C/2000/0135

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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

CIVIL APPEALS OFFICE

Royal Courts of Justice

Strand

London WC2

Monday, 31st July 2000

Before:

LORD JUSTICE PILL

LORD JUSTICE CLARKE

MR JUSTICE BENNETT

REVENKO

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

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Official Shorthand Writers to the Court)

MR NICOL QC (Instructed by Wilson & Co, 697 High Road, Tottenham, London, N17 8AD) appeared on behalf of the Appellant.

MR KOVATS (Instructed by the Treasury Solicitors, Queen Anne's Chambers, 28 Broadway, London, SW1H 9JS) appeared on behalf of the Respondent.

JUDGMENT

1) LORD JUSTICE PILL: This is an appeal, with leave of the Immigration Appeal Tribunal, against a majority decision of the Tribunal notified on 8th September 1999. The issue is whether a stateless person who is unable to return to the country of his former habitual residence is, by reason of those facts alone, a refugee within the meaning of the 1951 Convention relating to the Status of Refugees ("the 1951 Convention"), as modified by the 1967 New York Protocol ("the 1967 Protocol"). The Tribunal found, and the Secretary of State for the Home Department ("the Secretary of State") contends, that it is also necessary to establish a present well-founded fear of persecution for reasons of "race, religion, nationality, membership of a particular social group or political opinion" ("the Convention grounds").

2) The applicant, Oleg Andreevich Revenko, was born in Moldova, then a part of the USSR, in 1955. He claimed asylum in the United Kingdom in April 1991. The application was refused on 16th January 1996. Appeals against that refusal have been dismissed. The Special Adjudicator found that the applicant was stateless. The IAT found that the applicant was unable to return to Moldova. Moldova had become an independent State and by its Law of Citizenship, the applicant was not a citizen. The Special Adjudicator's conclusion that he was stateless was not challenged before the IAT and the conclusion that he was unable to return to Moldova was not challenged. Both the IAT and the Special Adjudicator held on the evidence that the applicant did not have a well-founded fear of persecution, on Convention grounds, in Moldova.

3) The word "refugee" is, for the purposes of the Convention, defined in Article 1.

4) The first paragraph of Article 1A(2) reads:

> "1A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who ...
>
> "[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 political 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."

5) The words "as a result of events occurring before 1 January 1951 and" and the words "as a result of such events" were deleted from Article 1A(2) by Article 1(2) of the 1967 Protocol. The reasons emerge from the preamble to the protocol:

> "The States Parties to the present protocol,
>
> "Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as 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,

"Have agreed as follows ..."

6) The Convention has been ratified by many States. We are told that the current number is 138. Most of those States have also ratified the 1967 Protocol.

7) The United Nations Economic and Social Council ('ECOSOC') had set up an ad hoc committee on statelessness and related problems which reported to ECOSOC on 17th February 1950 and again on 25th August 1950. This work followed the adoption by the General Assembly of the United Nations, in December 1948, of the Universal Declaration of Human Rights. That provides for rights of asylum and of nationality as set out in Articles 14 and 15:

"Article 14:

"(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

"(2) This right may not be invoked in the case of persecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

"Article 15:

"(1) Everyone has the right to a nationality.

"(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

8) The ad hoc committee submitted a revised draft convention relating to the status of refugees. It also submitted a draft protocol relating to the status of stateless persons. The General Assembly convened a conference of plenipotentiaries to complete the drafting of, and to sign, a convention relating to the status of refugees and a protocol relating to the status of stateless persons. In the event, the 1951 Convention was adopted on 25th July but in an annex to the Final Act of the conference of plenipotentiaries it was stated:

"With respect to the draft protocol relating to the Status of Stateless Persons, the Conference adopted the following resolution:

"The Conference,

"Having considered the draft protocol relating to the Status of Stateless Persons,

"Considering that the subject still requires more detailed study,

"Decides not to take a decision on the subject of the present Conference and refers the

draft protocol back to the appropriate organs of the United Nations for further study."

9) A Convention relating to the status of stateless persons was eventually adopted in 1954. Drummond J, in a decision of the Federal Court of Australia (171 ALR 483), to which I will refer, indicated the extent of the problem by reference to a paper produced by the Canadian Council for Refugees. He stated at paragraph 19 of his judgment:

> "Statelessness appeared as a mass phenomenon after World War I and the revolutionary upheaval that followed, while World War II left even larger numbers of people stateless."

10) Though they may be related, the phenomenon of statelessness is distinct from that of persecution giving rise to a right of asylum.

11) Under the 1954 Convention, stateless persons are given protection similar to, though not identical with, the protection given to refugees under the 1951 Convention. In general, the 1954 Convention requires States to give to stateless persons the same rights of admission as they give to aliens. There is no doubt that some stateless persons came within the definition of "refugees" adopted in the 1951 Convention. The issue is whether stateless persons qualify as refugees and thereby for the protection of the 1951 Convention merely by establishing that they are unable to return to the country of their former habitual residence. That there are many stateless persons who are not covered by the 1951 Convention is recognised by the third preamble to the 1954 Convention. Paragraph 3 of the preamble reads:

> "Considering that only those stateless persons who are also refugees are covered by the Convention relating to the Status of Refugees of 28 July 1951, and that there are many stateless persons who are not covered by that Convention,
>
> "Considering that it is desirable to regulate and improve the status of stateless persons by an international agreement."

12) Significant omissions from the 1954 Convention, as compared with the 1951 Convention, are articles equivalent to Articles 31 and 33 of the 1951 Convention. Article 31(1) provides:

> "Refugees unlawfully in the country of refuge.
>
> "(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

13) Article 33 provides:

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

> "(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

14) I have referred to the 1967 Protocol and its preamble. The reason for the presence of the words "as a result of such events" in Article 1A(2) of the 1951 Convention emerges from the report of Professor Guy S Goodwin-Gill prepared for the purposes of this hearing on behalf of the applicant. He refers, in paragraphs 29 and 30, to the 34th meeting of the conference of plenipotentiaries on 25th July 1951. The record states:

> "... the United Kingdom delegate, Mr Hoare, drew attention to,
>
> "'the anomoly, which was really a drafting point, in sub-paragraph (2) of paragraph A resulting from the omission of a reference to events occurring before 1 January 1951 from the last phrase of the paragraph, which dealt with the person who had no nationality and was outside the country of his former habitual residence. He could not imagine that those who had drafted the compromise text had intended to make any difference between persons having a nationality and stateless persons. He therefore proposed that the words 'as a result of such events' should be inserted after the word residence in the penultimate line of sub-paragraph (2) of paragraph A'. (Conference of plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of 34th Meeting, 25 July 1951: UN doc. A/CONF.2/SR.34, p 12).'"

15) The proposal was adopted by 17 votes to none with 3 abstentions, the Belgian representative having spoken in its favour.

16) Professor Goodwin-Gill had also described in his report the evolution of international instruments for refugee protection since 1922. It is not necessary to consider the instruments in detail. As Mr Nicol QC for the applicant put it, the international community took a "different tack" in the 1951 Convention.

17) The issue turns upon the construction of Article 1A(2). The relevant articles of the 1969 Vienna Convention of the Law of Treaties provide:

> "Article 31: General rule of interpretation.
>
> "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 connection with the conclusion of the treaty;
>
> "b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument 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 provision;

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

"c) ...

"4. ...

"Article 32: 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."

18) The relevant Conventions preceded the Vienna Convention but it is common ground that Articles 31 and 33 sufficiently reflect customary international law to provide a framework for construing the 1951 Convention (Oppenheim's International Law, 9th Edition, paragraph 629 and following). In construing Article 1A(2) for a different purpose Lord Lloyd stated, in Adan v Home Secretary [1999] 1 AC 293 at 304B:

"[Counsel for the Secretary of State] points out that we are here concerned with the meaning of an international Convention. Inevitably the final text will have been the product of a long period of negotiation and compromise. One cannot expect to find the same precision of language as one does in an Act of Parliament drafted by Parliamentary counsel. I agree. It follows that one is more likely to arrive at the true construction of Article 1A(2) by seeking a meaning which makes sense in the light of the Convention as a whole, and the purposes which the framers of the convention were seeking to achieve, rather than by concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach. But having said that, the starting point must be the language itself."

19) Construing the Article in the High Court of Australia in A v Minister for Immigration (1998) INLR 1 at 40, Brennan CJ stated that it was necessary to adopt "an holistic but ordered approach". (See also McHugh J at page 24).

20) In Horvath v Secretary of State [2000] 3 WLR 379 at 395H, Lord Clyde, also considering the effect of Article 1A(2), stated:

"We are concerned here with the construction of an international convention. The approach to be adopted must be appropriate to that situation. Regard must be given to the purpose of the Convention and the object which it seeks to serve. While the language of the article has to be respected, any pre-occupation with the precise words may fail to meet the broad intent of the Convention and any detailed analysis of its component elements may distract and divert attention from the essential purpose of what is sought to be achieved."

21) The present issue is clearly an important one because the category of stateless persons to which it could apply, both now and in 1951, is a large one. It needs to be considered whether, having referred the draft protocol relating to the status of stateless persons back for further study, that large category of stateless persons had been included for specific protection under Article 1A(2) of the 1951 Convention. Mr Nicol QC, for the applicant, submits that giving the words in Article 1A(2) their ordinary meaning concludes the issue in the applicant's favour. The words relevant to the applicant's position should be extracted from the overall wording of Article 1A(2), to decide whether he is a refugee within the meaning of the paragraph. The words relevant to him are:

> "A person who ... not having a nationality and being outside the country of his former habitual residence is unable ... to return to it."

22) Each of those requirements is satisfied and the applicant is a refugee within the meaning of the Convention, it is submitted. Mr Nicol accepts that the form and wording of the paragraph is such that there are in the second part references back to the terms of the first part, but the article must be read accurately. There must be a close focus on its wording and the limited nature of the reference back to the first part of the paragraph must be respected. The words "such fear" refer back to the Convention grounds after the words "is unable" and govern only the word "unwilling" and not the word "unable".

23) Given a plain meaning, it is submitted, it would need powerful and compelling considerations to displace that conclusion, and there are none. The construction is in harmony with the object and purpose of the Convention, Mr Nicol submits. A stateless person unable to return to the State of former habitual residence requires surrogate protection. The need for protection arises for the same reason as it does in the case of other refugees so defined. A stateless person has no State which will protect him.

24) Mr Nicol relies on the provision in the third preamble to the Convention, which provided that "the scope of and the protection accorded" should be extended. The object was to "extend" protection to those who lacked nationality and were for that reason without governmental protection. The article covered the zone where the predicament of stateless persons overlapped with that of other refugees. Mr Nicol adopts the reasoning of the dissenting member of the Immigration Appeal Tribunal in the present case:

> "'The literal construction of Article 1A(2) is a construction which is more compatible with the purpose of the Convention: to provide protection to those unable to be protected by their own countries. A stateless person who was inevitably in a much worse position than someone with a nationality. There was no State to which such a person could look for protection. A stateless person who was unable for whatever reason to return to his country of habitual residence was by that fact alone in need of protection and should receive asylum status with accompanying rights under the Convention.'"

25) Mr Nicol also adopts the views of Professor Goodwin-Gill at paragraph 51 of his report:

> "In short, the drafters of the 1951 Convention intended to protect stateless refugees who were outside their country of former habitual residence 'as a result of ... events' occurring before 1 January 1951. Such events included political, social and related displacements, as

> well as the wholesale 'writing off' of stateless individuals and populations, for example, by bureaucratic methods (failure to renew travel documents, to reply to correspondence, etc). It was not necessary that the individual should be outside that country because of a well-founded fear. The reason for treating the stateless refugee differently is found in the stateless person's a priori unprotected status which was considered to justify, in this one regard, a different treatment."

26) I note that the emphasis in that paragraph is upon a "reason" for treating the stateless refugee differently rather than any textual analysis.

27) Mr Nicol has indicated that no reliance is now placed on the conclusions at paragraphs 52 and 53 of the report. Mr Nicol also relies on the opinion of Professor Grahl-Madsen, expressed while conducting a textual analysis of the Convention in 1966. He stated that the requirement to establish the Convention grounds:

28) "... does not, however, apply to a person not having a nationality who is unable to return to the country of his former habitual residence." (The Status of Refugees in International Law, 1966, Volume 1, pages 143-144.)

29) There have been conflicting decisions of the courts on this question. In R v Chief Immigration Officer Gatwick Airport, ex parte Harjender Singh [1987] Imm AR 346, 357, Nolan J held that a stateless person who was unable to return to his country of former habitual residence was without law a refugee within the terms of the Convention.

30) The point arose, however, only at a late stage of the hearing before Nolan J and does not appear to have been argued. I note that Nolan J was a party to the decision in Adan [1999] 1 AC 293, to which I will refer in more detail, and agreed with Lord Lloyd.

31) There are conflicting decisions of the IAT and also in Australia. In that jurisdiction, it has been held in several cases that even a stateless person who was unable to return to the country of his former habitual residence had to show a well-founded fear of persecution for a Convention reason. However, in Savvin v Minister for Immigration and Multicultural Affairs [1999] FCA 1265, it was held by Dowsett J that he did not. That decision was reversed on appeal, (171 ALR 483), and I will refer to the judgments.

32) In Canada, legislation giving effect to Article 1A(2) requires a well-founded fear of persecution for a Convention reason to be established, with the result that Canadian cases, specifying that requirement are of little value for present purposes. Reference has been made to the opinion of academic writers in this field, and Professor Grahl-Madsen and Professor Goodwin-Gill have already been mentioned.

33) Mr Kovats, for the Secretary of State, relies on the views of Professor Hathaway, expressed in his book, The Law of Refugee Status, 1991. Professor Hathaway considered in detail the background to the 1951 Convention. Having done so, he concluded that:

> "... it was agreed to restrict the scope of the Convention to those persons who required protection from a State to which they were formally returnable and to leave the problems of the stateless population to be dealt with by a later and less comprehensive conventional regime. It is thus clear that statelessness per se does not give rise to a claim to refugee status."

34) In a passage at page 68 to 69, cited by Lord Lloyd in Adan, Professor Hathaway stated:

> "'In the Convention as ultimately adopted, therefore, persons determined to be refugees under earlier arrangements are not required to demonstrate a well-founded fear of being persecuted, and are not automatically subject to cessation of refugee status if conditions become safe in their homeland.
>
> "'It was the intention of the drafters, however, that all other refugees should have to demonstrate 'a present fear of persecution' in the sense that they 'are or may in the future be deprived of the protection of their country of origin'. Thus it was agreed that the first branch of the IRO [International Refugee Organisation] test which focused on past persecution should be omitted in favour of the 'well-founded fear of being persecuted' standard, involving evidence of a present or prospective risk in the country of origin. The use of the term 'fear' was intended to emphasise the forward-looking nature of the test, and not to ground refugee status in an assessment of the refugee claimant's state of mind.'"

35) Lord Lloyd in Adan also referred, at page 307, to a document headed "Joint Position". It was dated 4th March 1996 and shows the adoption by the Council of Europe of certain guidelines for the application of Article 1 of the Convention. Paragraph 3 provides:

> "'The determining factor for granting refugee status in accordance with the Geneva Convention is the existence of a well-founded fear of persecution on grounds of race, religion, nationality, political opinions or membership of a particular social group ...
>
> "'The fact that an individual has already been subject to persecution or to direct threats of persecution is a serious indication of the risk of persecution, unless a radical change of conditions has taken place since then in his country of origin or in his relations with his country of origin.'"

36) Professor Goodwin-Gill, in his book The Refugee in International Law, 2nd edition, 1996, also conducted, under the heading "Definition and Description", a study of the background to the 1951 Convention. He concluded the section by stating, at paragraph 38:

37) "'Convention Refugees are thus identifiable by their possession of four elemental characteristics: (1) they are outside their country of origin; (2) they are unable or unwilling to avail themselves of the protection of that country, or to return there; (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted; (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.'" (See pages 19 to 20 of the book.)

38) The present distinction sought to be drawn in Article 1A(2) is not mentioned either in that conclusion or in the extract from that section of the work entitled "Statelessness", with which we have

been supplied. In his recent report, Professor Goodwin-Gill cited the above passage from his book and added, at paragraph 39:

> "While this summary clarifies the basic qualities of the Convention refugee, it is presented at a certain level of generality and does not include, either the particularities of the refugee claimant without a nationality, or the implications of the essential relationship between lack of protection and well-founded fear. It should therefore not be read as supporting a reading of Article 1A(2) that fails to take account of the particular characteristics of stateless persons."

39) Professor Goodwin-Gill has not, of course, been cross-examined on his recent report and has not expounded it orally. The court had no wish to exclude the opinion of a distinguished academic in this field; a report was prepared for the purpose of the present hearing and only very shortly before the hearing. But it is hardly satisfactory for an appellate court to be put in the position of adjudicating on paper upon Professor Goodwin-Gill's book as compared with his recent opinion and the apparent inconsistency between them. I have to say that I do have difficulty in reconciling the opinion expressed in the report at paragraph 39 with the contents of the Professor's book, to which I have referred.

40) The important point raised in this case, which had been addressed by Professor Hathaway in his earlier 1991 publication, was not addressed in Professor Goodwin-Gill's book, in which the definition of "refugee" at paragraph 38, apparently a comprehensive one, does not provide for the point now sought to be made. Professor Goodwin-Gill is of course entitled, as he has done in paragraph 51 of his report, adopted by Mr Nicol, to suggest reasons why a stateless person requires protection.

41) There is a clear expression of opinion in the UNHCR Handbook. That Handbook has its origin in a request to the Office of the High Commissioner:

> "To consider the possibility of issuing -- for the guidance of governments -- a handbook relating to procedures and criteria for determining refugee status."

42) The first edition was issued in 1979. The present 1988 edition purports to set out and explain the various components of the definition of "refugee", set out in the 1951 Convention and the 1967 Protocol. The explanations are said to be based on the knowledge accumulated by the High Commissioner's Office over some 25 years since the entry into force of the 1951 Convention. It is stated that:

> "The practice of States is taken into account as are exchanges of views between the Office and the competent authorities of Contracting States, and the literature devoted to the subject over the last quarter of a century. As the Handbook has been conceived as a practical guide and not as a treatise on refugee law, references to literature, etc. have purposely been omitted ."

43) In the Handbook, the second part of Article 1(2)(a), that is the part following the semicolon, is set out as a heading, following paragraph 100. Paragraph 101 begins with this sentence:

> "This phrase, which relates to stateless refugees, is parallel to the preceding phrase, which

concerns refugees who have a nationality."

44) Paragraph 102 provides:

> "It will be noted that not all stateless persons are refugees. They must be outside the country of their former habitual residence for the reasons indicated if the definition. Where these reasons do not exist, the stateless person is not a refugee."

45) Paragraph 103:

> "Such reasons must be examined in relation to the country of 'former habitual residence' in regard to which fear is alleged. This was defined by the drafters of the 1951 Convention as 'the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned.'"

46) In the section of the Handbook interpreting terms in Article 1A(2), it is stated at paragraph 37:

> "The phrase 'well-founded fear of being persecuted' is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character."

47) In Adan, the issue was whether, under Article 1A(2), an applicant had to show a current well-founded fear of persecution for a Convention reason or whether a "historic fear" was sufficient. The House of Lords, reversing the Court of Appeal, held unanimously that a current fear had to be shown. Lord Lloyd, with whom Lord Goff, Lord Nolan, and Lord Hope agreed, stated at page 304:

> "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; (2) nationals who are outside their country owing to a well-founded fear of persecution for a Convention reason, and, owing to such fear, are unwilling to avail themselves of the protection of their country; (3) non-nationals who are outside the country of their former habitual residence owing to a well-founded fear of persecution for a Convention reason and are unable to return to their country, and; (4) non-nationals who are outside the country of their former habitual residence owing to a well-founded fear of persecution for a Convention reason, and, owing to such fear, are unwilling to return to their country."

48) That appears to be a comprehensive categorisation directly in conflict with the applicant's submission as to the requirements placed upon stateless persons if they are to establish that they are refugees. I bear in mind that the categorisation was stated to be common ground and also that it was unnecessary to the decision. However, Lord Lloyd must have had in mind Simon Brown LJ's expression of a contrary view in the Court of Appeal, and the general effect of Article 1A(2) had been scrutinised in argument in the House of Lords. Simon Brown LJ had stated in the Court of Appeal in Adan, [1997] 1 WLR 1107 at 1117:

> "So far as the stateless are concerned, moreover, the latter part of Article 1A(2) construed literally, requires of those presently unable to return home nothing more [than inability to return]."

49) I have already cited Lord Lloyd's general observations upon the construction of Article 1A(2).

50) Lord Lloyd went on to consider the facts in Adan itself, in relation to the definition:

> "'The most striking feature is that it is expressed throughout in the present tense: 'is outside', 'is unable', 'is unwilling'. Thus in order to bring himself within category (1) Mr Adan must show that he is (not was) unable to avail himself of the protection of his country. If one asks 'protection against what'? The answer must surely be, or at least include, protection against persecution. Since 'is unable' can only refer to current inability, one would expect that the persecution against which he needs protection is also current (or future) persecution. If he has no current fear of persecution it is not easy to see why he should need current protection against persecution, or why, indeed, protection is relevant at all.
>
> "'But the point becomes even clearer when one looks at category (2), which includes a person who (a) is outside the country of his nationality owing to a well-founded fear of persecution and (b) is unwilling, owing to such fear, to avail himself of the protection of that country. 'Owing to such fear' in (b) means owing to well-founded fear of being persecuted for a Convention reason. But 'fear' in (b) can only refer to current fear, since the fear must be the cause of the asylum-seeker being unwilling now to avail himself of the protection of his country. If fear in (b) is confined to current fear, it would be odd if 'owing to well-founded fear' in (a) were not also confined to current fear. The word must surely bear the same meaning in both halves of the sentence.'"

51) Lord Lloyd thus stresses the continuity in the language and tense of the paragraph. By a parity of reasoning, Mr Kovats submits, the same considerations apply throughout the paragraph. As indicating his approach to Article 1A(2), albeit on a different question, I do, with respect, find the reasoning of Lord Lloyd helpful upon the present issue.

52) Mr Nicol relies on the decision of Dowsett J in the Federal Court of Australia in Savvin 166 ALR 348. Dowsett J disagreed with the earlier statement of Cooper J in Rishmawi v Minister of Immigration and Multicultural Affairs (1997) 77 FCR 421 at 427:

> "... the object of the draft Convention was to provide sanctuary to persons who had a well-founded fear of persecution for a Convention reason and not for any other reason."

53) Dowsett J stated at paragraph 51:

> "In my view, there is no apparent difficulty in construing para A(2). The difficulty arises only if it be assumed that the underlying intention of the parties can be more accurately determined from the extrinsic material than from the text itself. I doubt whether any clear understanding of the intention of the parties can be derived from the extrinsic material. I will presently go to that material with a view to demonstrating that such is the case, but my primary point is that the text, in so far as it deals with stateless persons, contains very little difficulty. I would have thought it beyond argument that the words preceding the semicolon deal with persons having nationality and those following the semicolon deal with persons without nationality. If so, it follows that in order to satisfy the definition, a person without nationality must be outside the country of his former habitual residence (for whatever reason) and either:
>
> "unable to return thereto for any reason; or
>
> "unwilling to return because of well-founded fear of persecution for a Convention reason."

54) In his conclusion, Dowsett J stated:

> "The underlying humanitarian philosophy of the Convention is that displaced persons should be given an opportunity to rebuild their lives with a relative degree of security. The Convention regulates the way in which these people are to be treated by those countries which ratify it. Further, it clearly recognises that some refugees may not be able to return to their country of origin for reasons unrelated to persecution.
>
> "I find nothing in the Travaux, the Handbook or the other material which would lead me to the conclusion that any interpretation other than the literal interpretation of the Convention definition ought to be adopted. None of the material demonstrates how the clear wording of the definition might be tortured into the more limited form for which the respondent presently contends. In those circumstances, the better course is to adopt the literal meaning."

55) The full court of the Federal Court reversed Dowsett J's decision (171 ALR 483). Spender J stated at paragraph 7:

> "If inability to return is sufficient for a stateless person (that is, a fear of persecution is not necessary) the words "such fear" are inappropriately included after the semicolon. The presence of that phrase indicates to me that the fear of being persecuted for a Convention reason is the talisman of the definition, and applies to both categories of persons to whom the definition is directed. This accords with the definition of "refugee" proposed in the draft Refugee Convention annexed to the report of the first Ad Hoc Committee on statelessness and related problems, dated 17th February 1950, which is set out ... in the judgment of Justice Drummond."

56) Drummond J stated at paragraph 23:

> "There are good textual reasons given by Katz J for reading Art 1A(2) in so far as it applies to stateless persons, as requiring them to be victims of persecution before they are entitled to the status of refugee under the Convention. The travaux to the Convention to which I have referred show that this was the intention of those involved in the drafting of what became the 1951 Convention. Hathaway propounds the same view of the entitlement of stateless persons to claim refugee status under the Convention: see pages 59-63. These considerations are sufficient to displace the considerations which I have referred to above that favour a reading of the definition of "refugee" in the Convention that would extend its reach to stateless persons unable to return to their country of habitual residence even though they never faced possible persecution there."

57) Katz J stated at paragraph 75:

> "However, it appears to me that a real question arises whether Art 1A(2) does in fact have the natural or literal meaning which has thus far been attributed to it in the cases. As to that question, for reasons which I will now give, I do not attribute to the presence in Art 1A(2) of the semicolon the significance which has thus far been attributed to it. Further, giving to the semicolon that significance which I consider appropriate and construing Art 1A(2) accordingly, it appears to me that the preferable view is that, on the natural or literal

meaning of Art 1A(2), it does include the disputed condition.

"I begin by pointing out that, in the construction of legal instruments, there existed in earlier times a hesitant attitude on the part of the judiciary to the use of punctuation marks as a constructional aid."

58) I do not find it necessary to set out the illuminating analysis by Katz J of the use of the semicolon, save to mention his conclusion that judges may look at the punctuation in order to interpret the meaning of legislation accepted by Parliament.

59) Katz J continued at paragraphs 82 to 86:

"82. It is therefore not because I take the view that one should ignore the existence of the semicolon in construing Art 1A(2) of the Convention that I reject the correctness of the view earlier expressed in the cases as to the natural or literal meaning of that definition. It is because, even giving the semicolon its full weight as a constructional aid, I take the view that, in accordance with accepted grammatical principles, the semicolon does not do the work of dividing the definition into two independent parts, as has thus far been concluded.

"83. The use of semicolons is discussed by Quirk and others in their authoritative work, A Comprehensive Grammar of the English Language (1985) (note the work's use by Mason CJ and Brennan, Gaudron and McHugh JJ in Chew v R (1992) 173 CLR 626 at 630-1; 107 ALR 171 and its use by Gaudron J in Re Dingjan; Ex parte Wagner (1995) 183 CLR 323 at 362; 128 ALR 81). The authors point out (at 1622) that, typically, the semicolon is used as a replacement for the word 'and', in order to show that 'two independent clauses are regarded as being sufficiently related to belong to one sentence'. They further point out, however (at 1623), that the use of a semicolon may sometimes be followed by the use of the word 'and', 'but' or 'or'. As to the use of the semicolon in the latter circumstances, they say (emphasis added):

"'Such a use (in effect, replacing a comma) is chiefly found in rather formal writing and in sentences whose complexity already involves the use of one or more commas and whose major divisions call for a hierarchically superior punctuation mark if the reader is not to be momentarily puzzled or misled.'

"84. Once it is recognised that the semicolon in Art 1A(2), preceding, as it does, the use of the word 'or', has the effect, according to accepted grammatical principles, merely of a comma, rather than that of showing that what follows it is an independent clause, then it appears to me that:

"'... the problem of construction which emerges from the location of the words relating to stateless persons after the semicolon and the absence of any repetition of the reference to persecution as a necessary cause of such a person being outside of the is to be resolved in a manner different from that in which it has thus far been resolved in the cases.

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"(to quote (again) something said by the primary judge in the present matter), is to be resolved in a manner different from that in which it has thus far been resolved in the cases.

"85. When one reads the words which relate to stateless persons in the later part of Art 1A(2) as being part of one complete clause, rather than as comprising in themselves an independent clause, then I consider that the appropriate way to approach their construction is as follows: it is apparent that those words describe a person whose circumstances are to be contrasted with those of the person described in the earlier part

> of the clause. So much is apparent from the first six of those words, 'or who, not having a nationality'. However, not only do the words in the later part of Art 1A(2) describe a person of contrasting circumstances to the person described in the earlier part of the clause. They also suggest naturally a particular point in the description of the first person's circumstances at which the reader is to begin to mark that contrast of circumstances. That point in the description of the first person's circumstances is at the words, 'is outside the country of his nationality' and not earlier. That is the particular point in the description of the first person's circumstances at which the reader is to begin to mark the contrast of circumstances is demonstrated by the use in the later part of Art 1A(2) of the words, 'or who, not having a nationality and being outside the country of his former habitual residence, is ...'. The form of words which I have just quoted, beginning the contrast of circumstances between the two classes of person part way through the description of the first person's circumstances, avoids the necessity, in what is already a very long clause, to repeat, so far as a stateless person is concerned, the phrase, 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion', which opens the clause. That opening phrase is instead taken to be impliedly applicable to a stateless person simply by reason of the form of words used in relation to such a person in the later part of the clause.
>
> "86. I find the reading which I have just given to Art 1A(2) to be an entirely satisfying one linguistically and I therefore consider that that reading, rather than the reading given to the provision both by Cooper J and by the primary judge in the present matter (heavily influenced as that reading appears to have been in both cases by an erroneous view as to the effect of the presence in the provision of the semicolon), represents its true 'natural' meaning."

60) The text of Article 1A(2) should be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the treaty. That exercise entitles the court given the task of interpretation to have regard to the international instruments already cited and to the resolution adopted in 1951, with respect to the draft protocol relating to the status of stateless persons, at the last session of the conference of plenipotentiaries, which drafted the 1951 Convention. It is clear from Article 1A(2) that stateless persons can be refugees. It is also clear that consideration of the predicament of stateless persons in a comprehensive way was deferred.

61) The deletion of the temporal limitation by the 1967 Protocol does not, in my judgment, affect the construction of Article 1A(2) for present purposes. It is clear from its terms that the purpose of the 1967 Protocol was to remove the temporal limitation in the article. The drafting reason for the insertion in 1951 of the words "a result of such events" is also clear from the UN record already cited and to which Professor Goodwin-Gill refers in his report. Its deletion does not in my view bear upon the present issue of construction.

62) Subject to the removal of the temporal limitation, the article bears the same meaning now as it did when adopted. Mr Hoare's comment when proposing the amendment in 1951 that "he could not imagine that those who had drafted the compromise text had intended to make any difference between persons having a nationality and stateless persons", does support the Secretary of State's submission upon the meaning of the Article. However, I should not wish to put much weight upon it because it is only a detail of the travaux préparatoire. I do, however, note that the applicant has not been able to point to anything in

the travaux préparatoire which supports the view that the intention of the article was to provide surrogate protection for stateless persons generally.

63) The court must consider the extent of the information with which it should be equipped when conducting its textual analysis. As to travaux préparatoire, there is force in the warnings of Mr Nicol that travaux préparatoire are only a supplementary means of interpretation, and his more general warnings. There had been prolonged negotiations between many delegations leading to a compromise text, and a comprehensive analysis of travaux préparatoire is impossible to achieve and better not attempted in this case. Lord Lloyd expressed reservations about their value in Adan, pages 304 to 305, and Lord Steyn found them unhelpful upon another issue arising on Article 1A(2) in R v Immigration Appeal Tribunal, ex parte Shah [1999] 2 AC 629 at 638.

64) I have, however, referred to the sequence of events at the United Nations between 1948 and 1954. That, including the resolution deferring consideration of a Convention or Protocol on statelessness, are in my view relevant considerations for present purposes. I agree with the view of Lord Lloyd that the opinions of specialist academic writers may also be of significance in this context, though they are not to be accepted without scrutiny and analysis. The writers can be expected to have a good knowledge of the background to a Convention, which may be complex.

65) The contents of the UNHCR Handbook are also relevant, in my view. It purports to express views based on the experience of the High Commissioner's Office, including experience as to the practice of states. Given the task of the Commissioner, opinions in the Handbook as to the definition of "refugee" are entitled to respect. I attach importance to the view expressed that the phrase "well-founded fear of persecution" is the key phrase in the definition of Article 1A(2). Spender J used the word "talisman". I find persuasive Professor Hathaway's statement, consistent as it is with the contents of the UNHCR Handbook, and made in the context of his comprehensive study, that it was the intention of the drafters that refugees should have to demonstrate a present fear of persecution. That opinion is not, in my view, discredited by Professor Hathaway's more controversial views upon the relevance of the absence of a country of former habitual residence.

66) I am not at all surprised that it was common ground in Adan that there are four categories of refugees, all required to establish the well-founded fear, and that Lord Lloyd thought it right to set out a comprehensive definition. If the text is to be interpreted in the light of the object and purpose of the treaty, it is, in my view, legitimate to approach it in the light of the factors I have set out above, and I do so. The importance of the fear of persecution on Convention grounds when defining refugee status is a theme which emerges strongly from that material.

67) The paragraph in Article 1A(2) should be read as a whole and does, in my judgment, set out a single test for refugee status. When the words in the first part of the paragraph "is unable or, owing to such fear,

is unwilling" were repeated in the second part of the paragraph, it was intended that the entire paragraph should be governed by the need to establish a well-founded fear of persecution on a Convention ground. The existence of a well-founded fear was intended to be a pre-requirement of refugee status. It is significant that both categories, nationals and stateless persons, were dealt with in the same paragraph and indeed in the same sentence. I cannot conclude that by the order of words in the last part of the paragraph, the need for the fear was intended to be excluded in the case of what could be a large category of persons.

68) I accept the submission of Mr Kovats that Article 1A(2) was not intended to create two fundamentally different types of refugee. I also find the reasoning of Katz J in Savvin, read with that of Lord Lloyd in Adan, persuasive in the present context. The contrary view would involve a pre-occupation with precise words or rather with the order in which the words appear, which would, in the words of Lord Clyde in Horvath, fail to meet the broad intent of the Convention. The court is entitled to take a step back from the detail and consider the paragraph as a whole and in its context.

69) What I have found difficult in the authorities is the summary rejection of the submission that Article 33 of the 1951 Convention, dealing with refoulement, throws light on the meaning of Article 1A(2): Lord Lloyd in Adan at page 306H; Simon Brown LJ in Adan at page 1116; Katz J in Savvin at paragraph 140. Submissions made on behalf of the Secretary of State on paragraph 33 have been given short shrift. My respectful view is that, as a routine approach to treaty interpretation, the two articles should be read together. One is capable of throwing light on the other.

70) I am encouraged in that view by the way the present applicant's case is put. Mr Nicol accepts that if he succeeds in his submission on Article 1 and a well-founded fear does not have to be established to render the applicant a refugee, he must still establish that the applicant's expulsion or return would threaten his life or freedom on account of a Convention reason under Article 33. The Secretary of State's directions for removal are not unlawful unless such a threat for a Convention reason is established. The imposition of this requirement is thus a pre-requisite of a finding that expulsion or return is unlawful. That appears to me to support the view that it is a pre-requisite of refugee status under Article 1A(2).

71) I find it difficult to conclude that it was intended to open a door in Article 1A(2) by not requiring a well-founded fear, only substantially to close the door again in Article 33 by requiring a threat on account of a Convention reason to be established. The interrelation of the two articles was accepted by Lord Goff in R v Home Secretary, ex parte Sivakumaran [1988] 1 AC 958. Lord Goff stated at page 1001:

> "I consider, plain, as indeed was reinforced in argument by Mr Plender with reference to the travaux préparatoires, that the non-refoulement provision in Article 33 was intended to apply to all persons determined to be refugees under Article 1 of the Convention. I cannot help feeling, however, that the consistency between Articles 1 and 33 can be more easily accepted if the interpretation of 'well-founded fear' in Article 1A(2) espoused by the Secretary of State is adopted, rather than that contended for by the High Commissioner."

72) Mr Plender's submission that the requirement for a well-founded fear of persecution was to be determined subjectively was not accepted in that case, the issue being whether the test was subjective or objective. However, his submissions on behalf of the UNHCR are recorded at pages 983 and 984 of the report, and Lord Goff's reference to them supports the view that Articles 1A(2) and 33 are to be read together. That achieves a single undivided approach to the Convention rights. To be a refugee but without protection against refoulement would be an anomaly. If I am right about that, it adds weight to the view I have expressed as to the construction of Article 1A(2).

73) Mr Nicol submits that on the evidence in the case, the Article 33 obstacle is crossed so that he is entitled to relief if he succeeds on the Article 1 argument. To return an unwilling applicant to Moldova would on the facts, it is submitted, be to endanger his freedom. I do not consider that the submission can survive the findings of fact below. If I am wrong on both the legal point and the point of fact, I would not, however, accede to the Secretary of State's application for remission to the Tribunal for further consideration as to whether the applicant is "unable" to return to Moldova.

74) In R v Secretary of State for Home Department, ex parte Bradshaw [1994] Imm AR 359, the Court of Session received evidence that a stateless person had not made an application for citizenship of states which may have granted it. It was held by Lord MacLean that before a person can be said to be stateless under the Convention he would have had to have applied to those states which might consider him to be, and might accept him as, a national. In the present case, the applicant was found by the special adjudicator to be stateless and this finding was not challenged before the IAT. Evidence of statelessness and of the unliklihood of his obtaining Moldavian nationality was called. If the Bradshaw point was to be taken, it should, in my view, have been taken by the Secretary of State at an earlier stage. In any event, there is nothing to suggest that circumstances have changed.

75) For the reasons I have given, I would dismiss this appeal.

76) LORD JUSTICE CLARKE: This appeal raises a deceptively simple question which can be formulated in this way: is a stateless person who is unable to return to the country of his former habitual residence, by reason of those facts alone, a refugee within the meaning of Article 1A(2) of the 1951 Geneva Convention relating to the Status of Refugees ("the 1951 Convention"), as modified by the 1967 New York Protocol ("the protocol"). I shall call the Convention as modified "the Convention" because it represents the Convention as at present in force.

77) I have not found this an easy question to decide. The appellant says that the answer is "yes", whereas the respondent says that the answer is "no" because the appellants must also establish a present well-founded fear of persecution by reasons of race, religion, nationality, membership of a particular social group or political opinion, which, like others before me, I shall compendiously refer to as Convention reasons.

78) The answer depends upon the meaning properly to be given to Article 1A(2) of the Convention. Article 1A(2) provides:

> "1A. 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 a 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."

79) The words in the square brackets were removed by the protocol so that strictly the Convention should be read omitting the words in the square brackets. It is common ground that the correct approach to construction of the Convention is set out in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties ("the Vienna Convention"). Although the Vienna Convention was made in 1969 and does not express to be retrospective, it is common ground that its provisions set out customary international law: see Oppenheim's International Law, 9th Edition, 1992, paragraphs 629 to 633. Articles 31 and 32 have been quoted by Lord Justice Pill so that it is not necessary for me to repeat them. It follows from those principles that the starting point is to try to ascertain the ordinary meaning to be given to the terms of the Treaty or Convention in their context and in the light of the object and purpose of the Treaty or Convention.

80) Various different emphases have been given to those principles in recent cases: see, for example, Adan v Home Secretary [1999] 1 AC 293 per Lord Lloyd at 305, and Horvath v Home Secretary [2000] 3 WLR 379 per Lord Hope at 382/3 and per Lord Clyde at 395, and the statements of principle to which Lord Justice Pill has referred, including that of Chief Justice Brennan in the High Court of Australia, in A v Minister for Immigration and Ethnic Affairs [1997] 190 CLR 225 at 230 to 231, where he said that "it is necessary to adopt a holistic but ordered approach".

81) Although the principles are common ground, Mr Nicol naturally stresses the language of Article 1A(2), whereas Mr Kovats naturally stresses the context and purpose of the Convention. As Lord Lloyd said in Adan at page 305:

> "... 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."

82) As Lord Lloyd put it:

> "A broad approach is what is needed, rather than a narrow linguistic approach.

"But having said that, the starting point must be [is] the language itself."

83) I turn, therefore, to the language. It is plain that in Article 1A(2) there are two classes of persons who can be refugees, those with nationality and those without. It is convenient to call the first class "nationals" and the second class "stateless persons". In the Court of Appeal, in Adan v Home Secretary [1997] 1 WLR 107, Lord Justice Simon Brown divided up Article 1A(2) in this way, at page 1114 to 1115:

> "I return, therefore, to Article 1A(2) itself. This provision, although already set out in extenso above, I now propose to break down into a series of clauses which for convenience I shall also number. A refugee is someone who: 1(a) owing to well-founded fear of being persecution for [a Convention reason] is outside the country of his nationality, and (b)(i) is unable to avail himself of the protection of that country, or (ii) owing to such fear, is unwilling to avail himself of the protection of that country; or who; 2(a) not having a nationality and being outside the country of his former habitual residence, (b)(i) is unable to return to it, or (ii) owing to a well-founded fear of being persecuted for [a Convention reason] is unwilling to return to it."

84) He then said this, with regard to stateless persons, at page 1117:

> "So far as the stateless are concerned, moreover, the latter part of Article 1A(2) (my clauses 2(a) and 2(b)(i)), construed literally, requires of those presently unable to return home nothing more, save only that until 1967 they had to show that they were displaced as a result of events prior to 1951. The position, however, with regard to the stateless, is, as I recognise, of only marginal relevance in all this and, indeed, as Mr Pannick points out, my clause 2(a) has been construed by the Canadians as if in fact it were qualified (as clause 1(a) is) by a requirement to be 'outside' for fear of Convention persecution: see the relevant Canadian legislation (enacted no doubt in the light of Canada's construction of the Convention) as set out in AG of Canada v Ward (1993) 103 DLR (4th) 1."

85) Mr Nicol submits that Lord Justice Simon Brown's literal construction of Article 1A(2) is correct. I am bound to say that if I were giving a literal construction to the article I would construe it in the same way as Lord Justice Simon Brown, and indeed in the same way as Mr Justice Nolan, albeit after little, if any, argument in R v Chief Immigration Officer of Gatwick Airport, ex parte Harjender Singh [1987] Imm AR 346 at 357. As I read the words the position is as follows: in the case of a national, he will only be a refugee if he shows that, (1) owing to a well-founded fear of being persecuted for a Convention reason he is outside the country of his nationality; and (2) either (a) he is unable to avail himself of the protection of that country; or (b) owing to a well-founded fear of being persecuted for Convention reasons, he is unwilling to avail himself of the protection of that country.

86) The House of Lords held in Adan that in order for a person to satisfy the tests in (1) and (2)(a) it is necessary for him to show that he has a current, well-founded fear of persecution on Convention grounds. The reasoning of Lord Lloyd on that point is essentially set out at page 305. The other members of the appellate committee agree.

87) In the case of a stateless person the position seems to be significantly different, if attention is focused on the literal meaning of the article. Such a person will be a refugee if he shows that, (1) he is

outside the country of his former habitual residence; and (2) either (i) he is unable to return to it; or (ii) owing to a well-founded fear of being persecuted for Convention reasons, he is unwilling to return to it. If I were focusing only on the language of the article I would construe it in that way. The words before the semicolon do not refer to stateless persons at all. The words immediately after the semicolon, namely "or who not having a nationality" on their face show that that part of the article is concerned with stateless persons. The test in (1) above is derived from the next words, namely "and being outside the country of his former habitual residence".

88) On the face of it, that test is satisfied by the applicant simply showing that he is outside what may, as a convenient shorthand, be called his former country. The words in the Convention do not, as I read them, say that he must be outside his former country owing to a well-founded fear of being persecuted for Convention reasons. Mr Nicol submits that that construction makes perfect sense as a matter of language. Thus he says that the framers of the 1951 Convention were careful to provide, in the case of a stateless person, that he must be:

> "Outside the country of his former habitual residence as a result of such events."

89) He submits with force that they did not say that he must be outside the country of his former habitual residence as a result of such events and owing to a well-founded fear of being persecuted for a Convention reason, my emphasis. To my mind that is a very powerful point. It seems to me that the respondent's argument involves inviting the court to imply those words into Article 1A(2). I do not think that the words can sensibly be read as having that meaning. I should add that it is not suggested that the phrase "is unable" in either part of the paragraph should be construed as meaning: is unable to return to the country concerned by reason of fear of persecution for a Convention reason.

90) I recognise that Lord Lloyd approached Article 1A(2) in Adan v Home Secretary. He said, at page 304:

> "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; (2) nationals who are outside their country owing to a well-founded fear of persecution for a Convention reason, and, owing to such fear, are unwilling to avail themselves of the protection of their country; (3) non-nationals who are outside the country of their former habitual residence owing to a well-founded fear of persecution for a Convention reason and are unable to return to their country, and (4) non-nationals who are outside the country of their former habitual residence owing to a well-founded fear of persecution for a Convention reason, and, owing to such fear, are unwilling to return to their country.
>
> "It will be noticed that in each of categories (1) and (2) the asylum-seeker must satisfy two separate tests: what may, for short, be called 'the fear test' and 'the protection test'. In categories (3) and (4) the protection test, for obvious reasons, is couched in different language."

91) Adan was not concerned with stateless persons so that that passage is not part of the ratio, in so

far as it refers to stateless persons, and in particular for present purposes, in so far as he described the class of refugee with which we are concerned as:

> "Non-nationals who are outside the country of their former habitual residence owing to a well-founded fear of persecution for a Convention reason, and ... are unwilling to return to their country"

92) Lord Lloyd does not explain how the requirement that the non-national must be outside his former country owing to a well-founded fear for a Convention reason, is to be deduced from the language of the article. It may well be that he accepted that proposition on the basis of a broad purposive approach to the article and not on the basis of the language itself. If the solution to the present problem depended upon an analysis of the language used, I would prefer the approach of Lord Justice Simon Brown to that of Lord Lloyd. Moreover, I do not think that the attempt of Justice Katz in Minister for Immigration and Multicultural Affairs v Savvin [2000] 171A OR 483 at 501, to construe the opening phrase as impliedly applicable to a stateless person:

> "Simply by reason of the form of words used in relation to such a person in the later part of the clause", is at all convincing.

93) As I see it, the question is whether the words "only by reason of a well-founded fear of persecution" for a Convention reason should be implied into Article 1A(2) of the 1951 Convention after the words "as a result of such events" and after the words "being outside the country of his former habitual residence" in the Convention. That depends upon a consideration of the article in the light of the object and purpose of the Convention, approaching the matter in the broad purposive way urged by Lord Lloyd and in the holistic and ordered way referred to by Chief Justice Brennan.

94) The question, as I see it, is whether the drafters of the Convention can have intended to afford protection to a stateless person who did not fear persecution for a Convention reason. I was at one time attracted by Mr Nicol's submission that the article should be given its ordinary and natural meaning, but as the argument progressed I became convinced that such a construction would not be consistent with the object and purpose of the Convention. It is, I think, clear that the purpose of the 1951 Convention was not to afford general protection to stateless persons.

95) The Final Act of the 1951 UN Conference on the Status of Refugees and Stateless Persons resolved to refer the draft protocol, relating to stateless persons, back for further consideration. The problem was subsequently met by the 1954 Convention relating to the status of stateless persons to which Lord Justice Pill has referred. It is true that the 1951 Convention made some provisions with regard to stateless persons, but it would, in my view, be surprising if it intended to put stateless persons in a better position than nationals, which is, I think, the effect of the construction urged on behalf of the appellant.

96) I recognise that the academic writers do not all take the same view. Compare Professor Hathaway

in The Law of Refugee Status 1991, at page 60, and Professor Atle Grahl-Madsen in The Status of Refugees in International Law 1966, at page 143. I have had the advantage of reading a draft of what Mr Justice Bennett proposes to say in his judgment. He will set out the relevant parts of those works in some detail. He will also set out some of the relevant parts of the work of Professor Goodwin-Gill, both in his book, The Refugee in International Law 1996, at page 19, and in paragraph 39 of his report which was made, as he describes it, on behalf of the appellant for the purpose of this appeal.

97) I entirely agree with Mr Justice Bennett's conclusion relating to Professor Goodwin-Gill. As I read the conclusions of Professor Atle Grahl-Madsen, they are based upon the language of Article 1A(2). In so far as they are so based, I agree with him. As Lord Justice Pill has shown, on the other hand, Professor Hathaway was considering the matter much more broadly and as such appears to me to provide strong support for the respondent's case. The UNHCR Handbook also supports the respondent's submissions. The Handbook has been treated in the past as evidence of the practice of signatory states. In R v Secretary of State for the Home Department, ex parte Adan [1999] 3 WLR 1274, this court said at page 1296 at F:

> "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 Article 31(3)(b) of the Vienna Convention."

98) Lord Justice Pill has referred to the preface to the Handbook which is dated 1979. Paragraphs (v) and (vi) of the Handbook, are to my mind important and are worth quoting. They are in these terms:

> "(v) The 'criteria for determining refugee status' set out in this Handbook are essentially an explanation of the definition of the term 'refugee' given by the 1951 Convention and the 1967 Protocol. The explanations are based on the knowledge accumulated by the High Commissioner's Office over a period of about 25 years, since the entry into force of the 1951 Convention on 21 April 1954, including the practice of States in regard to the determination of refugee status, exchanges of views between the Office and the competent authorities of Contracting States, and the literature devoted to the subject over the last quarter of a century. As the Handbook has been conceived as a practical guide and not as a treatise on refugee law, references to literature etc, have purposely been omitted.
>
> "(vi) with respect to procedures for the determination of refugee status, the writers of the Handbook have been guided chiefly by the principles defined in this respect by the Executive Committee itself. Use has naturally also been made of the knowledge available concerning the practice of States."

99) It is thus clear that one of the purposes of the Handbook was to explain the definition of the term based on the knowledge accumulated by the High Commissioner's Office over a considerable period. Also, as paragraph (vi) puts it, use has been made of the knowledge available concerning the practice of states. Lord Justice Pill has quoted part of the Handbook including paragraph 37. Paragraphs 101 to 104 set out the authors' construction of the article under this heading, so far as stateless persons are concerned:

> "'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.'"

100) The only paragraph I need otherwise set out is paragraph 102, which provides:

> "It will be noted that not all stateless persons are refugees. They must be outside the country of their former habitual residence for the reasons indicated in the definition. Where these reasons do not exist, the stateless person is not a refugee."

101) Those reasons are the Convention reasons. I do not attach significance to Mr Nicol's point that the relevant part of the article quoted in that paragraph is quoted without the deletion of the words "as a result of such events", because I entirely agree with Lord Justice Pill that the presence or absence of those words does not affect the question for decision. On the other hand, I do accept that paragraphs 101 to 105, including paragraph 102, are an attempt to construe Article 1A(2), but they are not to my mind only an attempt to set out the meaning of the language. They are also an attempt to explaining the meaning of "refugee", based on information available to the High Commissioner over very many years and can properly be regarded as evidence of practice.

102) It seems to me that if it was the practice of any, or any significant number, of signatory states to treat as refugees stateless persons who are outside their former country, otherwise than by reason of fear of persecution for a Convention reason, the UNHCR would have been aware of that fact and would have reverted to the practice in the Handbook. Indeed, it is to my mind a striking feature of this case that there is no evidence that as a matter of practice any signatory state treats persons in the position of the appellant as refugees.

103) I have reached the conclusion that the probable reason for that is that, as the Handbook suggests when read as a whole, states have required refugees, whether nationals or stateless persons, to show a fear of persecution for a Convention reason. As paragraph 37 puts it, the phrase "well-founded fear of being persecuted" is the key phrase in the definition. That view seems to me to be consistent with the document entitled "Joint Position", dated 4th March 1996, issued by the Council of Europe, which is quoted by Lord Lloyd in Adan, at page 307, and to which Lord Justice Pill has referred.

104) The only states about which there is direct information are Canada and Australia. Both Lord Justice Pill and Mr Justice Bennett consider the Australia and Canadian authorities in some detail. The relevant Canadian statute resolves the issue in favour of the respondent's submission. There are perhaps two possible explanations for that. The first is the cynical one that Canada thought that the Convention might be construed to protect those without a fear of persecution. The second is that touched on by Lord Justice Simon Brown in Adan, at page 1117, namely that the Canadian legislation was enacted in the light of Canada's construction of the Convention. There is no evidence that the first explanation is correct and I accept the second. It certainly makes the practice in Canada clear. I do not, however, think that the Canadian authorities themselves are of any real assistance.

105) As to the Australian authorities, I was at one time attracted by the analysis of Mr Dowsett J in the Savvin case. But although I take the same view as him on the literal meaning of the language, I have reached the same overall conclusion as the Federal Court of Australia on appeal in Savvin and as Justice Cooper at First Instance in Rishmawi v Minister for Immigration and Multicultural Affairs (1997) 77 FCR 421, and by Sackville J in Diatlov v Minister for Immigration and Multicultural Affairs [1999] FCA 468.

106) I turn briefly to the travaux préparatoire. I accept Mr Nicol's submission that they must be regarded with caution and indeed that they are a secondary source of assistance: see Article 32 of the Vienna Convention. Nevertheless, if the drafters of the Convention had intended that persons in the position of the appellant should be treated as refugees without any fear of persecution, I would have expected that point of view to be advanced at some stage during the course of the travaux préparatoire. I recognise that the appellant's advisors have not been able to study every one of the voluminous material which form part of the travaux préparatoire. Indeed, I doubt whether that would be possible. However, no one has been able to refer to any part of the materials leading up to the Convention which suggests that it was intended by anyone that unless perhaps he fell within paragraph 1(a)(i), a person should have the status of a refugee unless he feared persecution for a Convention reason.

107) In all the circumstances, I have reached the conclusion that all the indicia(?) as to the purpose of the 1951 Convention and all the indications of subsequent practice, indeed all the pointers, apart from the literal words of the article, lead to the conclusion that the framers of the Convention intended a person to be a refugee only if he had a well-founded fear of persecution on a Convention ground.

108) In these circumstances, and notwithstanding my view of the literal meaning of the words, Article 1A(2) should, in my opinion, be construed in the broad purposeful way identified by Lord Lloyd implying appropriate words as necessary. It is, I think, likely that it was such an approach, rather than any literal interpretation of the paragraph, which lead to the common ground recited by Lord Lloyd in Adan and to the approval by him, and by the other members of the appellant committee, including Lord Nolan, who agreed with him of the paragraph, which I quoted earlier, including the requirement that:

> "Non-nationals who are outside the country of their former habitual residence owing to a well-founded fear of persecution for a Convention reason, and, are unwilling to return to their country."

109) For these reasons, I agree that the appeal should be dismissed.

110) There is a further consideration which to my mind also supports the same conclusion. I have left it to last and do not found my conclusion upon it because it may not be open to us to do so. It is the relationship to which Lord Justice Pill has referred, between Article 1A(2) and Article 33 of the Convention. In R v Home Secretary, ex parte Sivakumaran [1998] 1 AC 958, the House of Lords was concerned with the meaning of the expression "well-founded fear of persecution" in Article 1A(2). However, in the course of its consideration of that question, the House of Lords considered the relationship between the two articles.

Lord Goff, with whom all the other members of the appellate committee agreed, said at page 1001:

> "The Master of the Rolls suggested, ante p 965E-F, that, even if the Secretary of State decides that an applicant is a refugee as defined in Article 1, nevertheless he has then to decide whether Article 33, which involves an objective test, prohibits a return of the applicant to the relevant country. I am unable to accept this approach. It is, I consider, plain, as indeed was reinforced in argument by Mr Plender with reference to the travaux préparatoires, that the non-refoulement provision in Article 33 was intended to apply to all persons determined to be refugees under Article 1 of the Convention. I cannot help feeling, however, that the consistency between Articles 1 and 33 can be more easily accepted if the interpretation of 'well-founded fear' in Article 1A(2) espoused by the Secretary of State is adopted, rather than that contended for by the High Commissioner."

111) To my mind, that is an example of the House of Lords using Article 33 as an aid to construction of Article 1A(2). I recognise that Lord Goff was not considering the issue raised in this appeal, but the approach accepted by the House of Lords seems to me to sit oddly with the appellant's argument in the instant case. Lord Goff said that Article 3 was intended to apply to all persons determined to be refugees under Article 1. If that is so, it follows that in principle, a person in the position of the appellant is entitled to the benefit of Article 33. But Article 33 on its face involves the appellant establishing that if he were returned to Moldova his life or freedom would be threatened for a Convention reason. I can understand that if, in order to become a refugee, it is necessary to establish a well-founded fear of persecution for a Convention reason, Article 33 naturally applies, as the House of Lords held. That is on the basis that the words in Article 33 are a shorthand for the words in Article 1A(2). The same cannot, however, be said if all that a stateless person has shown is that he is unable to return to his former country.

112) In so far as Mr Nicol submits that such a person will automatically be able to establish that his life or freedom will be threatened by being sent back to that country in every case, I am unable to accept that submission. Whether he will be able to do so depends upon the facts of the particular case. In many such cases, such a person might well simply be sent away without any threat to his life or freedom for a Convention reason.

113) If I am free to do so, I regard these considerations as a significant factor in support of Mr Kovats' submissions. However, I recognise that both in the Court of Appeal and in the House of Lords in Adan, it was said that Article 33 cannot be used to construe Article 1A(2): see [1997] 1 WLR 1107 at 1116 and [1999] 1 AC 293 at 306, apparently on the basis that the argument approaches the problem from the wrong end because it is Article 1(2) which must govern the scope of Article 33 and not vice versa. See also Justice Katz to the same effect in Savvin at page 513, paragraph 139.

114) That may well have been an appropriate view and in any event is binding upon us with regard to the problem raised by the facts in Adan. It does seem to me that it must, in some cases at least, be permissible, when construing a particular article of a convention, to have regard to other provisions of it. Otherwise, it is difficult to see how the particular article can be considered in its context and, in the words of Article 31.1 of the Vienna Convention, "in the light of the object and purposes of the treaty". Indeed, it

appears to me that ex parte Sivakumaran is an example of the court doing precisely that.

115) I would hold that in order to resolve the issue which arises in this appeal, it is permissible to have regard to Article 33 in construing Article 1, and I would further hold that the relationship between Article 1 and Article 3, identified by the House of Lords in ex parte Sivakumaran, gives significant support for the respondent's construction of Article 1A(2).

116) However, with or without that further factor, I would dismiss the appeal.

117) In these circumstances, it is not necessary to consider what order it would be appropriate to make if the applicant were held to be a refugee. But if it were further held that the findings of fact do not support the conclusion that if he were returned to Moldova his life or freedom would be threatened, within the meaning of Article 33, for my part I would wish to give further consideration to that question if it arose, but since it does not arise I say nothing further.

118) MR JUSTICE BENNETT: I agree that the appeal should be dismissed for the reasons given by Lord Justice Pill and Lord Justice Clarke, subject to what I say below. I will thus endeavour to express my reasons as concisely as possible.

119) The issue in this appeal is whether the appellant is a "refugee" within Article 1A(2) of the 1951 Geneva Convention relating to the Status of Refugees, as modified by the Protocol of 1967. The appellant is a stateless person i.e. "not having a nationality". Mr Nicol QC, on his behalf, submitted that as he was also outside the country of his former habitual residence and unable to return to it, he was a refugee. Mr Kovats, for the Secretary of State, submitted that as the Immigration Appeal Tribunal had found that the appellant did not have a well-founded fear of being persecuted for any of the reasons set out in Article 1A(2) of the Convention, he was not a refugee.

120) Thus, the question of construction that has to be decided is whether the words in Article 1A(2) "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" which are a part of the definition of a refugee having a nationality, are also part of the definition of a refugee not having a nationality. Article 1 provides:

> "For the purposes of the present Convention, the term 'refugee' shall apply to any person who:
>
> "(1) ...
>
> (2) [As a result of events occurring before 1 January 1951 and] owing to a 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."

121) The words in the square brackets were deleted by the 1967 Protocol. The Convention is an international treaty. It is common ground between the parties that Article 31 and 32 of the Vienna Convention on the Law of Treaties, which Convention came into force on 27th January 1980, are applicable. Lord Justice Pill has set them out in his judgment and it is not necessary for me to repeat them.

122) Further guidance as to the interpretation of international treaties is to be found in Adan v Secretary of State for the Home Department [1999] 1 AC 293 and in Horvath v Secretary of State for the Home Department [2000] 3 WLR 379. In Adan, Lord Lloyd of Berwick, with whose speech all the other Law Lords agree, said at page 305:

> "I return to the argument on construction. Mr Pannick points out that we are here concerned with the meaning of an international Convention.
>
> Inevitably the final text will have been the product of a long period of negotiation and compromise. One cannot expect to find the same precision of language as one does in an Act of Parliament drafted by parliamentary counsel. I agree. It follows that one is more likely to arrive at the true construction of Article 1A(2) by seeking a meaning which makes sense in the light of the Convention as a whole, and the purposes which the framers of the Convention were seeking to achieve, rather than by concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach.
>
> "But having said that, the starting point must be the language itself."

123) In Horvath, Lord Clyde said at page 395H:

> "We are concerned here with the construction of an international convention. The approach to be adopted must be appropriate to that situation. Regard must be given to the purpose of the Convention and the object which it seeks to serve. While the language of the article has to be respected, any pre-occupation with the precise words may fail to meet the broad intent of the Convention and any detailed analysis of its component elements may distract and divert attention from the essential purpose of what is sought to be achieved. As my noble and learned friend, Lord Lloyd of Berwick, observed in Adan v Secretary of State for the Home Department [1999] 1 AC 293, 305:
>
> "'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.'
>
> "The dangers of over-sophistication in the construction and application of the Convention are real and significant. Prolonged debate about the niceties of the language may readily lead to delay in the processing of what in the interests of everyone should be a relatively expeditious process. Of course there may often be difficult points of fact to be resolved and uncertainties in matters of fact which may not immediately be open to a clear answer. But it is obviously undesirable to heap onto the shoulders of the adjudicators and the members of the tribunals who already have a heavy burden of work an additional complexity in the unravelling of legal issues on the precise construction of the particular words used in the Convention.
>
> "The Convention was worked out and agreed between states and it is at a state level that it has to be understood."

Language

124) In my judgment, Article 1A(2) must be looked at as a whole. It is drafted as one sentence albeit with a semicolon in the middle of it. The Article is not an all-embracing definition of "refugee". The words "owing to a well-founded fear ... political opinion" come right at the beginning of the Article and undoubtedly are an integral part of the words before the semicolon. Those who are outside the country of their nationality, and are unable or, owing to such fear, are unwilling to avail themselves of the protection of their country and those not having a nationality and being outside the country of their former habitual residence and who owing to such fear are unwilling to return to it, must show "a well-founded fear of being persecuted" for a Convention reason.

125) Further, a person is not having a nationality and being outside the country of his former habitual residence and who, owing to such fear, is unwilling to return to it has to show a well-founded fear of being persecuted for a Convention reason. I thus find it rather difficult, as a matter of pure construction, to say that there is a category of person who can establish that he is a refugee within the Article by reason solely of his statelessness and inability to return to the country of his former habitual residence, but who does not have to show a well-founded fear of being persecuted for a Convention reason. As Mr Kovats submitted, if the appellant's construction of the Article is correct, then greater protection is given to the stateless than to those with a nationality.

126) Does Article 33 of the Convention give assistance? Mr Kovats submitted that it does. If that point were free from authority I would have agreed. But the point was specifically argued in Adan in the Court of Appeal, see [1997] 1 WLR 1107, at page 1115, and in the House of Lords, see [1999] 1 AC 293, at page 306. The House of Lords were unanimous in concluding that Article 33 could not be used to construe Article 1A(2). Accordingly I feel constrained not to take it into account.

Travaux préparatoire

127) The full text of the travaux préparatoire was not placed in front of us. Such of the travaux préparatoires were shown to us by counsel appeared in varies authorities. We were not shown any part of the travaux préparatoires which shed light on the point in issue in this case. Mr Nicol was unable to point to any discussion in the travaux préparatoires relating directly or indirectly to the issue that he has raised before us. As Lord Justice Clarke said in argument, such a lack of discussion could be said to be striking, I take that into account.

Academic writers

128) In 1996 Professor Atle Grahl-Madsen wrote in his work "The Status of Refugees in International Law":

"The criteria of refugeehood set forth in Article 1A(2) of the Refugee Convention may be itemised as follows:

"(1) In order to be a 'refugee' in the sense of Article 1A(2) a person must be outside the country of his nationality, or, if he has no nationality, outside the country of his former habitual residence.

"(2) Moreover, he must be outside the said country as a result of events occurring before 1 January 1951; this requirement to be understood in the light of the provisions of Article 1B ...

"(3) Furthermore, he must be outside the said country owing to a well-founded fear of being persecuted for any of the reasons set forth in Article 1A(2)c ... This proviso does not, however, apply to a person not having a nationality who is unable to return to the country of his former habitual residence. This exception is of particular import with respect to stateless persons who have been expelled by a new government. Those who have left on their own prompting may hardly claim to be outside the country of their former habitual residence 'as a result of' events occurring before 1 January 1951, unless they have had some fear of persecution.

"(4) The relevant reasons are ... (Convention reasons)

"(5) Finally, in order to qualify as a 'refugee' in the sense of the Convention a person must be unable, or owing to well-founded fear of persecution, unwilling to avail himself of the protection of the county of his nationality (if he has a nationality). The corresponding requirement with respect to persons not having a nationality is that they are unable or, owing to such fear, unwilling to return to the country of their former habitual residence."

129) Mr Kovats accepted that that opinion very much favoured the appellant's construction.

130) However, in 1991, Professor James Hathaway, wrote at page 60 of his work "The Law of Refugee Status":

"As such, it was agreed to restrict the scope of the Convention to those persons who required protection from a state to which they were formally returnable, and to leave the problems of the stateless population to be dealt with by a later and less comprehensive conventional regime.

"It is thus clear that statelessness per se does not give rise to a claim to refugee status."

131) At page 68 of the same work Professor Hathaway wrote in a passage which was expressly approved by the House of Lords in Adan, see page 307:

"In the Convention as ultimately adopted, therefore, persons determined to be refugees under earlier arrangements are not required to demonstrate a well-founded fear of being persecuted, and are not automatically subject to cessation of refugee status if conditions become safe in their homeland.

"It was the intention of the drafters, however, that all other refugees should have to demonstrate 'a present fear of persecution' in the sense that they 'are or may in the future be deprived of the protection of their country of origin'. Thus it was agreed that the first branch of the IRO test which focused on past persecution should be omitted in favour of the 'well-founded fear of being persecuted' standard involving evidence of a present or prospective risk in the country of origin. The use of the term 'fear' was intended to

emphasise the forward-looking nature of the test, and not to ground refugee status in an assessment of the refugee claimant's state of mind."

132) In 1996 Professor Goodwin-Gill wrote at page 19 of his work"The Refugee in International Law":

> "From the outset, it was recognised that, given its various limitations, the Convention would not cover every refugee. The Conference of Plenipotentiaries therefore recommended in the Final Act that States should apply the Convention beyond its strictly contractual scope to other refugees within their territory. Many States relied upon this recommendation in the case of refugee crises. Precipitated by events after 1 January 1951, until the 1967 Protocol expressly removed that limitation. It may still be invoked to support extension of the Convention to groups or individuals who do not fully satisfy the definitional requirements.
>
> "Convention refugees are thus identifiable by their possession of four elemental characteristics: (1) they are outside their country of origin; (2) they are unable or unwilling to avail themselves of the protection of that country or to return there; (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted; and (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group or political opinion."

133) Mr Nicol did not draw to our attention any passage in that work of Professor Goodwin-Gill which in any way supported the appellant's construction of Article 1A(2).

134) On 23rd July 2000 Professor Goodwin-Gill wrote a report on behalf of the appellant for the purposes of this appeal. In that report he argued strongly in favour of the appellant's construction of Article 1A(2). At paragraph 38 thereof he referred to the passage at page 19 of his work in 1996 to which I have just referred. At paragraph 39 of the report he said with reference to that passage:

> "While this summary clarifies the basic qualities of the Convention Refugee it is presented at a certain level of generality and does not include, either the particularities of the refugee claimant without a nationality, or the implications of the essential relationship between lack of protection and well-founded fear. It should therefore not be read as supporting a reading of Article 1A(2) that fails to take account of the particular characteristics of stateless persons."

135) The passage at page 19 of his work which I have quoted does not contain any qualification as Professor Goodwin-Gill seeks to make at paragraph 39 of his report. The passage at page 19 is, in my judgment, categorical. Thus, with respect, I find his reasoning at paragraph 39 of the report to be unconvincing.

136) UNHCR Handbook on the Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees Mr Kovats relied upon paragraph 101-104 inclusive as supporting the Secretary of State's construction of Article 1A(2). Mr Nicol submitted, in my view correctly, that these paragraphs represented not state practice but the interpretation of Article 1A(2) by the UN High Commissioner for Refugees. Accordingly, I am not prepared to use these paragraphs as an aid to interpreting Article 1A(2).

English Authorities

137) In R v Chief Immigration Officer Gatwick Airport ex parte Harjendar Singh [1987] Imm AR 346, Nolan J (as he then was) said at page 357 in relation to Article 1A(2):

> "The first part of that definition which of course is the familiar definition of refugee, is in terms considered most recently by their Lordships' House in the Bugdaycay case. The second part would, on the undisputed facts, govern the case of the applicant as someone who, not having a nationality, was outside the country of his former habitual residence, namely India, and is unable to return to it, unless of course he is a British national."

138) Mr Nicol, as I understand it, in drawing attention to this authority did not place much weight upon it. He accepted the force of Mr Kovats' submission that the point leading to those dicta only arose at a late stage in that case and it is not clear from the report whether the point was argued.

139) Mr Kovats relied heavily upon the dicta of Lord Lloyd in Adan. At page 304 Lord Lloyd said:

> "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; (2) nationals who are outside their country owing to a well-founded fear of persecution for a Convention reason, and, owing to such fear are unwilling to avail themselves of the protection of their country; (3) non-nationals who are outside the country of their former habitual residence owing to a well-founded fear of persecution for a Convention reason and are unable to return to their country; and (4) non-nationals who are outside the country of their former habitual residence owing to a well-founded fear of persecution for a Convention reason, and, owing to such fear, are unwilling to return to their country.
>
> "It will be noticed that in each of categories (1) and (2) the asylum-seeker must satisfy two separate tests: what may, for short, be called 'the fear test' and 'the protection test'. In categories (3) and (4) the protection test, for obvious reasons, is couched in different language."

140) I accept at once that the point of construction before us was not before the House of Lords in Adan. Thus the dicta to which I have just referred are not binding. But in my judgment they are of great persuasive authority. Mr Nicol submitted that we should not follow Lord Lloyd's construction of Article 1A(2) because the point was not argued and because he submitted the appellant's construction was so plain and obvious. I have some difficulty with the latter part of that submission. If the House of Lords had entertained doubt as to the construction of Article 1A(2) as put forward by highly experienced counsel for the appellant and the respondent, and particularly in the light of Lord Justice Simon Brown's construction in respect of stateless persons at [1997] 1 WLR 1107 at 1117, I feel confident that such a doubt or reservation would have been expressed.

Australian Authorities

141) The meaning of Article 1A(2) has been debated and construed in several Australian authorities. Counsel's submissions to us involved principally looking at two of those authorities, namely Rishmawi v

Minister for Immigration and Multi-Cultural Affairs [1997] 77 FCR 421 and Savvin and others v Minister for Immigration and Multi-Cultural Affairs 166 ALR 348 and later on appeal at 171 ALR 483. In Rishmawi Cooper J, in construing Article 1A(2), adopted "an holistic but ordered approach having regard to the ordinary meaning of the text and the context, object and purpose of the Convention as an international treaty" (page 422 E to F). Cooper J considered the travaux préparatoires and at page 427 concluded that, from the documents in the travaux, the Convention was not intended to deal with stateless persons who were not also refugees. He said:

> "Further, it is apparent that the object of the Convention was to treat uniformly persons seeking refugee status, so far as was possible, whether or not those persons had a nationality. This equality of treatment is seen in the equation of country of nationality with country of former habitual residence and in the inability or unwillingness to obtain the protection of the country of nationality with the inability or unwillingness to return to the country of former habitual residence. And finally, the object of the draft Convention was to provide sanctuary to persons who had a well-founded fear of persecution for a Convention reason and not for any other reason."

142) In my judgment that reasoning is very compelling.

143) At page 428, Cooper J concluded:

> "A literal interpretation of Article 1A(2) of the Convention ... would mean that a stateless person outside his or her country of former habitual residence for a reason other than a Convention reason and unable to return to it for whatever reason other than a Convention reason would by definition be a refugee. Such a result would be unintended on the part of the framers of the Convention and inconsistent with the object of dealing only with persons who have been or who are being persecuted for a Convention reason or who have a well-founded fear of such persecution. It would also treat stateless persons in a substantially more favourable way in respect of obtaining refugee status than persons with a nationality and thus would be inconsistent with the object of equality of treatment to all who claim refugee status.
>
> "The approach to the interpretation of Article 1A(2) contended for by the applicant is wrong in principle. It ignores the totality of the words which define a refugee ... it is in breach of the requirements of Article 31 of the Vienna Convention because it divorces the interpretation of the words from the context, object and purpose of the treaty. And, it also seeks to give the Convention a scope of operation beyond its object and purpose.
>
> "The object of the Convention and its scope are limited and it does not provide universal protection for asylum seekers ... the Convention is limited to persons fleeing, or who have fled, or who remain away because of one or more of the five Convention reasons."

144) Accordingly, Cooper J found that the Refugee Review Tribunal did not err when it construed the definition of 'refugee' in the Convention such that all applicants claiming that status had to have a well-founded fear of persecution (see page 422C).

145) In Savvin, Dowsett J (at first instance) said at page 362, paragraph 51:

> "... but my primary point is that the text, in so far as it deals with stateless persons, contains very little difficulty. I would have thought it beyond argument that the words

preceding the semicolon deal with persons having nationality and those following the semicolon deal with persons without nationality. If so, it follows that in order to satisfy the definition, a person without nationality must be outside the country of his former habitual residence (for whatever reason) and either:

"unable to return thereto for any reason; or

"unwilling to return because of well-founded fear of persecution for a Convention reason."

146) Dowsett J disagreed with the construction of Cooper J in Rishmawi. His reasoning and interpretation of Article 1A(2) provides, in my judgment, strong support for the appellant's construction in the instant case. However, on appeal, the Federal Court of Australia, consisting of Spender, Drummond and Katz JJ disagreed with Dowsett J and held, allowing the appeal, that Article 1A(2) should be construed as including the requirement that a stateless person, being outside the country of former habitual residence, has a well-founded fear of being persecuted for a Convention reason. Cooper J's conclusion in Rishmawi in that respect was approved and followed. At page 485 Spender J said:

"[3] Article 1A(2) of the Convention is not happily expressed, as the cases referred to by Katz J make plain. The Treaty was the result of compromise and diplomatic trade-offs, and it is not surprising that the Treaty as finally formulated lacks the precision of, say, domestic legislation. If a camel is a horse designed by a committee, it is unremarkable, given the development of the treaty, that there should be serious problems of interpretation as to its intended operation.

"[4] Simon Brown LJ in Adan v Secretary of State for the Home Department [1997] 1 WLR 1107 said, at page 1117: so far as the stateless are concerned ... the latter part of Article 1A(2) ... construed literally, requires of those presently unable to return home nothing more ...

"[5] The view of the learned primary Judge in the present case is in accordance with that literal construction.

"[6] Clearly, Article 1 concerns two categories of persons: those outside that person's country of nationality and those who did not have a nationality and are outside the country of former habitual residence.

"[7] If inability to return is sufficient for a stateless person (that is a fear of persecution is not necessary) the words 'such fear' are inappropriately included after the semicolon. The presence of that phrase indicates to me that the fear of being persecuted for a Convention reason is the talisman of the definition, and applies to both categories of persons to whom the definition is directed. This accords with the definition of 'refugee' proposed in the draft Refugee Convention annexed to the report of the first Ad Hoc Committee on statelessness and Related Problems dated 17 February 1950, which is set out in the reasons for judgment of Drummond J.

"I respectfully agree with the reasoning of Cooper J in Rishmawi ... and in particular with his conclusion that Article 1A(2) is not to be construed literally, but in accordance with the object and purpose of the Convention as disclosed by the preparatory work for the 1951 version of it and with the context in which Article 1A(2) appears. The conclusion is that Article 1A(2) is to be construed as including the requirement that a stateless person, being outside the country of his former habitual residence, have a well-founded fear of being persecuted for a Convention reason."

147) Drummond J agreed with the reasons of Katz J subject to what he said in his judgment.

148) A large proportion of Katz J's judgment dealt with the significance, or lack of it, which could be attached to the semicolon. He concluded at page 500, paragraph 35, that the semicolon did not do the work of dividing the definition in Article 1A(2) into two independent parts.

149) Then it is not necessary to read page 501, paragraph 85 of Katz J's judgment as it has already been set out in the judgment of Lord Justice Pill.

150) Mr Nicol submitted that that passage was tortuous. I say nothing of the language with which Katz J expressed himself. But it seems to me that he is construing Article 1A(2) consistently with the Secretary of State's submissions in the instant case.

Canadian Authorities

151) Mr Kovats relied upon several Canadian authorities in support of the Secretary of State's construction -- see paragraph 46 of his skeleton argument. However, Mr Nicol submitted, correctly in my judgment, that the usefulness of such authorities was limited. What was being considered in those authorities was domestic legislation which incorporated the Geneva Convention, not the Geneva Convention itself. In paragraph 42 of his report Professor Goodwin-Gill drew attention to the fact that in such legislation the criterion of well-founded fear of persecution had been placed in a controlling position.

152) Mr Kovats submitted that in the Final Act of the 1951 UN Converence of Plenipotentiaries on the Status of Refugees and Stateless Persons, Article II provided that the subject of the status of stateless persons required more detailed study and decided not to take a decision on the subject at the present conference and referred the draft protocol back to the appropriate organs of the UN for further study. He submitted that that showed that the drafters of the Convention made a deliberate decision to separate the problems of refugees from the problems of stateless persons. He further submitted that the 1954 Convention relating to the Status of Stateless Persons was the instrument envisaged in the Final Act of the 1951 Conference which adopted the 1951 Convention. There was much debate before us as to whether or not those submissions were, or might be, correct. I find it difficult to come to a concluded view on those particular submissions and accordingly I do not take into account the submissions of Mr Kovats on this point.

Conclusions

153) It seems to me that the weight of judicial opinion and of academic writers is substantially in favour of the Secretary of State's construction. I do not accept that Article 1A(2) is to be construed literally in the way formulated by Simon Brown LJ in Adan, Dowsett J in Savvin and Clarke LJ in the instant case. Whilst I see the force of that argument it is by no means determinative even if the language alone is construed.

There are, in my opinion, countervailing arguments of equal and greater force. Further, I have endeavoured to remember at all times the dicta of Lord Lloyd in Adan and Lord Clyde in Horvath as to the approach to construing an international treaty. In my judgment, the meaning of Article 1A(2) 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, is the protection of a person (or persons) whether outside the country of his nationality, or, not having a nationality and outside the country of his former habitual residence, who has a well-founded fear of being persecuted for the reasons therein set out.

154) The Special Adjudicator held that the appellant had failed to establish that he currently had a well-founded fear of persecution in Moldova for a Convention reason. The Immigration Appeal Tribunal unanimously upheld their finding. In my judgment, there are no further findings which can be made. Thus, even if the appellant's construction of Article 1A(2) is correct, the appellant is not entitled to return either to the Immigration Appeal Tribunal or the Special Adjudicator for further findings of fact to be made in relation to Article 33 of the Convention.

155) Furthermore, it would not be right to accede to the Secretary of State's submission to remit the matter on the grounds that a stateless person is under an obligation to try to obtain either citizenship or admission to a stay, that the appellant does not apply for a Moldavan citizenship and that it is not clear that he would be refused citizenship or residence if he applied. I accept Mr Nicol's submissions that the Secretary of State has not challenged the finding that the appellant is stateless and that there is ample evidence, including expert evidence, that he has made proper enquiries and would not get Moldovan citizenship even if he applied.

156) Accordingly, I would dismiss the appeal.

ORDER: Appeal dismissed with leave to appeal refused. Order made for legal aid assessment. Order does not form part of the approved judgment.