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Neutral Citation Number: [1997] EWCA Civ 3090
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand
London WC2

Friday 11 July 1997

B e f o r e:

THE MASTER OF THE ROLLS
(LORD WOOLF)
LORD JUSTICE POTTER
LORD JUSTICE BROOKE

- - - - - -

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

R E G I N A

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT
IMMIGRATION APPEALS TRIBUNAL
EX PARTE ANTHONY PILLAI FRANCIS ROBINSON

- - - - - -

(Computer Aided Transcript of the Palantype Notes of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 831 3183
Official Shorthand Writers to the Court)

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MR N BLAKE QC and MR R HUSAIN (Instructed by Nathan & Co, London SW19 1LX) appeared on behalf of the Appellant.

MR D PANNICK and MISS A FOSTER (Instructed by The Treasury Solicitor, London SW1H 9JS)) appeared on behalf of the Secretary of State.

MR M SHAW (Instructed by the Treasury Solicitor, London, SW1H 9JS) appeared on behalf of the Immigration Appeal Tribunal.

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J U D G M E N T

LORD WOOLF, MR: This is the judgment of the court primarily prepared by Lord Justice Brooke.

1. This appeal raises three points of general importance. The first is the scope of what is now often called "the internal flight alternative." This is linked with the definition of "refugee" in the 1951 Geneva Convention relating to the Status of Refugees, as amended by the 1967 Protocol (which we will call "the Convention"). The second is whether the appellate authorities handling appeals under the Asylum and Immigration Appeals Act 1993 have jurisdiction to consider issues relating to the internal flight alternative. The third relates to the scope of the duty, if any, on the Immigration Appeal Tribunal to consider issues which are not apparent on the face of a Notice of Appeal when it decides whether to grant leave to appeal from a decision of a Special Adjudicator.

2. The facts of the case are very similar to those which have frequently had to be considered by the appellate authorities in recent years in cases concerned with Tamils from northern Sri Lanka who seek asylum in this country. The present applicant was born in Sri Lanka, of Tamil ethnic origin, in September 1967. He grew up in the Jaffna area, and he was detained by Sri Lankan security forces and the Indian peace-keeping force on three occasions between 1984 and May 1988. One of his uncles, who was then a Roman Catholic priest, was at one time wanted by Sri Lankan authorities on suspicion of supporting the Tamil separatist movement: this uncle left Sri Lanka following his detention in 1983 and was subsequently recognised as a refugee in the United Kingdom. By 1988 the LTTE (the Tamil Tigers) were the de facto authority in Jaffna, and they required the applicant to help them in their campaign against the Sri Lankan Government. In May 1991 his family home was destroyed by Sri Lankan forces, and he had to go and live with his parents in a refugee camp run by priests. For the next two years the LTTE required him to undergo military training and to join their forces, although he was reluctant to do so.

3. In April 1993 he left Jaffna and travelled to Colombo. He stayed with a friend for about a fortnight until the incident in which President of Sri Lanka was assassinated by Tamil militants on 1st May 1993. He had given his mother's jewellery to his friend to pay for his support, and he paid the balance left over from the sale of this jewellery to an agent who helped him to leave the country. After the President's death the security measures against young Tamils were stepped up, and on 4th May 1993 he was detained by the security forces for five days on suspicion of being a member of the LTTE. He was beaten, but later released without charge. He then went into hiding, and stayed at a number of short term addresses until his departure from Sri Lanka could be arranged the following month, when he travelled to this country by air via Abu Dhabi and claimed asylum on arrival.

4. His asylum application was refused on 11th April 1995 and he was refused leave to enter on 22nd April 1995. He appealed to a Special Adjudicator, but on 13th March 1996 a Special Adjudicator, Mr Latter, dismissed his appeal. On 11th

April 1996 the Immigration Appeal Tribunal refused leave to appeal. He then applied for leave to apply for judicial review of the Tribunal's decision to refuse leave to appeal, but on 10th May 1996 Popplewell J dismissed this application after an oral hearing. On 11th October 1996 this court granted him leave to renew his application for judicial review and directed that the substantive hearing should take place before this court since it raised procedural issues of general contemporary importance.

5. The Special Adjudicator had found the applicant and his supporting witness, the uncle to whom we have referred, to be credible witnesses. He held that the mere fact of the applicant's past connection with the Tamil Tigers would not, *ipso facto*, lead to a risk of persecution, and that he therefore had to consider whether there was a particular or special factor in the applicant's background which could put him at unusual risk. He did not consider that the risk of repeated detention by the security forces in Colombo, when searching for suspected terrorists, constituted persecution within the meaning of the Convention. He went on:

> "I do not think there is any serious possibility that the appellant can be regarded as having a special characteristic by reason of the fact that he is his uncle's nephew which means that he is likely to be treated differently from other Tamils of his age and background living in Colombo or other areas controlled by the Sri Lankan government.
>
> I accept the appellant could not reasonably be expected to return to an area controlled by the LTTE. There is a risk that he would be recruited by them against his will to support them. The issue is whether the appellant can safely return to an area controlled by the Sri Lankan authorities. In my view the appellant is not at particular or unusual risk compared with other Tamils in Colombo. He does not satisfy me that he has a well-founded fear of persecution."

6. The Special Adjudicator ended by saying that he was sure that in the light of the current situation in Sri Lanka the Secretary of State would give careful consideration as to whether or not the applicant should be granted a period of exceptional leave to remain. In this context he mentioned the fact that the applicant had only been in Colombo for a few days before he was arrested and that he then moved from place to place before leaving Sri Lanka; that he has no relatives in Colombo and does not know where his parents are; and that his uncle lives in this country, where he has been granted asylum, and that he also has a grandmother, two uncles and two aunts living here. It is a central feature of Mr Blake's submissions that the Special Adjudicator should have taken considerations of this kind into account when deciding whether the applicant was a refugee as defined by the Convention (see paragraph 334(ii) of the Immigration Rules (HC 395 of 1994)) and that he should not merely have left them as matters for the Secretary of State to consider when determining whether to grant the applicant exceptional leave to remain outside the Immigration Rules.

7. Arguments of this kind were not, however, included in the Grounds of Appeal to the Immigration Appeal Tribunal, which were settled by his solicitors. These were limited to issues relating to the applicant's safety if he was returned to Colombo, and arguments concerned with deficiencies in the reasoning of the Special Adjudicator. The Tribunal's chairman did not therefore allude to them in the short reasons he gave for refusing leave to appeal. Mr Blake, however, contends that the

Tribunal was wrong when it said that the Special Adjudicator "concluded that the applicant could safely return [to Colombo] and it would be reasonable for him to do so". He said that the Special Adjudicator did not express himself in these terms, so far as questions of reasonableness were concerned, and that if he had considered questions of reasonableness as a freestanding issue, there were more matters that he should have taken into account, and this raised questions fit for argument at a substantive hearing before the Tribunal.

The definition of refugee and the "internal flight alternative"

8. The 1951 Convention conferred special status on a person recognised as a refugee within the meaning of the Convention. Chapter II of the Convention sets out the juridical status of a refugee. Chapter III prescribes the conditions on which refugees are entitled to enjoy gainful employment, Chapter IV their welfare entitlements, and so on. In particular, so long as they are recognised as refugees, they may not be expelled from the territory in which they are lawfully present save on grounds of national security or public order, and even then only after due process of law (see Article 32), and in any event a refugee may not be expelled or returned "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 (Article 33). In *R v Home Secretary ex p Sivakumaran* [1988] AC 958 Lord Goff of Chieveley said at p 1001C that it was plain 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.

9. It is therefore to Article 1 that we must turn to see who is entitled to the benefits conferred by the Convention. Article 1A provides, so far as is material, that for the purposes of the Convention, the term 'refugee' is to apply to any person who

> "(2) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ...."

10. The Convention does not deal in express terms with a situation in which a person may technically be able to live in part of a country free of fear but for one reason or other it is not reasonable to expect him to do so. Obvious examples are parts of countries which are uninhabitable - desert areas or mountainous terrain are very straightforward illustrations - and other examples have cropped up over the years in which the terms of the Convention have been worked out in practice.

11. There is no international court charged with the interpretation and implementation of the Convention, and for this reason the Handbook on Procedures and Criteria for Determining Refugee Status, published in 1979 by the Office of the United Nations High Commissioner for Refugees, is particularly helpful as a guide to what is the international understanding of the Convention obligations, as worked out in practice. As its Preface makes clear the explanations of the definition of the term 'refugee' which it contains were based on the knowledge accumulated by the High Commissioner's Office since the Convention came into force in 1954. This knowledge was derived, inter alia, from 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 previous quarter of a century.

12. When the authors of this Handbook came to explain the phrase "is outside the country of his nationality" in Article 1A(2) of the Convention, they said in paragraph 91:

> "The fear of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil was conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."

13. A similar concept is to be found in paragraph 8 of the Joint Position of 4th March 1996 defined by the Council of the European Union on the basis of Article K.3 of the Treaty on European Union on the harmonised application of the definition of the term 'refugee' in Article 1 of the Geneva Convention:

> "8 Relocation within the country of origin
>
> Where it appears that persecution is clearly confined to a specific part of a country's territory, it may be necessary, in order to check that the condition laid down in Article 1 A of the Geneva Convention has been fulfilled, namely that the person concerned 'is unable or, owing to such fear of persecution, is unwilling to avail himself of the protection of that country', to ascertain whether the person concerned cannot find effective protection in another part of his own country, to which he may reasonably be expected to move."

14. It is a long established principle of international law that it is legitimate, when interpreting a treaty, to take into account not only the context in which it was made but also any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation. This principle has been formalised in Article 31(3)(b) of the Vienna Convention on the Law of Treaties. In *Fothergill v Monarch Airlines Ltd* [1981] AC 250 Lord Diplock said at p 282D that this article in his view did no more than codify already existing public international law.

15. It appears to us that the 1996 Joint Position reflects a contemporary understanding of the obligations created by the Convention which is not confined to the member States of the European Union. See, for example, The Law of

Refugee Status, James C Hathaway (Toronto: Butterworths, 1991) pp 133-134; The Refugee in International Law, Guy Goodwin-Gill (2nd Edition, 1996), pp 74-75; *Thirunavukkarasu v Minister of Employment and Immigration* 109 DLR (4th) 682; and *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* 124 ALR 265.

16. The 1996 advice is based on the principle that the international protection afforded by the Convention will only come into play when a country cannot afford the claimant protection within its own frontiers. The idea was clearly stated by La Forest J in *Canada (AG) v Ward* 103 DLR (4th) 1 at p 12:

> "The rationale underlying international protection is to serve as "surrogate" shelter coming into play only upon failure of national support. When available, home state protection is a claimant's sole option.
>
> International refugee law was formulated to serve as a back-up to the protection one expects from the State of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other States becomes engaged."

17. It follows that if the home state can afford what has variously been described as "a safe haven", "relocation", "internal protection", or "an internal flight alternative" where the claimant would not have a well-founded fear of persecution for a Convention reason, then international protection is not necessary. But it must be reasonable for him to go to and stay in that safe haven. As the majority of the Federal Court of Australia observed in *Randhawa* (above):

> "If it is not reasonable in the circumstances to expect a person who has a well-founded fear of persecution in relation to the part of a country from which he or she has fled to relocate to another part of the country of nationality it may be said that, in the relevant sense, the person's fear of persecution in relation to the country as a whole is well-founded."
>
> See Black CJ at p 270 and Whitlam CJ at p 280.

18. In determining whether it would not be reasonable to expect the claimant to relocate internally, a decision-maker will have to consider all the circumstances of the case, against the backcloth that the issue is whether the claimant is entitled to the status of refugee. Various tests have been suggested. For example, (a) if as a practical matter (whether for financial, logistical or other good reason) the 'safe' part of the country is not reasonably accessible; (b) if the claimant is required to encounter great physical danger in travelling there or staying there; (c) if he or she is required to undergo undue hardship in travelling there or staying there; (d) if the quality of the internal protection fails to meet basic norms of civil, political and socio-economic human rights. So far as the last of these considerations is concerned, the preamble to the Convention shows that the contracting parties were concerned to uphold the principle that human beings should enjoy

fundamental rights and freedoms without discrimination. In *Thirunavukkarasu*, Linden JA, giving the judgment of the Federal Court of Canada, said at p 687:

> "Stated another way for clarity, would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?"

19. He went on to observe that while claimants should not be compelled to cross battle lines or hide out in an isolated region of their country, like a cave in the mountains, a desert or jungle, it will not be enough for them to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there.

20. In the English cases which touch on this topic, while not identifying the governing considerations so clearly, Nolan J in *R v Immigration Appeal Tribunal ex p Jonah* [1985] Imm AR 7 considered that it was unreasonable to expect a senior Ghanaian Trade Union Official to go back to a very remote village accessible only by a 15 mile walk through the jungle; on the other hand in both *R v Secretary of State for the Home Department ex p Yurekli* [1990] Imm AR 334 (Otton J), [1991] Imm AR 153 (CA), and *R v Secretary of State for the Home Department ex p Gunes* [1991] Imm AR 278 (Simon Brown J) the courts held that it was not unreasonable to expect Kurdish Turks to relocate in a part of Turkey away from the villages in which they faced persecution. A similar view was expressed by this court in *El-Tanoukhi v Secretary of State for the Home Department* [1993] Imm AR 71, which related to a decision that it was not unreasonable to expect a claimant who lived in a part of Lebanon under Israeli control to relocate in a different part of Lebanon.

21. Mr Pannick, who appeared for the Secretary of State, accepted that it was appropriate to interpret this country's obligations under the Convention by reference to what is set out in Paragraph 91 of the UNHCR Handbook. This is scarcely surprising in the light of this country's recent adherence to the Joint Position of the Council of the European Union. In those circumstances, if a question arises whether an applicant for asylum might reasonably live in another part of his home country where he has no present fear of persecution, the answer to this question goes directly to the issue whether he should properly be treated as a 'refugee' within the meaning of the Convention, or whether he may legitimately be returned to that part of his home country consistently with this country's obligations under the Convention.

The Jurisdiction of the Appellate Authorities

22. The reason why this is important in the present context is that the jurisdiction of the appellate authorities in asylum cases is derived exclusively from Section 8(1) of the Asylum and Immigration Appeals Act 1993 which provides that:

> "A person who is refused leave to enter the United Kingdom under the [Immigration Act 1971] may appeal against the refusal to a special adjudicator on the ground that his removal in consequence of the refusal would be contrary to the United Kingdom's obligations under the [1951 Geneva Convention and its Protocol]".

23. Although Section 19(1) of the Immigration Act 1971 has effect as if Section 8 of the 1993 Act were contained in Part II of the 1971 Act, the restriction on the grounds of appeal in asylum cases which is contained in Section 8 of the 1993 Act serves to limit the jurisdiction of a [special] adjudicator under Section 19(1) of the earlier Act in such cases to the single issue set out in Section 8.

24. It was because of the language of Section 8 that different divisions of the Immigration Appeal Tribunal, each chaired by its Vice-President, Professor D C Jackson, in three cases decided between February 1995 and December 1996 (*Dupovac* (118846) 8th February 1995, *Ahmed* (13371) 15th May 1996, and *Nirmalan* (14361) 30th December 1996), concluded that they had no jurisdiction to consider a question arising under the internal flight alternative because they did not believe that it impinged on this country's obligations under the Convention. The reason why they formed this view was that they considered that paragraph 91 of the Handbook could not import an extra provision into the Convention and that the only provision of the Immigration Rules which bore on issues relating to the internal flight alternative (Paragraph 343) was a national rule which conferred a discretion on the Secretary of State to refuse an application in circumstances unconnected with this country's Convention obligations.

25. It appears to us that the Tribunal fell into error in these cases because of the way the relevant Immigration Rules were drafted before the true nature of the 'internal flight alternative' was fully considered by the courts or by academic writers, at all events in this country. The relevant Rules, which are contained in paragraphs 334, 336 and 343 of HC 395, are in these terms:

> "334 An asylum applicant will be granted
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the United Kingdom if the Secretary of State is satisfied that a

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(i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom; and

(ii) he is a refugee, as defined by the Convention and Protocol; and

(iii) refusing his application would result in his being required to go (whether immediately or after the time limited by an existing leave to enter or remain) in breach of the Convention and Protocol, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group.

336 An application which does not meet the criteria set out in paragraph 334 will be refused.

343 If there is a part of the country from which the applicant claims to be a refugee in which he would not have a well-founded fear of persecution, and to which it would be reasonable to expect him to go, the application may be refused."

26. That Parliament in 1993 intended the appellate authorities to ensure that this country's obligations under the Convention are enforced is evident from Section 2 of the 1993 Act which reads:

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

27. Before July 1993, the relevant Immigration Rule (paragraph 75 of HC 251) simply prescribed that cases involving asylum seekers should be referred by immigration officers to the Home Office who were to consider the case in accordance with the provisions of the Convention and Protocol. An effort was then made, with effect from 7th July 1993, to spell out the effect of the Convention in the Immigration Rules themselves: see the new Paragraphs 180A to 180Q introduced into HC 251 of 1990 by HC 725 of 1993 and later, for the new consolidated Rules, see Paragraphs 327-352 of HC 395 of 1994. However, no effort was made, no doubt for very prudent reasons, to codify the meaning of the word 'refugee' in what is now paragraph 334(ii), and the only reference to the concept of the safe haven or the internal flight alternative is contained in paragraph 343, under the heading 'Consideration of cases', which says in effect that if there is a safe haven or internal flight alternative an application for asylum may be refused. This is no more than the obverse side of the proposition that if there is no such safe haven then the claimant will be a refugee within the meaning of the Convention and this country will be bound to grant him asylum, as is made clear in Paragraph 334. Simon Brown LJ reached much the same conclusion in his bracketed observations in *Adan v Secretary of State for the Home Department* [1997] 2 All ER 723 at p 733h-j.

28. It follows that the Tribunal was wrong to hold in *Dupovac, Ahmed* and *Nirmalan* that it had no jurisdiction to consider such issues on an appeal founded on Section 8 of the 1993 Act and that another division of the Tribunal, chaired by the Chief Immigration Adjudicator (Judge Pearl) was correct in *Ikhlaq* (13679) 15th July 1996 to hold that it had. In two recent cases this court has assumed, without hearing argument, that these issues could be considered on a Section 8 appeal: see *Ikhlaq* (unreported, 16th April 1997) per Staughton LJ at p 4, and *R v Immigration Appeal Tribunal ex p Sivanentheran* (unreported, 21st May 1997) per Lord Bingham of Cornhill CJ at p 7. We have now heard full argument on this issue and we are satisfied that the assumption on which the court acted in those two cases was correct in law. What almost certainly led to the division of opinion within the Tribunal which we have now resolved is the language of paragraph 343. The paragraph ends with the words "the application *may* be refused." The discretion to refuse the application which the use of the word "may" connotes is only appropriate because "if there is a part of the country from which the applicant claims to be a refugee in which he would not have a well-founded fear of persecution, and to which it would be reasonable to expect him to go", he would not be *entitled* to have his claim to be a refugee accepted. In the obverse situation he would be so entitled, and no question of discretion would therefore arise.

29. In our judgment, the Secretary of State and the appellate authorities would do well in future to adopt the approach which is so conveniently set out in paragraph 8 of the European Union's Joint Position. Where it appears that persecution is confined to a specific part of a country's territory the decision-maker should ask: can the claimant find effective protection in another part of his own territory to which he or she may reasonably be expected to move? We have set out in paragraphs 18 and 19 of this judgment appropriate factors to be taken into account in deciding what is reasonable in this context. We consider the test suggested by Linden JA - "would it be unduly harsh to expect this person to move to another less hostile part of the country?" - to be a particularly helpful one. The use of the words "unduly harsh" fairly reflects that what is in issue is whether a person claiming asylum can reasonably be expected to move to a particular part of the country.

Grounds not referred to in the notice of appeal

30. We turn now to consider the third point which arises on this appeal. We have observed that the Special Adjudicator did not expressly consider whether it was reasonable to expect the claimant to settle in Colombo. He merely asked himself whether the claimant would have a well-founded fear of persecution if he was returned there. However, he did consider the question whether the claimant had "special characteristics", so that he may have been assuming that Colombo was a safe haven in accordance with previous decisions. No question relating to reasonableness, as opposed to safety, was raised in the grounds of appeal to the Tribunal. Under these circumstances was the Tribunal itself obliged to

consider whether the Special Adjudicator had dealt correctly with questions relating to reasonableness when it considered whether to grant leave to appeal?

31. Mr Blake concedes that the relevant rules of procedure obliged the applicant to say why he thought the Special Adjudicator's decision was wrong (see Asylum Appeals (Procedure) Rules 1993, Rule 13(3) and Part 3 of the Form A2 prescribed in the Schedule to those Rules). He says, however, that this is not the end of the matter, because the Tribunal is part of the decision-making process on the question whether a person is a refugee, and the answer to that question depends, so far as the claimant's part in the process is concerned, on the evidence he presents to the decision-makers and not on the legal arguments he submits, if any. Mr Blake supported this submission by reference to paragraphs 205 and 28-29 of the UNHCR Handbook. His argument ran like this. A person is a refugee within the meaning of the Convention as soon as he fulfils the criteria contained in the Convention definition. At the first stage of the process of determining his refugee status he has to present the relevant facts to the examiner truthfully and honestly. At the second stage it is the duty of the examiner, once he has established the facts, to relate the objective and the subjective elements in the case to the relevant Convention criteria in order to arrive at the correct conclusion as to the claimant's status. Thus if the facts show that he has a well-founded fear of persecution for a Convention reason in one part of a country and he cannot reasonably avail himself of a safe haven or internal flight alternative in any other part of that country then he is unable to avail himself of the protection of that country within the meaning of Article 1A(2), and it is the duty of the decision-maker to see that this is the case when he applies the Convention criteria to the facts he has found.

32. Mr Blake went on to submit that the functions the appellate authorities perform under the 1993 Act necessarily preclude the argument that they are limited, when applying the Convention criteria to the facts they find, to considering the points, if any, raised by the applicant or his advisers. In the context of Tamil asylum seekers, he has shown us that issues relating to the reasonableness of Colombo as a safe haven have cropped up repeatedly in recent years (see, for example, *Vigna* [1993] Imm AR 93 per Roch J at p 94; *Probakaran* [1996] Imm AR 603 per Jowitt J at p 605; and *Vijendran* (unreported, 15th January 1997) per Latham J at p 14 (note that Latham J's test of "satisfactory quality of life" was expressly disapproved by this court in *Sivanentheran* (above)).

33. We were referred during argument to a passage in the judgment of Hobhouse LJ, with which the two other members of this court agreed, when the court refused a renewed application for leave to apply for judicial review of the Tribunal's decision in *Anandanadarajah v Immigration Appeal Tribunal* [1996] Imm AR 514 at p 519. In that passage Hobhouse LJ said, agreeing with the judge:

> "In an application for asylum the applicant has to discharge a burden of proof, place before the adjudicator the material upon which he seeks to rely and to advance the arguments which he considers

> assist his case. In the present matter the only argument of substance which was made to the special adjudicator was that Colombo was an unsafe place for the applicant and that it gave rise to a fear on his part that if he stayed there he would be subjected to persecution of a relevant kind.
>
> The adjudicator did not accept the applicant's evidence on that point and did not accept the only submission that was made to him. Under those circumstances, other categories of reasonableness not having been raised before him, it is not surprising that the adjudicator did not specifically refer to them."

34. In that case the special adjudicator's decision had been challenged on the basis that he had failed to assess the requirement of 'reasonableness' as laid down in paragraph 343 of the rules in respect of Colombo, although this was brought to his attention. In fact, as Hobhouse LJ observed, the only arguments raised before the special adjudicator had related to questions of safety, and the Tribunal had refused leave to appeal on the basis that there was no error of law and that the adjudicator had considered all the points raised before him.

35. Neither leading counsel who appeared before us was concerned to support this dictum of Hobhouse LJ if it was intended to suggest that, even if an appellant does not present a particular argument, a special adjudicator is not obliged to apply his own understanding of the Convention and its jurisprudence to his findings on the facts presented to him. The central issue in these appeals is whether this country would be in breach of its obligations under the Convention if it did not recognise the appellant as a refugee and were to subject him to refoulement contrary to Article 33 of the Convention, and we have shown in this judgment that a question whether a particular part of the appellant's home country affords a safe haven or an internal flight alternative is one which may well have to be considered by a special adjudicator, whether the appellant raises it or not, when deciding pursuant to Rule 334(ii) whether the appellant is a refugee.

36. Of course, it may well be the case that once the special adjudicator has rejected the appellant's case that he has a well-founded fear of persecution for a Convention reason if returned to the part of his country to which he is to be sent back, there is nothing else in his evidence which could reasonably support an argument that it would not be reasonable to return him there. This was the reason why this court refused a renewed application recently in *ex p Sureshkumar* (CAT, 19th December 1996) even though it knew that leave to appeal had been granted in the present case and that the appeal had not yet been heard.

37. It follows from what we have said that it is the duty of the appellate authorities to apply their knowledge of Convention jurisprudence to the facts as established by them when they determine whether it would be a breach of the Convention to refuse an asylum-seeker leave to enter as a refugee, and that they are not limited in their consideration of the facts by the arguments actually advanced by the asylum seeker or his representative. If Hobhouse LJ's dictum is interpreted as adopting a more restrictive approach to the duty of a special adjudicator, then it should not be followed. It

has no greater authority than any other observation made in this court when it refuses a renewed application for leave (see *R v Kensington and Chelsea LBC ex p Kihara* 29 HLR 147, per Simon Brown LJ at p 162) and this court, which has heard full argument on the present appeal, is not bound by it.

38. It is now, however, necessary for us to identify the circumstances in which it might be appropriate for the Tribunal to grant leave to appeal on the basis of an argument not advanced before the special adjudicator, or for a High Court judge to grant leave to apply for judicial review of a refusal of leave by the Tribunal in relation to a point not taken in the Notice of Appeal to the Tribunal.

39. Because the rules place an onus on the asylum-seeker to state his grounds of appeal, we consider that it would be wrong to say that mere arguability should be the criterion to be applied for the grant of leave in such circumstances. A higher hurdle is required. The appellate authorities should of course focus primarily on the arguments adduced before them, whether these are to be found in the oral argument before the special adjudicator or, so far as the Tribunal is concerned, in the written grounds of appeal on which leave to appeal is sought. They are not required to engage in a search for new points. If there is readily discernible an obvious point of Convention law which favours the applicant although he has not taken it, then the special adjudicator should apply it in his favour, but he should feel under no obligation to prolong the hearing by asking the parties for submissions on points which they have not taken but which could be properly categorised as merely "arguable" as opposed to "obvious". Similarly, if when the Tribunal reads the Special Adjudicator's decision there is an obvious point of Convention law favourable to the asylum-seeker which does not appear in the decision, it should grant leave to appeal. If it does not do so, there will be a danger that this country will be in breach of its obligations under the Convention. When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do. It follows that leave to apply for judicial review of a refusal by the Tribunal to grant leave to appeal should be granted if the judge is of the opinion that it is properly arguable that a point not raised in the Grounds of Appeal to the Tribunal had a strong prospect of success if leave to appeal were to be granted.

40. We were invited during the hearing to give more general guidance to the Tribunal about the criteria it should apply when deciding whether to grant leave to appeal. The Tribunal has told us, however, that it is its experience that the circumstances in which it is proper to grant leave to appeal vary greatly and depend on the facts of individual cases. Its discretion to grant or refuse leave is at large under the Asylum Appeals (Procedure) Rules, and counsel for the Tribunal tells us that this position, approved by Parliament, is workable and works satisfactorily. In non-asylum cases, in contrast, the circumstances in which the Tribunal must and may grant leave to appeal are set out (see Immigration Act 1971 s 22(5) and Rule 14 of the Immigration Appeals (Procedure) Rules 1984).

41. In these circumstances we consider it inappropriate, particularly in the absence of much more information than is at present available to us, to give the Tribunal the more general guidance suggested by Counsel. But if this court is not to take this course, it behoves the Tribunal itself to make clear to would-be appellants the general criteria it is accustomed to apply (while leaving room for exceptional cases to be accommodated outside any general statement of criteria) so that its decision-making process in a very important area of its jurisdiction may be both transparent and consistent. There are few things that upset would-be litigants more than a court or tribunal acting in a way which does not appear to be fair and consistent as between different applicants when it is exercising its gate-keeping function of deciding whether to grant leave to access it (see, for comparable complaints about inconsistencies in the way the judges of the Crown Office list were performing a similar function a few years ago, the recent Law Commission report, *Administrative Law: Judicial Review and Statutory Appeals* (1994) Law Com No 226, para 5.13). Provided that the Tribunal exercises its jurisdiction in a consistent and transparent way, giving clear reasons, which should include the reason why it is refusing to grant leave when unusual points have been put to it, we see no reason why we should give guidance in relation to matters with which it is inevitably much more familiar than this court would ever be.

42. Our final task on this appeal is to apply the principles we have set out in this judgment to the facts of the present case. It appears to us that the applicant's advisers were hard-pressed to conjure up out of those facts an "internal flight alternative" case that was even arguable once the Special Adjudicator had rejected the argument that the applicant had a well-founded fear of persecution for a Convention reason in Colombo. They based their arguments on the history of the very short time the applicant spent in Colombo in May-June 1993 when it was in its most disrupted state, following the assassination of the President and the Leader of the Opposition. These arguments ran along these lines:

(1) The applicant had no relatives to accommodate, support and protect him in Colombo;

(2) He had no employment prospects or capacity for independent support in Colombo, and had lived off the proceeds of his mother's jewellery until he left there;

(3) He had no secure accommodation in Colombo and had spent the best part of six weeks moving from address to address to avoid the attention of the authorities; he had arrived in Colombo dressed as a Sinhalese to avoid suspicion but he did not read Sinhalese and had language difficulties;

(4) There was a risk of repetition of his detention in May 1993 in Colombo at the hands of the authorities having regard to his family background, previous history and the understandable interest of the authorities in Colombo in suspect Tamils.

43. The appellate authorities had to consider the position in Colombo very much later than May-June 1993 when they exercised their jurisdiction in this case. The relevant time at which to consider the position was when they each came to make their decisions. We accept Mr Pannick's submission that the fourth argument was not open to the applicant in the light of the Special Adjudicator's findings of fact, unless what is meant is a risk of an occasional detention for questioning following a terrorist incident in Colombo. In our judgment, although it is clear that living in Colombo still creates its problems for Tamils from the north, this is far from being an obvious case of Colombo not being a safe haven or internal flight alternative, and the Tribunal did not err in law in failing to recognise that the special adjudicator had not expressly dealt with it as such. This application is therefore dismissed.

Order: Application dismissed. No order as to costs. Legal Aid taxation of the applicant's costs.