HOUSE OF LORDS

[1988] AC 958, [1988] 1 All ER 193, [1988] 2 WLR 92, [1988] Imm AR 147

Hearing Date: 10 NOVEMBER, 16 DECEMBER 1987

16 December 1987

Index Terms:

Immigration -- Leave to enter -- Refugee -- Asylum -- Fear of persecution held by applicant for refugee status -- Whether 'well-founded' fear to be determined objectively by reference to circumstances prevailing in country of applicant's nationality -- Whether Secretary of State entitled to take into account circumstances unknown to the applicant when deciding whether fear of persecution well founded -- Convention and Protocol relating to the Status of Refugees, art 1(A)(2-- Statement of Changes in Immigration Rules (HC Paper (1982--83) no 169).

Held:

The applicants, six Tamils who were nationals of Sri Lanka, applied for asylum in the United Kingdom. Under art 1(A)(2) of the Convention and Protocol relating to the Status of Refugees, which was for practical purposes incorporated into United Kingdom law by the Statement of Changes in Immigration Rules made by the Secretary of State in 1983, the term 'refugee' applied to any person who 'owing to well-founded fear' of being persecuted for such reasons as his race, religion, nationality or political opinion was unwilling to return to the country of his nationality. The Secretary of State refused the applications on the grounds that on the facts known to him the applicants had no reason to fear persecution if they returned to Sri Lanka. The applicants applied for judicial review of the Secretary of State's decision but the judge dismissed the applications. On appeal the Court of Appeal quashed the Secretary of State's decisions on the ground that he had misinterpreted the expression 'well-founded fear' because an applicant for refugee status had merely to establish that he had what appeared to him to be a well-founded fear of persecution. The Secretary of State appealed.
Held -- The requirement in art 1(A)(2) of the convention that an applicant for refugee status had to have a 'well-founded' fear of persecution if he was returned to his own country meant that there had to be demonstrated a reasonable degree of likelihood that he would be so persecuted, and in deciding whether the applicant had made out his claim that his fear of persecution was well founded the Secretary of State could take into account facts and circumstances known to him or established to his satisfaction but possibly unknown to the applicant in order to determine whether the applicant's fear was objectively justified. Since the Secretary of State had had before him information which indicated that there had been no persecution of Tamils generally or any particular group of Tamils or the applicants in Sri Lanka he had been entitled to refuse the applications on the ground that there existed no real risk of persecution. The appeals would accordingly be allowed.

Notes:

For asylum for refugees, see 18 Halsbury's Laws (4th edn) para 1717.

Cases referred to in the Judgment:

Immigration and Naturalization Service v Cardoza-Fonseca (1987) 94 L Ed 2d 434, US SC.
Immigration and Naturalization Service v Stevic (1984) 467 US 407, US SC. R v Governor of Pentonville Prison, ex p Fernandez [1971] 2 All ER 691, [1971] 1 WLR 987, HL.

R v Secretary of State for the Home Dept, ex p Bugdaycay [1987] 1 All ER 940, [1987] AC 514, [1987] 2 WLR 606, HL.

Introduction:

Conjoined appeals
The Secretary of State for the Home Department appealed, with leave of the Court of Appeal granted on 12 October 1987, against the decision of that court (Sir John Donaldson MR, Neill LJ and Sir Roualeyn Cumming-Bruce) ([1987] 3 WLR 1047) allowing the appeals of the applicants, Saravamuthu Sivakumaran, Skandarajah Vaithialingam, Nadarajah Vilvarajah, Navaratnasingham Vathahan (by his next friend Jeganathan Asokan), Vinasithamby Rasalingan and Kandiah Navaratnam, against the orders of McCowan J hearing the Crown Office list on 25 September 1987 dismissing their applications for judicial review by way of orders of certiorari to quash decisions of the Secretary of State made on various dates refusing their applications for asylum and directing their removal from the United Kingdom. On 29 October 1987 a petition by the Secretary of State that the applicants' appeal be conjoined was allowed by the House of Lords. By an order of the Appeal Committee of the House of Lords dated 2 November 1987 a petition by the United Nations High Commissioner for Refugees that he might have leave to be heard or otherwise to intervene in the appeals was allowed. The facts are set out in the opinion of Lord Keith.

Counsel:

John Laws and Roger Ter Haar for the Secretary of State.
Louis Blom-Cooper QC and Andrew Nicol for Vathahan and Rasalingan.
Michael Beloff QC and Alper Riza for Sivakumaran, Vaithialingam and Vilvarajah.
K S Nathan QC and George Warr for Navaratnam.
R Plender for the United Nations High Commissioner for Refugees.

Judgment-READ:

Their Lordships took time for consideration. 16 December. The following opinions were delivered.
PANEL: LORD KEITH OF KINKEL, LORD BRIDGE OF HARWICH, LORD TEMPLEMAN, LORD GRIFFITHS AND LORD GOFF OF CHIEVELEY

Judgment One:

LORD KEITH OF KINKEL. My Lords, these appeals are concerned with the question of what is the correct test to apply in order to determine whether six Tamils from Sri Lanka, who arrived in this country on various dates between 13 February and 31 May 1987, are entitled to the status of refugee, so as to be enabled, for the time being at least, to remain here.
Each of the Tamils, on or shortly after his arrival, applied for asylum in the United Kingdom, claiming to be a refugee from Sri Lanka. The Secretary of State for the Home Department refused the applications of three of them on 20 August 1987 and of the other three on 1 September 1987. All six were granted leave to apply for judicial review of the Secretary of State's decisions. On 25 September 1987 McCowan J dismissed each of the applications, but on 12 October 1987 the Court of Appeal (Sir John Donaldson MR, Neill LJ and Sir Roualeyn Cumming-Bruce) ([1987] 3 WLR 1047) reversed his judgment and quashed all six decisions. The Secretary of State now appeals, with leave of the Court of Appeal, to this House.
The question at issue in the appeals turns on the proper interpretation of art 1(A)(2) of the United Nations Convention relating to the Status of Refugees (Geneva, 28 July 1951 TS 39 (1954) Cmd 9171). That article, as amended by the Protocol dated 16 December 1966 (New York, 31

January 1967, TS 15 (1969), Cmnd 3906), provides that the term 'refugee' applies to any person who:
'. . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country or who, not having a nationality and being outside the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it . . .'The United Kingdom having acceded to the convention and protocol, their provisions have for all practical purposes been incorporated into United Kingdom law. Rules 16, 73 and 165 of the Statement of Changes in Immigration Rules (HC Paper (1982--83) no 169) (made under s 3(2) of the Immigration Act 1971) provide:

'16. Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugees (Cmd. 9171 and Cmnd. [3906]). Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments.73. Special considerations arise where the only country to which a person could be removed is one to which he is unwilling to go owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Any case in which it appears to the immigration officer as a result of a claim or information given by the person seeking entry at a port that he might fall within the terms of this provision is to be referred to the Home Office for decision regardless of any grounds set out in any provision of these rules which may appear to justify refusal of leave to enter. Leave to enter will not be refused if removal would be contrary to the provisions of the Convention and Protocol Relating to the Status of Refugees.

165. In accordance with the provision of the Convention and Protocol relating to the Status of Refugees, a deportation order will not be made against a person if the only country to which he can be removed is one to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion.'
The critical words in art 1(A)(2) of the convention are 'well-founded fear' of being persecuted for what may compendiously be called 'a convention reason'. The Court of Appeal's view of the meaning of these words, as expressed in the judgment of the court delivered by Sir John Donaldson MR, was as follows ([1987] 3 WLR 1047 at 1052--1053):
'Authority apart, we would accept that ''well-founded fear'' is demonstrated by proving (a) actual fear and (b) good reason for this fear, looking at the situation from the point of view of one of reasonable courage circumstanced as was the applicant for refugee status. Fear is clearly an entirely subjective state experienced by the person who is afraid. The adjectival phrase ''well-founded'' qualifies, but cannot transform, the subjective nature of the emotion. The qualification will exclude fears which can be dismissed as paranoid, but we do not understand why it should exclude those which, although fully justified on the face of the situation as it presented itself to the person who was afraid, can be shown objectively to have been misconceived. A simple, but graphic, example will illustrate our point. A bank cashier confronted with a masked man who points a revolver at him and demands the contents of the till could without doubt claim to have experienced ''a well-founded fear''. His fears would have been no less well-founded if, one minute later, it emerged that the revolver was a plastic replica or a water pistol.'The Court of Appeal, in quashing the Secretary of State's decisions, proceeded on the basis that he had interpreted 'well-founded fear' as meaning that the applicant for refugee status must establish not only that he in fact feared persecution for a convention reason, but also that the fear was objectively justified. It held that this was a misinterpretation, and that the Secretary of State should therefore consider the application anew, in the light of what it had decided to be the correct interpretation. It was not found that the applicants were in fact entitled to refugee status. As was made clear by this House in R v Secretary of State for the Home Dept, ex p Bugdaycay [1987] 1 All ER 940, [1987] AC 514, the decision on that matter was one for the Secretary of State alone, not for the court exercising judicial review. Counsel for the Secretary of State argued that, while the existence of a state of fear in the applicant for asylum was clearly a

subjective matter, the question whether the fear was well founded fell to be assessed by the Secretary of State on an objective basis in the light of facts and circumtances known to him or established to his satisfaction. The test was whether in the light of those facts and circumstances there was a real and substantial risk that the applicant would be persecuted for a convention reason if returned to the country of his nationality.

Counsel for the applicants Vathahan and Rasalingan did not seriously dispute the correctness of the test propounded by counsel for the Secretary of State, but he maintained that the Secretary of State had not applied it in this case. On the other hand, counsel for the applicant Navaratnam and counsel for the remaining three applicants supported the formulation favoured by the Court of Appeal, as in the main did counsel for the United Nations High Commissioner for Refugees, to whom the House granted leave to intervene. The construction contended for by the Secretary of State finds some support in other provisions of the convention. Thus section C of art 1 provides that the convention shall cease to apply to any person falling under the terms of section A if, inter alia--
'(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality . . .'subject to a proviso which does not apply to a person who qualifies as a refugee under art 1(A)(2).

There is a similar provision in para (6) of section C in relation to a person who has no nationality. It is a possible interpretation of these provisions that 'the circumstances in connexion with which he has been recognized as a refugee' refer only, so far as an art 1(A)(2) refugee is concerned, to the fact that the person formerly had a well-founded fear of persecution for a convention reason. But a more likely interpretation is that the 'circumstances' contemplated as having ceased to exist are those which caused the original fear of persecution to be well founded. The question whether such circumstances have ceased to exist can only be one to be determined objectively, in the light of any new circumstances presently prevailing in the country of the person's nationality. It is a reasonable inference that the question whether the fear of persecution held by an applicant for refugee status is well founded is likewise intended to be objectively determined by reference to the circumstances at the time prevailing in the country of the applicant's nationality. This inference is fortified by the reflection that the general purpose of the convention is surely to afford protection and fair treatment to those for whom neither is available in their own country and does not extend to the allaying of fears not objectively justified, however reasonable these fears may appear from the point of view of the individual in question.
The Court of Appeal's formulation would accord refugee status to one whose fears, though genuine, were objectively demonstrated to have been misconceived, that is to say one who was at no actual risk of persecution for a convention reason. The Court of Appeal would qualify this by denying refugee status to one who, while holding a genuine fear, was not a person of reasonable courage, so that his fears were not such as a person of that degree of courage would entertain. The differentiation means that the fears of some, but not those of others, would be allayed, and it might be by no means easy to decide what degree of courage a person of ordinary fortitude might be expected to display. Further, the court's illustration of the bank cashier threatened by an imitation firearm does not truly support the thesis for which it is prayed in aid. An objective observer of the scene would agree that at the time the imitation firearm was presented the cashier's fear was well founded. But once it became clear that the firearm was an imitation the fear, if it continued to exist, would no longer be well founded. Fear of persecution, in the sense of the convention, is not to be assimilated to a fear of instant personal danger arising out of an immediately presented predicament. The claimant to refugee status is not immediately threatened with danger arising out of a situation then confronting him. The question is what might happen if he were to return to the country of his nationality. He fears that he might be persecuted there. Whether that might happen can only be determined by examining the actual state of affairs in that country. If that examination shows that persecution might indeed take place then the fear is well founded. Otherwise it is not. The Court of Appeal found some support for its formulation of the test in a decision of the United States Supreme Court in Immigration and Naturalization Service v Cardoza-Fonseca (1987) 94 L Ed 2d 434. It was there

held by a majority that in order for an alien to show a 'well-founded fear of persecution' within the meaning of sc 101(a)(42) of the Immigration and Nationality Act
1952 (8 USC scsc 1011--1525), so as to be eligible for consideration for asylum as a refugee under sc 208(a) of the Act, the alien need not prove that it was more likely than not that he or she would be persecuted on return to his or her own country. The effect of sc 208(a) was that an alien who qualified as a refugee under sc 101(a)(42) (which reflected the language of art 1(A)(2) of the convention) might be granted asylum at the direction of the Attorney General. Under another section (sc 243(h)) of the Act deportation of an alien to any country was prohibited if the Attorney General determined that his--
'life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.'The Supreme Court had previously decided, in Immigration and Naturalization Service v Stevic (1984) 467 US 407, that to qualify under sc 243(h) an alien had to prove that it was more likely than not that he would be persecuted. It was argued for the government in and Naturalization Service v Cardoza-Fonseca that the same standard of proof was applicable to determine refugee status under sc 101(a)(42). The Supreme Court rejected this argument. Stevens J, delivering the majority opinion, observed that the 'would be threatened' language in sc 243(h) had no subjective component, whereas the word 'fear' in sc 101(a)(42) made the eligibility determination turn to some extent on the subjective mental state of the alien (see 94 L Ed 2d 434 at 447). Later he said:

'That the fear must be ''well-founded'' does not alter the obvious focus on the individual's subjective beliefs, nor does it transform the standard into a ''more likely than not'' one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.'Stevens J stated that there was no room for the view that because an applicant had only a 10% chance of being shot, tortured or otherwise persecuted he or she had no 'well-founded fear' of the event happening (at 453). Quoting from Immigration and Naturalization Service v Stevic he said:

'. . . so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.'Stevens J also referred with approval to the views of certain academic writers, quoted in a footnote, referring to 'a real chance that he will suffer persecution' and '[the] appropriate test is ''reasonable chance,'' ''substantial grounds for thinking,'' or ''serious possibility'' ' (at 452--453). It would accordingly appear that Stevens J was of opinion that it was appropriate to weigh up on the basis of an objective situation established by evidence whether or not there was a reasonable chance or serious possibility of persecution. There is no suggestion that the matter should be looked at only from the point of view of the individual claiming to have the well-founded fear. The case, accordingly, does not support the Court of Appeal's formulation of the test, but rather favours that put forward by counsel for the Secretary of State.

In my opinion the requirement that an applicant's fear of persecution should be well founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a convention reason if returned to his own country. In R v Governor of Pentonville Prison, ex p Fernandez [1971] 2
All ER 691, [1971] 1 WLR 987 this House had to construe s 4(1)(c) of the Fugitive Offenders Act 1967, which requires that a person shall be returned under the Act if it appears--
'that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reasons of his race, religion, nationality or political opinions.'Lord Diplock said ([1971] 2 All ER 691 at 697, [1971] 1 WLR 987 at 994):

'My Lords, bearing in mind the relative gravity of the consequences of the court's expectation being falsified either in one way or in the other, I do not think that the test of the applicability of para (c) is that the court must be satisfied that it is more likely than not that the fugitive will be detained or restricted if he is returned. A lesser degree of likelihood is, in my view, sufficient and I would not quarrel with the way in which the test was stated by the magistrate or with the alternative way in which it was expressed by the Divisional Court. ''A reasonable chance'',

''substantial grounds for thinking'', ''a serious possibility''--I see no significant difference between these various ways of describing the degree of likelihood of the detention or restriction of the fugitive on his return which justifies the court in giving effect to the provisions of s 4(1)(c).'I consider that this passage appropriately expresses the degree of likelihood to be satisfied in order that a fear of persecution may be well founded. Counsel for the UN High Commissioner presented a careful and thoughtful argument largely based on the travaux praaeparatoires of the convention and protocol. The relevant expressions used in these works, such as 'good reason' or 'reasonable grounds' for fear of persecution, present questions of interpretation similar to those which arise as to the meaning of 'well-founded fear' in the convention itself. As I have indicated, the convention provides a context which throws some light on that meaning, and in the result I have not found that the oeuvres praaeparatoires provide helpful guidance nor any persuasive indication that the objective approach to 'well-founded' is erroneous. I may add that I agree with observations on the argument of counsel for the UN High Commissioner which are contained in the speech of my noble and learned friend Lord Goff.

If the Court of Appeal's formulation of the test were correct, then the decisions of the Secretary of State undoubtedly would fall to be quashed. The terms of his decision letters make it clear that he has proceeded on the basis of the objective situation in Sri Lanka as understood by him. The affidavit of Mr Potts, an official of the Home Office, indicates that the Secretary of State took into account reports of the refugee unit of his department compiled from sources such as press articles, journals and Amnesty International publications, and also information supplied to him by the Foreign Office and as a result of recent visits to Sri Lanka by ministers. It is well known that for a considerable time Sri Lanka, or at least certain parts of that country, have been in a serious state of civil disorder, amounting at times to civil war. The authorities have taken steps to suppress the disorders and to locate and detain those responsible for them. These steps, together with the activities of the subversives, have naturally resulted in painful and distressing experiences for many persons innocently caught up in the troubles. As the troubles have occurred principally in areas inhabited by Tamils, these are the people who have suffered most. The Secretary of State has in his decision letters expressed the view that army activities aimed at discovering and dealing with Tamil extremists do not constitute evidence of persecution of Tamils as such. This was not disputed by counsel for any of the applicants, nor was it seriously maintained that any sub-group of Tamils, such as young males in the north of the country, were being subjected to persecution for any convention reason. It appears that the Secretary of State, while taking the view that neither Tamils generally nor any group of Tamils were being subjected to such persecution, also considered whether any individual applicant had been so subjected and decided that none of them had been. Consideration of what had happened in the past was material for the purpose of assesing the prospects for the future. It was argued that the Secretary of State's decision letters did not clearly indicate that he had applied the 'real and substantial risk' test, but left it open that he might have applied a 'more likely than not' test. But there is clearly to be gathered from what the Secretary of State has said that in his judgment there existed no real risk of persecution for a convention reason. My Lords for these reasons I would allow the appeals and restore the orders of McCowan J.

Judgment Two:

LORD BRIDGE OF HARWICH. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Keith, Lord Templeman and Lord Goff. I agree with them and for the reasons they give I would allow the appeals and restore the order of McCowan J.

Judgment Three:

LORD TEMPLEMAN. My Lords, in order for a 'fear' of 'persecution' to be 'well founded' there must exist a danger that if the claimant for refugee status is returned to his country of origin he will meet with persecution. The United Nations Convention relating to the Status of Refugees

(Geneva, 28 July 1951 TS 39 (1954) Cmd 9171) does not enable the claimant to decide whether the danger of persecution exists. The convention allows that decision to be taken by the country in which the claimant seeks asylum. Under the Immigration Act 1971 applications for leave to enter the United Kingdom, including applications based on a claim to refugee status, are determined by the immigration authorities constituted by the 1971 Act. By the rules made under the 1971 Act the appropriate authority to determine whether a claimant is a refugee is the Secretary of State. The task of the Secretary of State in the present proceedings was and is to determine in the case of each applicant whether the applicant will be in danger of persecution if he is sent back to Sri Lanka. Danger from persecution is obviously a matter of degree and judgment. The Secretary of State accepts that an applicant who fears persecution is entitled to asylum in this country unless the Secretary of State is satisfied that there is no real and substantial danger of persecution. The Secretary of State has concluded that there is no real and substantial danger of persecution. In R v Secretary of State for the Home Dept, ex p Bugdaycay [1987] 1 All ER 940 at 955--956, [1987] AC 514 at 535--537 I pointed out: 'Applications for leave to enter and remain do not in general raise justiciable issues. Decisions under the Act are administrative and discretionary rather than judicial and imperative. Such decisions may involve the immigration authorities in pursuing inquiries abroad, in consulting official and unofficial organisations and in making value judgments. The only power of the court is to quash or grant other effective relief in judicial review proceedings in respect of any decision under the 1971 Act which is made in breach of the provisions of the Act or the rules thereunder or which is the result of procedural impropriety or unfairness or is otherwise unlawful . . . where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process.'In the present case an examination of the decision-making process does not disclose any error on the part of the Secretary of State or justify the court in contradicting his view that the applicants will not be in danger of persecution if they are returned to Sri Lanka. I agree that the appeals must be allowed.

Judgment Four:

LORD GRIFFITHS. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Keith, Lord Templeman and Lord Goff. I agree with them and for the reasons they give I would allow the appeals and restore the order of McCowan J.

Judgment Five:

LORD GOFF OF CHIEVELEY. My Lords, the manner in which the issue in the present case came before your Lordships' House was almost calculated to undermine confidence in the test adopted by the Court of Appeal. First, the issue appears barely to have surfaced in argument before McCowan J and so was only touched on by him in a brief passage in his judgment. Second, Sir John Donaldson MR ([1987] 1 WLR 1047 at 1052--1053) supported the test favoured by the Court of Appeal by reference to an example (a bank cashier held up by a masked man armed with an imitation gun) which appears to me, as it does to my noble and learned friend Lord Keith, to be inapposite. Third, in argument before your Lordships, counsel for certain of the applicants abandoned any support for the Court of Appeal's test the continued support of counsel for the applicants Sivakumaran, Vaithialingam and Vilvarajah for it could hardly be described as enthusiastic only counsel for the applicant Navaratnam was prepared to give it his whole-hearted support. In truth, however, it was not until counsel for the intervener, the United Nations High Commissioner for Refugees, made his submissions that the substance of the argument became fully exposed. It is, I think, important to state precisely the form of the competing interpretations of 'well-founded fear' in art 1(A)(2) of the United Nations Convention relating to the Status of Refugees (Geneva, 28 July 1951 TS 39 (1954) Cmd 9171). The view of the Court of Appeal, as expressed in the judgment of Sir John Donaldson MR, was that 'well-founded fear' is demonstrated by proving (a) actual fear, and (b) good reason for that fear, looking at the situation from the point of view of a person of reasonable courage circumstanced

as was the applicant for refugee status. The submission of counsel for the Secretary of State was that a claimant for refugee status must establish (1) that he was afraid that he would be persecuted for a convention reason and (2) that there existed a real or substantial risk or danger that he would in fact be so persecuted if returned to the country in question. The submission of counsel for the UN High Commissioner was that a 'well-founded fear' means fearing with reason. It followed that a claimant for refugee status need only show that he had 'good reason' to fear persecution for a convention reason, i e that, on the basis of objective facts, his fear was reasonable and plausible. Counsel accepted that, in applying that test, the Secretary of State was entitled to take into account circumstances unknown to the applicant but he submitted that the question was whether, on the basis of the objective facts as ascertained by the Secretary of State, a reasonable man, in the position of the applicant, would think that there was a risk.
Now, when I consider these competing submissions, three matters immediately strike me. The first is that, as I have already indicated, Sir John Donaldson MR's example of the imitation firearm is not apposite on the approach proposed by the UN High Commissioner for the Secretary of State could, by his own inquiries, ascertain whether the applicant was acting on the basis of a straightforward misapprehension as to the facts and, if so, proceed on the basis of the true facts. The second is that the rival interpretations of the Secretary of State and of the High Commissioner are not far apart, because each proceeds on the basis of the objective facts, and not exclusively on the basis of the facts known to the applicant, or believed by him to be true. It is for that reason that (although, in agreement with my noble and learned friend Lord Keith, I consider that art 1(C)(5) and (6) of the convention provides insuperable barriers to the test favoured by the Court of Appeal) I do not derive any assistance from those provisions when considering the rival interpretations of the High Commissioner and the Secretary of State. It seems to me that they are equally apt to be applied on the basis of either interpretation, because on each interpretation the refugee will have been admitted on the basis of objective facts which, under art 1(C)(5) or (6), will have ceased to exist. The third matter is that the rival approaches of the Secretary of State and the High Commissioner are both coloured by policy considerations to which each, very understandably, attaches importance. Following the decision of the Court of Appeal, the Secretary of State is evidently concerned that this country, which is regarded as a suitable haven by many applicants for refugee status, may become flooded with persons seeking to acquire refugee status when, objectively considered, there is no real risk of their being persecuted for a convention reason. The High Commissioner, on the other hand, is concerned, as your Lordships were told, by the fact that circumstances do arise in which certain states are reluctant to grant refugee status for fear of prejudicing relations with the country where it is alleged by the applicant that a danger of persecution exists it is thought that they may find it easier to overcome this reluctance if they are released from the burden of deciding whether, in their own judgment, there is or is not such a risk. I must confess to feeling sympathy for both points of view. But in the end the question has to be decided as a matter of construction, on established principles. As I see it, the crucial question is this: does the applicant have to establish, as the Secretary of State asserts, that, on the objective facts, a real or substantial risk of persecution for a convention reason actually exists? Or does he only have to establish, as the High Commissioner asserts, that, on the same facts, fear by the applicant of persecution for a convention reason is reasonable and plausible? As I have already stated, since on either test the Secretary of State is entitled to take into account objective facts not known to the applicant, there is, in my opinion, not a great deal of difference in the result between these two tests indeed, I cannot help feeling that, in the majority of cases, both tests would lead to the same conclusion. In support of his submissions, counsel for the High Commissioner advanced three main arguments. First, he relied on the objects of the convention. The convention, he submitted, had its origin in the need to protect displaced persons fleeing from eastern Europe after the 1939--45 war on account of reasonably held fears of persecution and the preamble to the 1951 convention reflected the profound concern of the United Nations for refugees and the need to assure refugees of the widest possible protection of their fundamental rights and freedoms. It therefore followed, asserted counsel, that the provisions of the 1951 convention should be interpreted liberally, with this humanitarian objective in mind. Second, counsel relied on the travaux praaeparatoires for the convention, so far as they related to the expression 'well-

founded fear' of persecution. He referred your Lordships in particular to the original United Kingdom proposal, and to other proposals advanced by France and the United States, to the report by the United Nations Ad Hoc Committee on Statelessness and Related Problems and that committee's comments on the draft convention, and to the Constitution of the International Refugee Organisation, the ad hoc committee having asserted its intention to afford by the new convention at least as much protection for refugees as had been provided by previous 'agreements', among which must be included the Constitution of the International Refugee Organisation. Third, he invoked the Handbook on Procedures and Criteria for Determining Refugee Status issued by the High Commissioner in September 1979, para 42 of which reads as follows:

'As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin--while not a primary objective--is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded it he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.'On the basis of this material, counsel for the High Commissioner sought to support the statement of Sir John Donaldson MR in the Court of Appeal ([1987] 3 WLR 1047 at 1052):

'Fear is clearly an entirely subjective state experienced by the person who is afraid. The adjectival phrase ''well-founded'' qualifies, but cannot transform, the subjective nature of the emotion.'I am, however, unable to accept these submissions. The objects of the convention are, in my opinion, consistent with the interpretation of the Secretary of State, for those objects will surely be fulfilled if refugee status is afforded in cases where there is a real and substantial risk of persecution for a convention reason. The travaux praaeparatoires, which I have studied with care, do not appear to me to be inconsistent with the interpretation of the Secretary of State. Paragraph 42 of the Handbook amounts to a statement of the point of view espoused by the High Commissioner but provides no justification for that point of view as a matter of construction. Above all, none of the material on which counsel for the High Commisisoner relied seemed to me to face up to the basic artificiality of the approach which he sought to support. A purely subjective approach, such as that apparently favoured by the Court of Appeal, has at least the merit of inherent consistency. But once it is accepted that the Secretary of State is entitled to look not only at the facts as seen by the applicant, but also at the objective facts as ascertained by himself in relation to the country in question, he is, on the High Commissioner's approach, not asking himself whether the actual fear of the applicant is plausible and reasonable: he is asking himself the purely hypothetical question whether, if the applicant knew the true facts, and was still (in the light of those facts) afraid, his fear could be described as plausible and reasonable. On this approach, the Secretary of State is required to ask himself a most unreal question. His appreciation is in any event likely to be coloured by his own assessment of the objective facts as ascertained by him and it appears to me that the High Commissioner's approach is not supported, as a matter of construction, by the words of the convention, even having regard to its objects and to the travaux praaeparatoires. In truth, once it is recognised that the expression 'well-founded' entitles the Secretary of State to have regard to facts unknown to the applicant for refugee status, that expression cannot be read simply as 'qualifying' the subjective fear of the applicant, it must, in my opinion, require that an inquiry should be made whether the subjective fear of the applicant is objectively justified. For the true object of the convention is not just to assuage fear, however reasonably and plausibly entertained, but to provide a safe haven for those unfortunate people whose fear of persecution is in reality well founded.

For these reasons, I too would allow the appeals. I wish, however, to add one or two footnotes. First, I respectfully agree with my noble and learned friend Lord Keith, for the reasons given by

him, that the requirement that the applicant's fear must be well founded means no more than that there has to be demonstrated a reasonable degree of likelihood of his persecution for a convention reason indeed, I understand the submission of counsel for the Secretary of State, that there must be a real and substantial risk of persecution, to be consistent with that interpretation. Second, it is not to be forgotten that the Secretary of State has in any event an overriding discretion to depart from the immigration rules and admit an applicant for refugee status if he considers it just to do so. Third, I am with all respect unable to agree with the view expressed by Sir John Donaldson MR that different tests are applicable under art 1 and art 33 of the convention (see [1987] 3 WLR 1047 at 1051). Article 33(1) provides as follows:
'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.'Sir John Donaldson MR suggested that, even if the Secretary of State decides that an applicant is a refugee as defined in art 1, nevertheless he has then to decide whether art 33, which involves an objective test, prohibits a return of the applicant to the relevant country (at 1053). I am unable to accept this approach. It is, I consider, plain, as indeed was reinforced in argument by counsel for the High Commissioner with reference to the travaux praaeparatoires, that the non-refoulement provision in art 33 was intended to apply to all persons determined to be refugees under art 1 of the convention. I cannot help feeling, however, that the consistency between arts 1 and 33 can be more easily accepted if the interpretation of 'well-founded fear' in art 1(A)(2) espoused by the Secretary of State is adopted rather than that contended for by the High Commissioner. Finally, I wish to express my understanding of the objectives of the High Commissioner, and my appreciation of the argument advanced by counsel on his behalf. It may be that the High Commissioner will be unpersuaded by the opinions expressed in your Lordships' House, in which event he can continue conscientiously to express the views set out in para 42 of the Handbook. But I cannot myself conscientiously hold that the Secretary of State is bound by that approach and I feel confident that the High Commissioner need entertain no well-founded fear that, in this country, the authorities will feel in any way inhibited from carrying out the United Kingdom's obligations under the convention by reason of their having to make objective assessments of conditions prevailing in other countries overseas.

DISPOSITION:

Appeals allowed.

SOLICITORS:

Treasury Solicitor; Winstanley-Burgess (for Sivakumaran, Vaithialingam, Vilvarajah, Vathahan and Rasalingan); Chatwani & Co, Southall (for Navaratnam); Fox & Gibbons (for the UN High Commissioner).