Ms U. Miszkiel for the applicant*

*Mr. D. Pannick QC and Ms L. Giovannetti for the respondent*

**LORD WOOLF MR:** The issue on this appeal is whether the Secretary o State can lawfully certify that Germany is a safe third country to which the applicant can be removed to have his claim for asylum determined, without having that claim determined in this country. The Secretary

of State's authority to issue a certificate is contained in s 2 of the Asylum and Immigration Act 1996 ('the 1996 Act').

## The background

It is not in dispute that the applicant is subject to s 2 of the 1996 Act. The submissions which Mr Gill makes on his behalf do not depend upon the applicant's personal circumstances. They depend upon the way claims for asylum are dealt with generally in Germany. In this situation, the applicant's personal circumstances are of no direct relevance to his case. However, the facts leading up to his application can be described briefly as follows. He is a citizen of Sri Lanka who is a Tamil. He was born on 4 May 1969. In February 1996 he travelled to Germany where he claimed asylum. His claim was refused and he left Germany and travelled to Italy where he remained one day. He then travelled to the UK hidden in the back of a lorry where he was discovered by immigration officers on 19 September 1997. The following, day he claimed asylum. On 15 January 1998 Germany was asked to accept responsibility for examining his asylum claim under the Dublin Convention. This request was accepted by the German authorities on 26 January 1998. On 28 January 1998 the Secretary of State issued a certificate under s 2 of the 1996 Act and directed that he be removed to Germany. On 10 February 1998 he made an application for leave to move for judicial review. This was refused by Jowitt J on 19 March 1998. At the end of the hearing before this court, the court indicated that we would grant the renewed application for leave and determine the substantive applications for judicial review.

## The relevant legislation

Section 2 of the 1996 Act is intended to enable the Secretary of State to remove expeditiously from this country claimants for asylum who have arrived in this country from a safe third country. Section 2(1)(a) of the 1996 Act provides that the Secretary of State may remove an asylum claimant from the UK if:
'The Secretary of State has certified that, in his opinion, the conditions mentioned in subsection (2) below are fulfilled'.

The relevant conditions set out in s 2(2) 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 [that is the Geneva Convention for the Protection of Refugees 1951].'
There is no dispute that conditions (a) and (b) are met in this case. The problem revolves around condition (c). The language of s 2 makes it clear that as long as the Secretary of State was entitled to form the opinion that condition (c) has been fulfilled, the courts cannot interfere with his decision. The 1996 Act does give an asylum claimant a right of appeal against the certificate to a special adjudicator on the ground that the conditions mentioned in s 2(2) are not fulfilled. However, that appeal cannot be exercised while the asylum claimant is in the UK (s 3) so it is of little practical value. It follows that this right of appeal is not an alternative remedy which prevents an applicant seeking judicial review.
Section 2 of the 1996 Act should be read with paras 337 and 345 of the Immigration Rules as amended by Cm 3365. For the purpose of this judgment it is not necessary to refer to their terms which do not assist the applicant.

## The approach to issues under s 2 of the 1996 Act

Both the applicant and the Secretary of State accept that the approach to s 2 was correctly indicated by this court in R v Secretary, of State for the Home Department and Immigration

Officer, Waterloo International Station ex parte Canbolat [1997] INLR 198. In that case it was stated as to s 2(2) of the 1996 Act that (at 209A):
"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.'

It was also stated in Canbolat (at 206G-207A) in relation to s 2:
'This is the statutory test. It is a test imposed as a requirement of over-riding the protection which would otherwise be provided by s 6 of the 1993 Act [that is protection against deportation). 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 and 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% 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 then in accordance with the Convention". The unpredictability of human behaviour or the remote possibility of changes in administrative law or procedure which there is no reason to anticipate would not be a real risk.'

In *Canbolat* the Secretary of State was unsuccessfully criticised for regarding France as a safe third country. This was not because of any criticism of French substantive law, but because of the danger of asylum- seekers not receiving a proper opportunity to have their claims determined in accordance with French law and the Convention. In R v A Special Adjudicator ex parte Kerrouche [1998] INLR 88 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 (at 92G-93C):
'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 ...

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. While it is highly desirable that there should be a harmonised approach to the interpretation of the 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.

The court also said (at 93F):
'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.'

Mr Gill on behalf of the applicant criticises the approach adopted in the foregoing passages of Kerrouche. He draws attention to the fact that there is in fact a supranational body provided for by the Convention. However, the relevant provision, namely Art 38, which was admittedly not

drawn to the attention of the court in Kerrouche, would not in fact achieve the sort of harmonisation to which the court was referring. Article 38 deals with disputes between the signatories to the Convention. More importantly he criticises the passages cited on the ground that the language of 'margin of appreciation' appears to apply the jurisprudence under the European Convention on Human Rights relating to the respect accorded by the court and Commission to the discretionary decisions of national authorities to the different situation under s 2 of the 1996 Act, where the court is concerned with the correct interpretation of the Convention.

In Kerrouche the provision binding the Secretary of State was the unamended para 345 of the Immigration Rules, which permitted the Secretary of State to remove an applicant to a third country when satisfied that 'the government of which would not send the applicant elsewhere in a manner contrary to the principles of the Convention' (emphasis added). That is to be contrasted with s 2 of the 1996 Act and the amended rule, where the Secretary of State is required to certify his opinion that the government of a third country would not send the applicant to another country 'otherwise in accordance with the Convention'. However, notwithstanding this, in the light of Mr Gill's criticisms, it has to be accepted that the reference to 'margin of appreciation' is not happily chosen because of its association with a different context in relation to the European Convention on Human Rights. It does, however, remain that we are here concerned with the meaning of an international Convention the general nature of which has been recently described by Lord Lloyd of Berwick in *R v Secretary of State for the Home Department ex parte Adan* [1998] INLR 325, 330F:

'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 Art 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.'

Applying this guidance, in considering whether or not the government of the third country would send the applicant to another country 'otherwise than in accordance with the Convention' what it is important for the Secretary of State to decide is not whether the third country formulates its test in precisely the same language as that adopted by this country but whether the Secretary of State regards the third country on the material available to him as properly giving effect to the Convention. This exercise involves examining the approach adopted in the third country against the proper international interpretation of the provisions of the Convention. It remains the situation that the Secretary of State is not required 'to become deeply involved in a comparative analysis of the law of different signatories to the Convention' (Kerrouche at 93D) and the third country can be complying with the Convention although it expresses its approach in different language to that which would be used in this country. If the Secretary of State has formed the opinion required by s 2 then the court's role is limited to one of supervision. The court can do no more than inquire whether the Secretary of State has (i) taken adequate steps to inform himself of the position in the third country, (ii) properly considered the information which is available to him, and (iii) come to an opinion which is consistent with that information, recognising that it is his responsibility to evaluate the material which is available to him.

In support of his criticisms of the approach adopted by this court in Kerrouche, Mr Gill referred to the case of Re H (Abduction: Acquiescence) [1997] 2 WLR 563. In that case the House of Lords had to apply the Hague Convention on the Civil Aspects of International Child Abduction. This Convention makes provision for the situations where the wronged parent 'had consented to or subsequently acquiesced in' the abduction. The House had been pressed with English authorities and the contention that in English law acquiescence by one party normally depends upon his outward actions that must be known to the other party if the latter seeks to rely on them.

Lord Browne- Wilkinson pointed out that an approach through English law concepts was inappropriate. He said (at 573A):

'In my view, these English law concepts have no direct application to the proper construction of ... the Convention. An international Convention, expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The Convention must have the same meaning and effect under the laws of all contracting states. I would therefore reject any construction ... which reflects purely English law rules as to the meaning of the word "acquiescence". I would also deplore attempts to introduce special rules of law applicable in England alone (such as the distinction between active and passive acquiescence) which are not to be found in the Convention itself or in the general law of all developed nations.'

The issue addressed by Lord Browne-Wilkinson was different from that which arises here. The issue was whether the Hague Convention required an overall 'subjective' or 'objective' approach. What Lord Browne-Wilkinson was concerned to demonstrate was that it was a mistaken approach to an international Convention, to think that there must or even that there could be, applied to a particular verbal formula used in an international Convention a meaning which was dependent purely upon domestic law. Lord Browne-Wilkinson was not addressing, the issue which arose in *Kerrouche*, and which arises in this case, namely 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. 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 s 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.
Mr Gill's criticisms of the German court relate to the difficult question as to what constitutes a well-founded fear of persecution. In this jurisdiction the test for this has now been authoritatively decided since the decision of the House of Lords in *R v Secretary of State for the Home Department ex parte Sivakumaran* [1988] 1 AC 958. In his speech at 994 Lord Keith of Kindle, after drawing, attention to the way the authorities in the USA have developed on this subject, succinctly states what is required: 'there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a Convention reason if returned to his own country'. Lord Keith also cites with approval the approach of Lord Diplock in *Fernandez v Government of Singapore and Others* [1971] 1 WLR 987, 994 who in relation to a different provision referred to 'A "reasonable chance", "substantial grounds for thinking", "a serious possibility".' Lord Diplock attaches no significance to the difference between these various ways of describing the degree of likelihood required.
Even though Lord Keith's approach has been generally accepted, it is in the present context interesting to note that in their speeches Lord Templeman and Lord Goff of Chieveley expressed themselves in somewhat different terms, yet Lord Bridge of Harwich had no difficulty in agreeing with their speeches as well as that of Lord Keith. Lord Templeman, adopting the same approach as the Secretary of State, expresses himself in this way (at 996F):
'A danger from persecution is obviously a matter of degree and judgment. The Secretary of State accepts that an applicant who fears persecution is entitled to asylum in this country unless the Secretary of State is satisfied that there is no real and substantial danger of persecution.'

Lord Goff of Chieveley also referred to there having to be 'a real and substantial risk of persecution for a Convention reason'. However he agreed with Lord Keith that this could be demonstrated by showing that there is 'a reasonable degree of likelihood of his persecution for a Convention reason'.
In applying the speeches of their Lordships, it becomes apparent that while a real and substantial risk of persecution is required, fear of this is well founded if -it is demonstrated that there is a reasonable degree of likelihood of persecution. It is to be noted that none of their

Lordships descended so far as to talk in the terms of percentages of risk. It would be wrong to do so. This is an area of developing jurisprudence among signatories to the Convention in relation to a topic on which the language of the Convention provides no precise answer.
It is necessary to examine what their Lordships said because Mr Gill's argument in support of the applicant involves examining the views expressed on this subject by German courts and contrasting them with the language of Lord Keith. This he contends demonstrates that Germany is not complying with the Convention.
In answer to this argument Mr Pannick draws attention to the fact that there is a difference between the burden of proof which is on an asylum claimant and the standard of fear of persecution to which that burden relates. In *Sivakumaran* their Lordships were considering the standard of fear of persecution which had to be established and not the burden of proof. As to the burden of proof, Mr Pannick submits this is not expressly addressed by the Convention and therefore this is an issue on which Contracting States may reasonably take a different approach. It is true that for the asylum claimant what is important is the combined effect of the burden and standard of proof that he has to meet.

## The evidence relied upon by the applicant

The present application was intended to follow the application which was made in the case *of R v Secretary of State for the Home Department ex parte Ethemi and Demiraj [1998]* INLR 451. That application concerned two Albanians from Kosovo whom the Secretary of State intended to return to Germany so that their application for asylum could be considered in Germany. However, by the time that their application was to be heard by the Court of Appeal, because of the situation at that time in Kosovo the application was not effective. If it had been then the question of whether the Secretary of State was entitled to grant certificates in relation to Germany would have been determined in that case. This would have provided useful guidance for other cases which were then awaiting determination, including the present application. The position resulting from Kosovo may have been to some extent a special situation so far as Germany is concerned.
The financial resources available to the present applicant and other applicants in a similar position are severely restricted and Mr Gill fairly makes the point that the Secretary of State is in a much better position than the applicants to ascertain what is in fact the position in Germany. However, as it was anticipated that the *Ethemi and Demiraj applications* would provide a test case, considerable material was obtained on behalf of the applicants in that case which is now relied upon for the purpose of the present application. Certain of the material is, however, linked with the particular problems in Germany of dealing with the repatriation from Germany of ethnic Albanians to Kosovo.
However, what the evidence relied upon by the applicant does do is indicate that certain of the Federal Administrative Court's jurisprudence indicates that an asylum claimant must establish a 'notable' or 'considerable' probability of persecution in order to succeed. Thus reliance is made on comparative research conducted by Ms Garlick, who indicates that in Germany most judges take a fairly strict approach and look for a greater than 50% probability of persecution. Some more liberal judges will accept less. However, in all cases, what is required is the probability rather than the possibility of persecutions. Reliance is also placed upon the views of Dr Marx who is a leading German lawyer in the field of asylum law who indicated that the standard of proof required of an asylum-seeker is that of 'clear probability' that he will be exposed to persecution in his country of origin. Dr Marx has provided literature which was in accord with his approach.
The Secretary of State on the other hand relies upon the opinions expressed by Professor Dr Kay Hailbronner who is an equally distinguished lawyer who has been both legal counsel for the Federal Government in asylum and immigration law and a judge of an Administrative Appeal Court and Director of the Centre for International and European Law on Immigration and Asylum. As to the standard of proof he points out there have been divergent interpretations in the lower courts but that in its decision of 15 March 1988 the Federal Administrative Court has clarified the requirement of 'Considerable probability'. This is not to be interpreted in a mathematical

statistical way. It requires an evaluation of risk taking into account all the circumstances of the case. The test is met, if, in consideration of all circumstances of the case a reasonable person in the situation of an asylum-seeker would be afraid of persecution. He therefore contends that 'a well founded danger of political persecution may well exist if on the basis of a mathematical consideration there is less probability than 50%'. What is essential in the Federal Administrative Court's view is that by comprehensive evaluation of all circumstances of the case on balance the factors indicating a danger of persecution weigh more heavily than those indicating the asylum-seeker's safety. Professor Hailbronner then goes on to refer to two later cases where the Federal Administrative Court in 1991 relaxed the requirements so that 'the fear of political persecution may indeed be well founded when, after an objective ... assessment it emerges that the return to the asylum-seeker's home country is not reasonable' and what was critical was 'whether return [to the home country] can be reasonably expected'. The professor indicates that the requirement of 'considerable probability' is primarily used to exclude claims for political asylum based on a mere 'possibility' as well as claims which are based on a purely subjective assumption of fear. The professor adds that even where there is only a small possibility in a quantitative sense, it will make a difference whether there is a risk for life or only a risk of minor punishment by the police.
Dr Marx accepts that in 1988 the Federal Administrative Court attempted to bring its 'clear probability' test into line with the Convention but he suggests this has failed to happen and he says that the effect of the German jurisprudence is a situation in which the standard is 'more likely than not'. Furthermore, he states that subjective elements relating to a claimant will only be considered where the claimant has already suffered persecution.
Reliance is also placed by the applicant upon the opinion of Professor Guy Good win Gill of Wolf son College, Oxford which is dated 2 December 1997. He draws attention to the fact that the 1951 Convention was drafted in English and French but that the content of a serious risk or possibility of persecution and the intended references to a combination of subjective and objective factors 'do not necessarily travel quite as easily' to other jurisdictions. He expresses the opinion that:
'A limited review of recent German jurisprudence, as well as a consideration of the views expressed by Professor Hailbronner, leads me to conclude that superior Courts in Germany generally, fail to distinguish sufficiently between personal credibility and evidence relating to conditions in countries of origin. This in turn has led to the adoption of a .. standard of proof' which significantly distorts the intended scope of the refugee definition adopted in 1951'.

In relation to the question of a 'margin of appreciation', Professor Good win Gill indicates:
'States may have some margin of appreciation in deciding whether certain types of treatment amount to persecution: ... However, any such margin will be closely circumscribed given that fundamental human rights are at stake. Thus, while in some circumstances it might be possible for different views to be taken as to the factual situation in a particular country ... the overriding question remains whether there is a serious risk or possibility of persecution. The concept of "margin of appreciation" cannot apply to the standard by which such a risk has to be proved.'

The applicant has also put forward opinions expressed by other commentators which supports this approach. However, the Secretary of State has subsequently consulted Professor Hailbronner and he has remained of his previous views. In a final letter written as recently as 27 April 1998 to the Treasury Solicitor, the professor vigorously refutes the reasoning of the applicant and Dr Marx in particular. He concludes his letter by stating that 'the assumption of Mr Marx that the German standards are in conflict with the Geneva Convention is therefore unfounded'. The Secretary of State contends that Professor Hailbronner's response to the applicant's case confirms his opinion. He also relies upon the comparative recognition rates of claims by Sri Lankan asylum-seekers in the UK and Germany. Those figures show that while in the UK the recognition rate in 1995 was 1.49%, in Germany it was 14.6%, in 1996 the UK rate was 0.23% while in Germany it was 8.20% and in 1997 the rate in the UK was 3.08% while the rate in Germany was 4.90%. These figures do provide material which in a general way is consistent with the opinion of the Secretary of State though no doubt they could be explained by other factors.

## Conclusions

The material produced by the applicant warranted the grant of leave. Having, been granted leave, it is appropriate to subject the opinion which the Secretary of State reached to the rigorous examination referred to in *R v Secretary Of State /or the Home Department ex parte Bugdaycay* [1987] 1 AC 514, 531. The process of rigorous examination, Must not however detract from the fact that the 1996 Act makes the decision one for the opinion of the Secretary of State. If on the material which was available to him, he was entitled to come to the conclusion which lie did, then this court cannot interfere.

The material as to the position in Germany relied upon by the applicant did call for a response by the Secretary of State. While the fact that Germany is a signatory of the Convention is a relevant matter the Secretary of State Could not rely on this alone. He was required to take reasonable steps to inform himself of the position in Germany. This he did by obtaining the opinions of Professor Hailbronner. On the responses of Professor Hailbronner the Secretary of State was entitled to come to the conclusion which he did. In dealing with asylum claims, the procedures adopted and the burden of proof and the standard of proof which an applicant has to meet can be all important. As Mr Pannick submitted, among the States who are parties to the Convention, it is inevitable that procedures will differ and topics such as the burden and standard of proof will be expressed in somewhat different terms. However Professor Hailbronner contends that Germany complies with Convention. Where what is under consideration is a Convention drafted in the style of the 1951 Convention, it is inevitable that there will be differences of emphasis and linguistic distinctions between how the Convention is approached among the signatory States. Professor Hailbronner regards this as being part of the explanation for the misunderstanding (as he would describe it) of the applicant's evidence as to the true position in Germany. Certainly the differences are not of scale which would rule out their attribution to linguistic difficulties.

Taking into account the evidence of Professor Hailbronner, as Mr Pannick submits, the Secretary of State was entitled to conclude that the German authorities do not adopt an approach which is outside the range of responses of a Contracting State acting in good faith to implement its obligations under the Convention. Care must be taken not to subject the approach adopted in other States to an over-technical comparison.

The higher recognition rate in Germany for Sri Lankan asylum-seekers than in the UK undoubtedly supports the opinion to which the Secretary of State has come. He has to take reasonable steps to inform himself of the position in Germany and this he has done. No more is required of him.

This is the conclusion reached upon all the material placed before the court. The matter could have been considered and would normally have to be considered at the date on which the Secretary of State formed his opinion, namely 28 January 1998. However, the applicant's case at that date was no than it was at the time of the hearing before this court and in those stronger circumstances it was sensible to look at the whole material as was done in Canbolat rather than to confine attention to the precise material which was available to the Secretary of State.

The application should be dismissed.

**BUXTON LJ:** I agree that this appeal should be dismissed, for the reasons given by the Master of the Rolls. Because of the importance of any asylum case I venture to add some words of my own. I gratefully adopt the statement of facts set out by and the terminology used by my Lord.

There is no doubt that the formulation in s 2 of the 1996 Act makes the Secretary of State, not the court, the decision-maker. However, it was accepted by Mr Pannick QC on behalf of the Secretary of State that in immigration matters the standard by which the court should assess the Secretary of State's decision was not the simple Wednesbury standard, but rather that adopted by this court in *R v Secretary of State for the Home Department and Immigration Officer, Katerloo International Station ex parte Canbolat* [1997] INLR 198, 208G:

'The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the

decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.'

That test is, perhaps, easier to state than it is to apply. In the context of the present case, however, it may be important to repeat two things. First, the court remains a court of review, not a court of appeal. Secondly, however, the court has jurisdiction to review to a higher standard than is adopted in at least the conventional statements of Wednesbury the process whereby the Secretary of State took the decision in question.
Before considering, how the Secretary of State approached the issue in this case, it is necessary to determine with rather more precision what was the legal nature or characterisation of the expected conduct of the German authorities on which he had to adjudicate.
Mr Pannick was at one stage disposed to argue that the review by the Secretary of State of the likely approach of the German authorities to the issue of whether the applicant had, in Convention terms, a well-founded fear of persecution in Sri Lanka involved consideration only of the procedure that they were likely to adopt in deciding that question. He suggested that the only issue in this jurisdiction should therefore be whether the German courts, in deciding that issue, sufficiently applied the procedure that they would bring to bear on an issue of a similar nature arising in a purely domestic German context: by analogy with the rule of Community law for the decision by national courts of Community issues, as exemplified for instance in Case 199/82 (1983] 5 ECR 3595, 3614 (*San Giorgio*). I am quite unable to agree with that view, which it is fair to say did not at the end of the day feature strongly in the argument on behalf of the Secretary of State.
First, the issue for the Secretary of State did not concern the procedure of the German courts. There was no suggestion made to him or before us that the applicant would not obtain a fair trial in the sense of being properly heard by a proper tribunal. What was in issue was the substantive law that the German courts would apply. True it is that the applicant complained of that law in terms of the 'standard of proof' that the German courts would apply, but that was to some extent a misnomer. His principal complaint, as set out for instance in para 12 of his written skeleton before us was that the:
'... standard of proof in Germany is that an asylum-seeker must show a "considerable probability" of persecution.'

The applicant undertakes that task in the course of demonstrating, as under the Convention he has to do, that he is a 'refugee': that is, that he has a well-founded fear of being persecuted on a Convention -round. The requirements imposed by German law for deciding that question are provisions as to the meaning, or at least the implications, of those words in the Convention. They are not rules of procedure, or even of evidence, in any normal sense of those terms: any more than when the courts of this country have had to consider that same question, as for instance in *R v Secretary of State for the Home Department ex parte Sivakumaran* [1988] AC 958, it has been regarded as a matter of procedure rather than of substantive law.
Secondly, even if the foregoing is not correct, this court has recently had cause in connection with s 2 of the 1996 Act to consider a third country's procedure in dealing with Convention issues, and has not held back from applying the general Canbolat test referred to above. That was so in Canbolat itself, where France was argued not to be a safe third country because of fears, entertained by special adjudicators in the UK, as to France's application of the Convention (at 205B-D):
'The adjudicators were not concerned about French substantive law. This does protect asylum-seekers in accordance with the Convention. Their concern was as to the danger that when an asylum-seeker was returned to France the asylum-seeker would not be given an opportunity to have his position determined in accordance with French law as the Convention required prior to his being deported from France.'

That case binds us to conclude that all aspects of a third country's practice have potentially to come under the scrutiny of the Secretary of State. Even if the present case were about the third country's procedure, that in itself would not prevent the third country's practice from scrutiny.

In my view, however, the question in this case is as to the construction put by the courts of the Federal Republic on the concept of a refugee, and whether that construction is in accord with the terms of the Convention. Mr Gill argued that, because of the particular human rights issues involved in refugee cases, the Secretary of State when addressing that question was under an obligation to give the right answer to it. If the court concluded that he had reached the wrong answer, that was the end of the case. There are two difficulties in that contention. First, it is impossible to reconcile with the terms of s 2 of the 1996 Act, which deprive a claimant of protection on the basis merely of an opinion expressed by the Secretary of State. Secondly, it is very difficult to see, in connection with the Convention, how the issue of whether a particular answer, particularly an answer given by the courts of another country, is 'right' can be determined in a municipal court.

This latter problem was addressed by this court in *R v A Special .Adjudicator ex parte Kerrouche* [1998) INLR 88. That case was decided on the procedure adopted before the 1996 Act came into force, and therefore took the form of an application for judicial review of the decision of a special adjudicator who had dismissed an appeal against a decision of the Secretary of State to remove to France, as a safe third country, a fugitive from Algeria. The objection raised to France in that capacity was that France took a narrower view of what constituted a political crime, under Art 1 F(b) of the Convention, than had the courts of this country in, in particular, T v Secretary of State for the Home Department [1996] AC 742. This court did not agree that that factor was decisive in determining whether the third country in question was safe in terms of the Convention, setting out its approach in the passage already cited by the Master of the Rolls.

Mr Gill criticised at least the latter part of that citation on the ground that the language of 'margin of appreciation' appeared to attract the jurisprudence under the European Convention on Human Rights relating to the respect accorded by the court and Commission to the discretionary decisions of national authorities. That in verbal terms would seem to be correct. The issue addressed by this court in Kerrouche concerned the correct legal interpretation of the provisions, not the assessment of the reasonableness of any action taken by the national authorities under those provisions. The point is, however, a verbal one only. This court was clearly addressing itself to the former and not to the latter issue.

Further, as the Master of the Rolls has pointed out, in Kerrouche the provision binding the Secretary of State was the then para 345 of the Immigration Rules, which permitted the Secretary of State to remove an applicant to a third country when satisfied that 'the government of which would not send the applicant elsewhere in a manner contrary to the principles of the Convention' (emphasis supplied). That is to be contrasted with s 2 of the 1996 Act, where the Secretary of State is required to certify his opinion that the government of the third country would not send the applicant to another country 'otherwise than in accordance with the Convention'. These provisions differ, therefore, or at least may differ, in that under s 2 what is in issue is the Convention itself rather than its 'principles'. Nevertheless, the methodology of the court's approach to such an issue, as adopted in *Kerrouche, does not differ* between that case and that required in our case.

In my view, therefore, Kerrouche is authority for, and binds us as to, the following propositions. 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 decisions of that court will be contrary to the terms of the Convention.

That question is not determined simply by asking whether the decision of the court in the third country would, on the same set of facts, be the same as the decision of the English court.

The appellant sought to challenge, or at least to offset, those conclusions by two principal arguments. The first was that international Conventions do in fact have 'a single true meaning' that it is the task of the court or where, as here, English law places that duty on him, the Secretary of State to divine. Particular reliance was placed on the comments of Lord Browne-Wilkinson in *Re H* (*Abduction*: *Acquiescence*) [1997] 2 WLR 563, 573B. Secondly, if that was not correct, the meaning attached to the concept of well-founded fear by the German courts was in

any event different, and less demanding, than the meaning attached by the English courts. The latter was to be found most conveniently in the speech of Lord Keith of Kinkel in Sivakumaran [1988] AC 958, 994F:
'... the requirement that an applicant's fear of persecution should be well-founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a Convention reason if he returned to his own country.'

Mr Gill said that even if it were not the case that Lord Keith had set out the real or only meaning of that expression, none the less it would be irrational of the Secretary of State, and by the same token irrational of this court, to assume in his dealings with third countries that a different meaning fulfilled the requirements of the Convention whilst insisting on the Sivakumaran meaning in its own application of the Convention to refugees.
I deal with these points in turn.
As the Master of the Rolls has demonstrated, the issue addressed by Lord Browne-Wilkinson in *Re H (Abduction: Acquiescence*) was different from that which arises in our case. The issue in Re H (Abduction: Acquiescence) was the somewhat protean one of whether the Convention required an overall approach in 'subjective' or 'objective' terms, concepts that do not have a fixed and certain meaning. Such an inquiry can only be answered in a broad sense, as Lord Browne-Wilkinson's conclusion demonstrates. What Lord Browne-Wilkinson was principally concerned to demonstrate was that it was a mistaken approach to an international Convention, when construed in a municipal court, to think that there must be, or even that there could be, applied to that construction the purely domestic meaning placed in municipal law on the particular verbal formulae used in the Convention. That seems, with respect, to be beyond argument. I do not however think that in saying 'The Convention must have the same meaning and effect under the laws of all contracting states' his Lordship intended to go further than that. Certainly, he was not invited to address the issue that arose in Kerrouche, and which arises in our case, of the extent to which one municipal court is constrained, in applying the Convention, by the meaning placed on terms in the Convention by another municipal court. I do not therefore consider that we are obliged, or even entitled, to apply Lord Browne-Wilkinson's observations in preference to the decision of this court in *Kerrouche*.
As to the second point, irrationality, it is to be observed that in Kerrouche this court was well aware that it was accepting as consistent with the Convention an approach on the part of the French courts that was different from that of the courts of this country. It did not see that as an obstacle to the view that it adopted. We are therefore bound by that aspect of the decision in Kerrouche to reject the present objection. I would further say that the argument is in any event excluded by the first of the propositions set out above as derived from Kerrouche. If there is no single meaning to be ascribed to the terms of the Convention, then a decision cannot be irrational just because it ascribes different meanings to the Convention for different purposes.
I now apply this law to the present case. The case involves not the determination by this court of whether the German courts will breach the Convention, but rather whether the opinion in that regard expressed by the Secretary of State is open to challenge. The principles recognised in *Kerrouche* are, however, directly relevant to that issue, because the guidance as to the law to be applied by the English court in relation to an assessment of the court of a third country must govern the same assessment made by the Secretary of State. In addition, however, the assessment by the Secretary of State is in terms of his opinion; and in considering that opinion, and the way in which it was formed, the court under the principle in *Canbolat* has to consider whether the decision was beyond the range of responses open to a reasonable Secretary of State.
I preface that consideration with the observation, in regard to the materials placed before the court by both sides in relation to German law, that when dealing with what are to some extent imprecise, or at least judgmental, concepts, there is bound to be a danger that matter will be lost, or distorted, in translation. It is therefore particularly important, when reviewing the reasonableness of an opinion formed on the basis of such materials, not to A place excessive weight on what may be purely verbal infelicities.
That said, and against the background set out above, I can deal with the issues comparatively briefly.

First, I consider that the Secretary of State acted within a range of reasonable procedures by relying on the advice of one expert only on the law of Germany, in the shape of Dr Hailbronner, granted that (i) Dr Hailbronner's status as such expert has never been questioned; and (ii) B where views contrary or apparently contrary to those expressed by Dr Hailbronner were put forward by other German lawyers, those views were referred by the Secretary of State to Dr Heilbronner and satisfactory responses obtained.
Secondly, the Secretary of State was entitled to act on the account of German law set out in Dr Hailbronner's letter of 17 March 1998, the essential elements in which were that (i) the test adopted by the Federal Administrative Court is whether in all the circumstances of the case a reasonable person in the situation of the asylum-seeker could have a well-founded fear of persecution; (ii) that test replaced the former 'more likely than not' approach; (iii) a mere theoretical possibility of persecution is not enough, there must be a real risk thereof-, (iv) the test of such risk is one of reasonable probability, which is not a mere mathematical evaluation; (v) that jurisprudence of the Federal Administrative Court is applied by the administrative courts of the Federal Republic despite there being no doctrine of binding judicial precedent.
Faced with that account of German law, it seems to me quite impossible to say that it was not open to the Secretary of State rationally to form the opinion that, in the terms of the judgment in *Kerrouche*, the courts of the Federal Republic will make their decision within and according to the terms of the Convention that define refugee status in terms of a well-founded fear of persecution. I do not think that that conclusion admits of any useful further elaboration.
**AULD LJ:** I agree.
*Application dismissed. Leave to appeal refused*
*Solicitors: Sri Kanth & Co for the applicant*
*Treasury Solicitor*

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[1] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities 1990.

[2] [1998] INLR 451, 461 C-E.