Hilary Term
[2012] UKSC 12
On appeal from: [2010] EWCA Civ 643

JUDGMENT

R (on the application of ST (Eritrea)) (FC) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Hope, Deputy President
Lady Hale
Lord Brown
Lord Mance
Lord Kerr
Lord Clarke
Lord Dyson

JUDGMENT GIVEN ON

21 March 2012

Heard on 13 and 14 February 2012

Appellant	*Respondent*
Richard Drabble QC	Lisa Giovannetti QC
Eric Fripp	Rory Dunlop
Emma Daykin	
(Instructed by Duncan Lewis Solicitors)	(Instructed by Treasury Solicitors)

LORD HOPE (with whom Lady Hale, Lord Brown, Lord Mance, Lord Kerr and Lord Clarke agree)

1. A refugee who has been granted a right of lawful presence in the receiving state needs the assurance that this right will not be withdrawn, with the result that he or she may again become an uprooted person in search of refuge. That assurance is given by article 32(1) of the Geneva Convention relating to the Status of Refugees (1951) (Cmd 9171) and the New York Protocol (1967) (Cmnd 3906), which provides:

> "The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."

This provision is to be contrasted with article 33(1), which provides:

> "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."

Every refugee has the protection of article 33. The protection of article 32 is more generous. Its effect is that, once a refugee has been admitted or his presence has been legalised and so long as entitlement to refugee status continues, he is entitled to stay indefinitely in the receiving state. He can only forfeit that right by becoming a risk to national security or by disturbing the public order. But he requires to have been afforded a certain degree of attachment to the receiving state before this privilege becomes available.

2. The question that this case raises is the extent of the attachment that is needed to attract that protection. Does the protection of article 32 extend to a refugee who has been temporarily admitted to the United Kingdom according to the rules of its domestic law and has engaged with the processes that its legislation provides to determine his status, but has not yet been given leave to enter or to remain here? In other words, does article 32 apply only to a refugee who has been given the right lawfully to stay in the contracting state, as its domestic law would answer that question? Or must the words "lawfully present in the territory" be given an extended and autonomous meaning, so as to ensure that a refugee who has not yet been given a right to remain in the territory is afforded protection under

article 32 that extends beyond the basic obligation under article 33 not to expel or return ("refouler") to a territory where his life or freedom would be threatened for a Convention reason? Should they be given this extended meaning to prevent his removal to a country where he will not be able to enjoy the full extent of the rights that the Convention extends to a refugee?

The facts

3. The appellant is of Eritrean nationality. But she has never lived in Eritrea. She was born on 2 July 1981 and was formerly resident in Ethiopia. She came to the United Kingdom on 3 July 1998. Immediately on her arrival in this country she claimed protection as a refugee. Her reason was that she feared persecution in both Eritrea and Ethiopia. Her claim was registered, and she was granted temporary admission into the United Kingdom under paragraph 21 of Schedule 2 to the Immigration Act 1971.

4. Paragraph 16 of Schedule 2 provides that a person liable to examination and removal upon his arrival in the United Kingdom may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter. Paragraph 21 of the Schedule provides that a person liable to detention under paragraph 16 may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained. Section 11(1) of the 1971 Act provides that a person who has not otherwise entered the United Kingdom shall be deemed (for the purposes of that Act) not to do so as long as he is detained, or temporarily admitted or released while liable to detention under the powers conferred by Schedule 2 to the Act.

5. The appellant's status has not changed since the date of her arrival more than 13 ½ years ago. Her temporary admission has been extended from time to time, and she remains liable to detention. The latest notification of temporary admission was issued to her on 17 October 2011. She was told that she must reside at the address given on the notification form and she was to report to an immigration official on 22 December 2011 and then on the fourth Thursday every two months. She was also told that she was not allowed to work or engage in any business unless she had been explicitly granted permission to do so. These instructions assume that, as she has been given temporary admission only and is still liable to be detained, she is not entitled to the rights that articles 18 and 26 of the Convention afford to refugees who are lawfully in this country's territory: see para 23, below.

6. The appellant claimed in a statement made shortly after her arrival that she had a well-founded fear of persecution if she were to be returned to Ethiopia. This was because she was afraid that Ethiopia would send her to Eritrea. In a later statement she said that she feared persecution in Eritrea because she had not taken part in the war between Eritrea and Ethiopia. Her claims for asylum and humanitarian protection were refused in a letter dated 1 November 2004. In a notice of refusal of leave to enter dated 5 November 2004 she was informed that the Secretary of State proposed to give directions for her removal to Eritrea. She appealed to an adjudicator. In a decision that was promulgated on 14 February 2005 the adjudicator said that he was satisfied that she would be at serious risk of persecution or ill-treatment because of her religion as a born-again Christian if she were to be removed to Eritrea. But he was not satisfied that she would be considered as a draft evader or a deserter. He dismissed her appeal on the basis that she could safely be returned to Ethiopia.

7. The appellant sought permission to appeal to the Immigration Appeal Tribunal. This was on the basis that the adjudicator, having found her to be of Eritrean nationality, should have allowed her appeal as he found that she had a well-founded fear of persecution in Eritrea. On 23 January 2006 her appeal came before the Asylum and Immigration Tribunal, as the Immigration Appeal Tribunal had now become. It was conceded on behalf of the Secretary of State that her appeal should have been allowed, as the proposal that had been communicated to the appellant on 5 November 2004 was that directions were to be given for her removal to Eritrea. In his determination, which was promulgated on 1 February 2006 and forwarded to the appellant's representatives on 20 February 2006, the senior immigration judge said that the tribunal was satisfied that the adjudicator had erred in law. But, using the adjudicator's clear and reasoned findings of fact, which were not challenged, the tribunal found that the appellant was a refugee and that she was entitled to international protection as her fear of persecution for a Convention reason in Eritrea was well-founded. It also found that her removal to Eritrea would be unlawful as it would lead to her ill-treatment contrary to her protected rights under article 3 of the European Convention on Human Rights. The Secretary of State did not appeal against this decision.

8. On 24 August 2006 the Secretary of State issued a fresh "reasons for refusal" letter and served a new notice of decision to refuse the appellant leave to enter. Notwithstanding the fact that the appellant had already been recognised to be a refugee from Eritrea, she was told that this time her asylum and human rights claims had been examined on the basis that she was an Ethiopian national. She was refused leave to enter the United Kingdom, and she was notified that it was proposed to give directions for her removal to Ethiopia. The letter stated that, in the light of all the evidence available, it had been concluded that the appellant had not established a well-founded fear of persecutions in Ethiopia and did not qualify for asylum, that her asylum claim was refused and that it had been recorded as

determined on 1 November 2004. It also stated that it had been concluded that her removal would not be contrary to the United Kingdom's obligations under the ECHR.

9. The appellant lodged an appeal against this decision in order to protect her position. But her primary position is that she is entitled to the status of a refugee on the basis of the determination by the Asylum and Immigration Tribunal of 1 February 2006. On 25 September 2006 the appellant commenced these proceedings for judicial review of the decision of 24 August 2006. She seeks a mandatory order requiring the Secretary of State to implement the decision of the AIT granting her leave to remain in the United Kingdom as a refugee, and an order quashing the decision in the letter of 24 August 2006 refusing her leave to remain and proposing that directions be given for her removal to Ethiopia. The Ethiopian appeal has been adjourned pending the outcome of these proceedings.

10. In a letter dated 13 November 2006 which was annexed to his Summary Grounds of Defence the Secretary of State informed the appellant's solicitors that he was no longer proceeding on the basis that the appellant was an Ethiopian national. He was proceeding on the basis that she was an Eritrean national. But he maintained his position that the appellant could safely be removed to Ethiopia for the reasons given in the letter of 24 August 2006.

11. The appellant was granted permission to apply for judicial review by Pitchford J on 27 February 2007. On 19 December 2008 Nicola Davies QC, sitting as a deputy judge of the High Court, quashed the decision declining to grant the appellant refugee status and ordered the Secretary of State to recognise her as a refugee and grant her leave to remain: [2008] EWHC 3162 (Admin). In para 22 of her judgment she said:

> "I am satisfied that a determination of the 'refugee' status of the claimant in accordance with article 1 of the Refugee Convention was made by an appropriate tribunal, the AIT. The decision is binding upon the defendant and affords the claimant the protection of article 32(1). Accordingly I grant the relief sought by the claimant."

In reaching this decision the deputy judge applied the following observation of Lord Brown of Eaton-under-Heywood in *Szoma v Secretary of State for Work and Pensions* [2005] UKHL 64, [2006] 1 AC 564, para 24:

> "The term 'refugee' in article 32(1) of the Refugee Convention can only mean someone already determined to have satisfied the article 1

> definition of that term (as for example in article 23 although in contrast to its meaning in article 33). Were it otherwise there would be no question of removing asylum seekers to safe third countries and a number of international treaties, such as the two Dublin Conventions (for determining the EU state responsible for examining applications lodged in one member state) would be unworkable."

As she saw it, therefore, the effect of the tribunal's determination that the appellant was a refugee of itself meant that she had a right to stay in this country under article 32.

12. The Court of Appeal (Sir Anthony May P, Longmore and Stanley Burnton LJJ) reversed the judge's decision [2010] EWCA Civ 643, [2010] 1 WLR 2858. In para 48 of his judgment Stanley Burnton LJ said that he would hold:

> "that article 32 applies only to a refugee who has been granted leave to enter and to stay in the United Kingdom. I would reject the contention that temporary admission or leave to enter for the purpose of the determination of a claim for asylum (or any other ground for claiming a right to stay) renders a stay lawful for the purpose of article 32. The purpose of article 32 is to give security of residence to a refugee who has been given the right to live in the contracting state in question."

He declined to apply Lord Brown's statement in *Szoma v Secretary of State for Work and Pensions*. In para 45 he acknowledged that the decision in that case was binding authority of the meaning of "lawfully present in the United Kingdom" in paragraph 4 of Part 1 of the Schedule to the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 (SI 2000/636), which was the provision under consideration in that case. But he said that it was clear that Lord Brown was not deciding any question of removability under the 1971 Act. He also held that the appeal that was determined by the tribunal was not a status appeal under section 83 of the Nationality, Immigration and Asylum Act 2002, but an appeal against an immigration decision under section 82 of that Act. So it could not have the effect of a direction to the Secretary of State to grant asylum: para 58.

The legislative provisions

13. As the Secretary of State's argument is that the answer to the question whether a refugee is "lawfully" in the territory must be determined solely with

reference to domestic law, the provisions of domestic law which are relevant to the appellant's case form an important part of the background.

14. The leading provision is section 11(1) of the Immigration Act 1971, which provides:

> "A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention, under the powers conferred by Schedule 2 to this Act."

In *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, the House of Lords applied that provision to the case of Mr Musisi, an asylum seeker of Ugandan nationality who had come to this country from Kenya and had been refused leave to enter the United Kingdom. It held that, even if he were properly to be treated as a refugee from Uganda, this would not present an obstacle to his return to Kenya. The argument that he was protected by article 32 because his status as a refugee meant that he was "lawfully in" the territory was rejected. Lord Bridge of Harwich said at p 526:

> "The United Kingdom was already a party to the Convention when the Act was passed and it would, to my mind, be very surprising if it had the effect contended for. But I am satisfied that the deeming provision enacted by section 11(1) makes Mr Collins's submission on this point quite untenable."

15. Then there are the provisions which set out the procedure that is to be adopted. Paragraph 2 of Schedule 2 to the 1971 Act provides for the examination of persons who have arrived in the United Kingdom by immigration officers for the purpose of determining whether, if he is not patrial, he may or may not enter the United Kingdom without leave and, if he may not, he should be given leave or should be refused leave. Paragraph 16(1) provides:

> "A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an

> immigration officer pending his examination and pending a decision to give or refuse him leave to enter."

Paragraphs 21(1) and (2) provide (as amended by section 10 of and paragraph 10 of the Schedule to the Immigration Act 1988):

> "(1) A person liable to detention or detained under paragraph 16 … above may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or be released from detention; but this shall not prejudice a later exercise of the power to detain him.
>
> (2) So long as a person is at large in the United Kingdom by virtue of this paragraph, he shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by an immigration officer."

16. Immigration and asylum appeals are provided for in Part V of the Nationality, Immigration and Asylum Act 2002. Sections 82 and 83, as amended by sections 26(2) and 26(3) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, and section 84 provide for a general right of appeal, for a right of appeal in the case of an asylum claim and for the grounds of appeal respectively. Section 82(1) provides that where an immigration decision is made in respect of a person he may appeal to the tribunal. A definition of the expression "immigration decision" is provided in section 82(2). It includes, so far as relevant:

> "(a) refusal of leave to enter the United Kingdom, (b) refusal of entry clearance… (g) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b) … or (c) of the Immigration and Asylum Act 1999 (c 33) (removal of person unlawfully in United Kingdom)…"

17. Section 83 provides that a person may appeal to the tribunal against the rejection of his asylum claim. Section 84(3) provides that an appeal under section 83 must be brought on the grounds that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention. The expression "asylum claim" is defined in section 113, as substituted by section 12 of the Immigration, Asylum and Nationality Act 2006, as

> "a claim made by a person that to remove the person from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention."

18. At the relevant time paragraph 334 of the Statement of Changes in Immigration Rules (1994) (HC 395) provided

> "An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:
>
> (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 [Refugee] Convention and Protocol; and
>
> (iii) refusing his application would result in him being required to go (whether immediately or after the time limited by any 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."

19. Section 2 of the Asylum and Immigration Act 1993, which has as its side-note the words "Primacy of the Convention", provides:

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

The Refugee Convention

20. By article 1A(2) of the Convention the term "refugee" applies 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 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."

21. The rights that attach to the status of refugee under the Convention depend in each case on the possession of some degree of attachment to the contracting state in which asylum is sought. Drawing on the way the hierarchy of attachment has been described by Professor Hathaway, *Rights of Refugees under International Law* (Cambridge, 2005), pp154-160, under the heading "Attachment to the Asylum State", the appellant's written case provides a helpful analysis. An examination of the Convention shows that it contemplates five levels of attachment to the contracting states, which from the weakest to the strongest may be set out as follows:

> a. subject to the contracting state's jurisdiction (articles 3, 5, 7(1), 7(3), and (4), 9, 12, 16(1) and (3), 17(3), 20, 22, 24(3) and (4), 29, 30, 33 and 34);
>
> b. physical presence ["sur leur territoire"] (articles 4, 27 and 28(1));
>
> c. lawful presence ["se trouvant régulièrement sur leur territoire] (articles 18, 26 and 32);
>
> d. lawful stay ["résidant régulièrement sur leur territoire "] (articles 7(2), 10, 15, 17, 19, 21, 23, 24(1)-(3), 25 and 28); and
>
> e. habitual residence ["où il à sa résidence habituelle"] (articles 14 and 16(2)).

22. The level of attachment which article 32 requires is commonly referred to by the commentators as "lawful presence": eg Hathaway, *Rights of Refugees in International Law*, 657. Article 32 provides:

> "1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
>
> 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except

> where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
>
> 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

23. Articles 18 and 26 require the same level of attachment. Article 18, which is headed "self-employment", provides:

> "The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies."

Article 26, which is headed "freedom of movement", provides:

> "Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances."

The issues

24. The dispute between the parties is as to whether the appellant is entitled to the protection of article 32 of the Convention, which precludes the contracting states from expelling a refugee who is "lawfully in their territory" save on grounds of national security or public order. At first sight the question at issue is a relatively narrow one, directed to the meaning of the phrase "lawfully in their territory". For the Secretary of State Miss Giovannetti QC submits that the appellant is not, and never has been, lawfully in the United Kingdom for the purposes of that article. Nor will she be lawfully in the United Kingdom for its purposes if she loses the Ethiopian appeal. There will be no obstacle to her removal should that event occur and she were to lose her article 3 case too. The question is to be determined solely by reference to the domestic law of the state in

question. The effect of the relevant legislation is that a refugee is not lawfully present in the United Kingdom if she does not have leave to enter or remain in this country. So the Secretary of State will be free to bring her temporary admission to an end if her appeal against the directions for her removal to Ethiopia is dismissed.

25. Mr Drabble QC for the appellant, on the other hand, invites the court to look at the issue much more broadly. The basic thrust of his argument, which he did not develop in this form before the Court of Appeal, is that it would be contrary to the proper construction and spirit and intendment of the Convention to hold that the appellant was not lawfully present in the United Kingdom and that the Secretary of State was free to bring her lawful presence to an end by issuing directions for her removal to Ethiopia. He takes his stand on the principle that the Convention is an international instrument which falls to be interpreted in accordance with the general rule of interpretation that article 31(1) of the Vienna Convention on the Law of Treaties 1969 (Cmnd 4140) sets out, that

> "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."

This approach, he said, should lead one to conclude that article 32 had a broader purpose than a study of its language, if taken on its own, might suggest. Its purpose was to ensure that a refugee who had been admitted to the appeal process of a contracting state, and had been found to be a refugee by the operation of that process, was not removed to a country that could not provide the full panoply of rights to which a refugee was entitled under the Convention.

26. The way that Mr Drabble has invited us to approach the issue suggests that it would be helpful to take it in two stages. The first is to examine the language of article 32 and to determine, provisionally, whether the words that it uses, taken by themselves, can accommodate the situation in which the appellant finds herself. The second is to consider whether, if they cannot, the object and purpose of the Convention require the words to be read and given effect more broadly so as to afford the appellant the protection which she seeks against her removal to Ethiopia.

27. Two points need to be stressed, however. First, it was no part of Mr Drabble's case that an exception should be made for the appellant simply because of the inordinate length of time that it is taking for her case to work its way through the appeal process. He said that the mere passage of time was not the sole or main reason why she should have the benefit of article 32, although the stage which the proceedings had reached was relevant. The issue whether the mere

passage of time is an obstacle to her removal is for another day. So Mr Drabble's argument, if sound, will apply to all refugees who have been given temporary permission to remain and have been admitted to the appeal process of the contracting state. I do not see how his argument can be limited in its effect to the case of this particular appellant.

28. The second point is that Mr Drabble was not aware of any other case in which the Secretary of State has insisted on removing a person to a country, such as Ethiopia, which did not satisfy the general criteria of a safe country. This case therefore breaks new ground. He said that he was not aware of any other case like this, as the Secretary of State was not known ever to have claimed that Ethiopia satisfied the general criteria for a safe third country. He finds some support for his argument that the class of beneficiary referred to in article 32 should be broadly interpreted in Professor James C Hathaway's work, *The Rights of Refugees under International Law* (Cambridge, 2005), pp 177-179 and 667-668 and in the wide-ranging discussion of the issue in Atle Grahl-Madsen, *The Status of Refugees in International Law* (Leiden, 1972), vol II, paras 215-216 where the point is made that, while a refugee who is lawfully in a territory according to municipal law is clearly entitled to the benefit of those provisions of the Convention whose applicability is subject to this test, persons may be considered to be "lawfully" there although they are not formally so, while at the same time not "lawfully" there for other purposes: pp 359-360. But I do not find anything in the passages to which we were referred that shows that their approach has universal acceptance, and there is no judicial authority that is directly in point. The argument has to be examined, therefore, as raising an issue of principle.

"Lawfully in their territory"

29. As Lord Bingham of Cornhill said in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55, [2005] 2 AC 1, para 15, the Refugee Convention, like most international conventions, represented a compromise between competing interests. On the one hand there was the need to ensure humane treatment of the victims of oppression. On the other there was the wish of sovereign states to maintain control over those seeking entry to their territory: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR, 225, 247-248, 274; *Rodriguez v United States* (1987) 480 US 522, 525-526.

30. There is no doubt that the Convention should be given a generous and purposive interpretation, bearing in mind its humanitarian objects and the broad aims reflected in its preamble, which states:

"*The high contracting parties*

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement,

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international co-operation,

Expressing the wish that all states, recognising the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between states,

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international convention, providing for the protection of refugees, and recognising that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of states with the High Commissioner…"

Support for this approach is to be found in article 31(1) of the Vienna Convention on the Law of Treaties to which Mr Drabble referred: see para 25, above. Reflecting principles of customary international law, it requires a treaty to be interpreted in the light of its object and purpose. So it must be interpreted as an international instrument, not a domestic statute. It should not be given a narrow or restricted interpretation.

31. But it must be remembered too that, however generous and purposive its approach to interpretation may be, the court's task remains one of interpreting the document to which the contracting parties have committed themselves by their agreement. As Lord Bingham was at pains to emphasise in the *Roma Rights* case, at para 18, it must interpret what the parties have agreed to. It has no warrant to give effect to what they might, or in an ideal world would, have agreed. One should not overlook the fact that article 31(1) of the Vienna Convention also states that a treaty should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context". So the starting point of the construction exercise should be the text of the Convention itself: *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, per Lord Lloyd of Berwick at p 305; *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426, para 4. A treaty must be interpreted "in good faith". But this is not to be taken to be a source of obligation where none exists, as the International Court of Justice has repeatedly emphasised: *In re Border and Transborder Armed Actions (second phase) (Nicaragua v Honduras)* [1988] ICJ Rep 69, para 94; *In re Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* [1988] ICJ Rep 175, para 39. As a general principle of law it has only marginal value as a source of rights and duties: see the *Roma Rights* case, para 62. There is no want of good faith if the Convention is interpreted as meaning what it says and the contracting states decline to do something that its language does not require them to do. Everything depends on what the Convention itself provides.

32. The context in which the word "lawfully" appears in article 32 is important too. The phrase in which it appears contemplates that the refugee is not merely present in the territory of the contracting state, but that he is there lawfully. This implies that his presence is not just being tolerated. On the contrary, it is to be assumed that he has a right to be there. As to the source of that right, the power to admit, exclude and expel aliens was among the earliest and most widely recognised powers of the sovereign state: *Roma Rights*, para 11. The Convention itself shows that it has come to be recognised that there is a right and indeed a duty in sovereign states to give refuge to aliens who are fleeing from persecution and to refuse to surrender them to the authorities in their home states. But states the world over consistently have exhibited great reluctance to give up their sovereign right to decide which persons will, and which will not, be admitted to their territory and be given a right to settle there: Hyndman, "Refugees under International Law with a Reference to the Concept of Asylum" (1986) 60 ALJ 148, 153, in a passage quoted by Lord Bingham in the *Roma Rights* case, para 19.

33. The approach which our own domestic law takes to this issue was explained by Lord Mustill in *T v Secretary of State for the Home Department* [1996] AC 742, 754:

> "Neither under international nor English municipal law does a fugitive have any direct right to insist on being received by a country of refuge. Subject only to qualifications created by statute this country is entirely free to decide, as a matter of executive discretion, what foreigners it allows to remain within its boundaries."

There is no indication in the travaux préparatoires that the other states who were party to the framing of the Convention were minded to surrender control over those seeking entry to their territory. On the contrary, Nehemiah Robinson's analysis of the Commentary on the 1951 Convention and the most important documents which had a bearing on its interpretation, *Convention relating to the Status of Refugees, its History, Contents and Interpretation* (New York, 1953), pp 110-111, led him firmly to the contrary conclusion:

> "'Lawfully in the country' was understood to refer to refugees either lawfully admitted or whose illegal entry was legalized but not to refugees who, although legally admitted or legalized, have overstayed the period for which they were admitted or were authorised to stay or who have violated any other condition attached to their admission or stay."

Referring to this passage, the UNHCR states in "Lawfully Staying – A Note on Interpretation" (1988) that its conclusion from the travaux is that the "lawfulness" of the stay is to be judged against national rules and regulations governing such a stay: para 8.

34. The Michigan Guidelines on Protection Elsewhere, which were adopted on 3 January 2007 at a colloquium of which Professor James Hathaway was the convener, appear to contradict this approach. They state in para 5:

> "Lawful presence must be defined by the sending state in good faith and in accordance with the requirements of international law. Lawful presence is in any event established not later than such time as a decision is reached on the admissibility of the protection claim."

This passage shows, as do Professor Hathaway's own writings, that some of the current thinking on the subject has developed substantially from that which appears to have been the guiding force when the wording of the Convention were under discussion over 60 years ago. But I agree with Lord Dyson that there is no consensus among the commentators that lawful presence should be given an autonomous meaning or what that meaning should be: para 63, below. So we must

take our guidance from what the framers of the Convention must be taken to have agreed to, as understood by the UNCHR. The problem to which its note was addressed was that created by the practice of some states simply to tolerate a stay for long periods without regularising the status of the refugee. The UNHCR recommended that a judgment as to lawfulness should take into account all the prevailing circumstances, including the fact that the stay in question is known and not prohibited – tolerated, in other words – because of the precarious circumstances of the person: para 23. That is not the point that needs to be considered here. The national rules and regulations are being applied in this case, and it is clear that the appellant has not yet been given leave to enter or to remain in the United Kingdom. She is still liable to be detained and, in the words of section 11(1) of the 1971 Act, she is deemed not to have entered this country.

35. There is, of course, no question of the appellant being expelled from the United Kingdom while the processes of appeal that are afforded by the 2002 Act remain open to her and have not been brought to an end. It might be thought, in these circumstances, that the Secretary of State could have no objection to it being held that, because she has been granted temporary admission pending her examination or removal, the appellant was lawfully in the territory within the meaning of article 32(1) so long as it was clear that she will cease to be lawfully present once her temporary admission comes to an end. Mr Drabble made it clear that he would be content with that interpretation, subject to the qualification that the protection of article 32 would remain available after the removal of her temporary admission to prevent her being removed to a country which could not provide the full panoply of rights to which a refugee was entitled under the Convention. But, as Miss Giovannetti explained, there is no basis in domestic law for holding that the appellant is entitled to be present in this country. To give her the protection of article 32 at this stage would have far reaching consequences. As Nehemiah Robinson explained in his Commentary, p 157:

> "The prohibition of the expulsion of refugees lawfully in the country means in substance that, once a refugee has been admitted or legalized, he is entitled to stay there indefinitely and can forfeit this right only by becoming a national security risk or by disturbing public order and having these grounds established in accordance with the procedure prescribed in para 2."

So one should be cautious about saying that, just because in practice the appellant is not at risk of removal for the time being, she is here "lawfully" within the meaning of that article.

36. Furthermore, the proper interpretation of the word "lawfully" is of wider significance. This can be seen from the use of the same phrase "lawfully in their

territory" in articles 18 and 26. A refugee who is lawfully present in the territory of a contracting state is entitled to the same treatment as regards self-employment as is accorded to aliens generally who are in the same circumstances: article 18. He must also be accorded the right to choose his place of residence and to move freely within the territory, subject to any regulations that are applicable to aliens generally in the same circumstances: article 26. The notifications that have been issued to the appellant from time to time, which require her to reside at an address notified to her by an immigration officer, to report to an immigration official every two months and not to work or engage in any business unless she has explicitly been granted permission to do so, make it plain that she is not being accorded the rights referred to in these articles. They are rights the granting of which a sovereign state could be expected to reserve to itself, in just the same way as it would wish to reserve to itself the decision as to whether a refugee should be granted permission to enter in its territory.

37. The fact that Mr Drabble's interpretation of the word "lawfully" in article 32 would apply to these articles too, so that the appellant could not be denied the rights that they afford to refugees lawfully in the territory, is a further indication that much caution is needed before that conclusion is drawn. It seems unlikely that the contracting states would have agreed to grant to refugees the freedom to choose their place of residence and to move freely within their territory before they themselves had decided, according to their own domestic laws, whether or not to admit them to the territory in the first place.

38. Mr Drabble did not seek to rely on Lord Brown's observations in *Szoma v Secretary of State for Work and Pensions* [2006] 1 AC 564, para 24, that in *R v Secretary of State for the Home Department, Ex p Bugdacay* [1987] AC 514 Lord Bridge has decided the case of *In re Musisi* rightly but for the wrong reasons, and that the term 'refugee' in article 32(1) of the Refugee Convention must be taken to mean someone who has been determined to have satisfied the article 1 definition of that term. I think that he was right not to do so. The ancient maxim *verba accipienda sunt secundum subjectam materiam* (words are to be understood according to the subject-matter with which they deal) provides the best guide to the meaning that should be given to what Lord Brown said in this paragraph.

39. As Stanley Burnton LJ said in the Court of Appeal, Lord Brown was not deciding any question of irremovability under the 1971 Act in *Szoma's* case: [2010] 1 WLR 2858, para 45. He was concerned with quite different legislation: see para 5. I am confident that, if his mind had been directed to the issue which arises under the 1971 Act, he would have been less ready than he was, in the context of that case, to hold that Lord Bridge's analysis in *Bugdacay* of the effect of section 11(1) of the 1971 Act was wrong. For my part, I think that Lord Bridge's analysis was right and it is directly in point in this case: see para 14, above. I would endorse Sedley LJ's way of reconciling the decision in *Szoma* with

what Lord Bridge said in *Bugdacay* in *JA (Ivory Coast) v Secretary of State for the Home Department* [2010] Imm AR 381, para 20, where he said:

> "Illegal entrants who are temporarily admitted rather than detained may thus be lawfully present here in the restricted sense material to the decision in *Szoma's* case, but they remain without an entitlement to be here."

40. For these reasons I would hold, provisionally, that the word "lawfully" in article 32(1) must be taken to refer to what is to be treated as lawful according to the domestic laws of the contracting state.

The "panoply of rights" argument

41. The essence of this argument is that there must be implied into article 32 a proposition that the article itself has not expressed. This is not, perhaps, an impossible conclusion to draw. But the general rule is that the parties to an international agreement are not to be treated as having agreed something that they did not agree, unless it is clear by necessary implication from the text or from uniform acceptance by states that they would have agreed or have subsequently done so: *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, para 4. It is generally to be assumed that the parties have included the terms they wish to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree: *Brown v Stott* [2003] 1 AC 681, 703. It is not open to the court to give effect to what, in an ideal world, the parties would have agreed to as a matter of obligation binding on all states parties to the Convention. One should bear in mind too that there may be a profound gap between what commentators, however respected, would like the article to mean and what it has actually been taken to mean in practice: *R(Hoxha) v Special Adjudicator* [2005] UKHL 19, [2005] 1 WLR 1063, para 5.

42. Mr Drabble submitted that it was not enough to give the appellant the protection against refoulement that article 33 provides. What she needed, and was entitled to in view of the fact that the United Kingdom had accorded her substantial recognition as a refugee, was the assurance that she would not be removed to a third country that was not able to provide her with the full panoply of rights she would get as a refugee under the Convention. Article 32(1) had to be read in that sense. Her presence here was to be taken, for this purpose, to be lawful and it could not be brought to an end unless to do this would fit in with the purpose of the Convention as a whole. He accepted that removal to another member state of the European Union under Council Regulation (EC) No 343/2003, which replaced the Dublin Convention 1990 and was designed to give effect to a

common policy on asylum throughout the EU (see *R (Yogathas) v Secretary of State for the Home Department* [2002] UKHL 36, [2003] 1 AC 920, para 27), would not be objectionable, and article 32(1) was not to be construed as making the removal under that system of a refugee who had been temporarily admitted to the United Kingdom pending a decision to give or refuse him leave to enter impermissible. So there would be no breach of article 32(1) if the refugee were to be returned immediately to another Dublin Convention country or to a country whose status as a safe country was not in doubt. But removal to a third country such as Ethiopia was a quite different matter.

43. Mr Drabble relied on the discussion of the meaning to be given to "lawful presence" by Professor Hathaway, *Rights of Refugees under International Law*, pp 173-184 in support of his argument. Support for his approach, as matter of principle, is also to be found elsewhere. In *Ng v Canada*, UN Doc CCPR/C/49/469/1991 (7 January 1994), para 14.2 the Human Rights Committee established under article 28 of the International Covenant on Civil and Political Rights said:

> "If a State party extradites a person within its jurisdiction in such circumstances that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant."

This proposition may be applied equally to the responsibility that attaches to States parties under the Refugee Convention, as Catherine Phuong, "The concept of 'effective protection' in the context of irregular secondary movements and protection in regions of origin", Global Migration Perspectives No 26, April 2005, has suggested. At p 9 of her paper, having acknowledged her debt to Professor Hathaway for this thought in footnote 38, she states:

> "It would surely defeat the purpose of the Convention if a state avoided its duties by merely transferring a refugee to another jurisdiction without ensuring that the receiving state protects the rights acquired by the refugee in the sending state. Refugees ought not to be deprived of the protection of their rights as defined in the 1951 Refugee Convention by virtue of the fact that another state has assumed responsibility for their protection."

44. Mr Drabble also relied on a passage in Lord Clyde's speech in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 where he said at p 508:

> "What [the Convention] seeks to achieve is the preservation of those rights and freedoms for individuals where they are denied them in their own state. Another state is to provide a surrogate protection where protection is not available in the home state. The Convention assumes that every state has the obligation to protect its own nationals. But it recognises that circumstances may occur where that protection may be inadequate. The purpose of the Convention is to secure that a refugee may in the surrogate state enjoy the rights and freedoms to which all are entitled without discrimination and which he cannot enjoy in his own state."

I am inclined to think, with respect, that the proposition in the last sentence of this passage was perhaps too widely expressed. In my own speech, at p 495, I said that the purpose of the Convention was to afford protection and fair treatment for those for whom neither is available in the home country and that, if the principle of surrogacy was applied, the criterion must be whether the alleged lack of protection in the home state was such as to indicate that it was unable or unwilling to discharge *its* duty to establish and maintain a system for the protection against persecution of its own nationals. Also, the issue in that case was very different from that which we are being asked to consider here. The allegation was that the applicant was at risk of violence at the hand of non-state agents whose actions the home state was unable or unwilling to control. The question whether, leaving that problem aside, the home state was in a position to provide the full panoply of rights under the Convention was not in issue.

45. This case is not subject to the provisions of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive"). The Directive was designed to give effect to the Tampere conclusion which provided that there should be a Common European Asylum System, based on a full and inclusive application of the Convention as supplemented by the New York Protocol, and that the system should include the approximation of rules on the recognition of refugees and the content of refugee status. It goes further in some respects than the Refugee Convention because, for example, it requires a residence permit to be issued as soon as possible where an applicant qualifies as a refugee: article 24(2). This Directive entered into force on 20 October 2004, and member states were required by article 38 to bring into force such laws, regulations and administrative provisions necessary to comply with it before 10 October 2006. The most recent decision to remove the appellant was dated 24 August 2006, before the date for its transposition. Mr Drabble did not develop the argument of which he had given notice in his written case that the appellant was entitled to rely on its provisions against the Secretary of State. But its provisions are of interest, because they show that the principle which he was

urging upon this court is undergoing a process of development among the Member States of the European Union.

46. This process was taken a step further by article 27(1) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (the Minimum Standards Directive) which applies to applications for asylum lodged after 1 December 2007. It provides:

> "Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:
>
> (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
>
> (b) the principle of non-refoulement in accordance with the Geneva Convention is respected;
>
> (c) the prohibition of removal in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law is respected; and
>
> (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention."

47. This provision sets out what the Member States must be taken to have agreed are the full panoply of rights that the person seeking asylum must be afforded if the principles on which articles 32 and 33 of the Refugee Convention are based are to receive effect. But it is one thing to acknowledge, as I would readily do, the force of these principles, to expect that the Secretary of State will, even in this case, give effect to them and to express the hope too that they will be taken into account if it becomes necessary for the appellant to pursue her Ethiopian appeal. It is another to find a basis in them for giving a different meaning to the words "lawfully in their territory" in article 32 of the Convention than the contracting states appear to have had in mind when they agreed to them, which is what Mr Drabble appeared to be urging the court to do on this branch of his argument.

48. I do not think that article 32 is capable of being expanded in the way that was being suggested. The United Kingdom was entitled to design its rules as to what was needed for a refugee to come within its terms under domestic law, as were all the other states who have undertaken to be bound by the Convention, on the basis of the ordinary meaning of the words of the article in their context and in the light of their object and purpose, as article 31(1) of the Vienna Convention indicates. Phrases such as these are entitled to be read in accordance with the principle of legal certainty. They ought not to be taken to have their meaning changed or expanded unless this is expressly agreed to or is shown to have been recognised generally among the contracting states. The weakness in Mr Drabble's argument was that he was unable to show how this could be done without breaching these fundamental principles.

Conclusion

49. For these reasons, I am not persuaded that there are sound grounds for departing from my provisional view that the word "lawfully" in article 32(1) must be taken to refer to what is to be treated as lawful according to the domestic laws of the contracting state. I think, in agreement with the Court of Appeal and with Lord Dyson, that this is what the framers of the Convention intended by the use of this word in this context. I would dismiss the appeal.

LORD DYSON

50. The appellant is a national of Eritrea. She was born in Ethiopia and lived there continuously until she departed for the United Kingdom arriving on 3 July 1998. On arrival, she claimed protection as a refugee on the grounds of a fear of persecution in Eritrea and Ethiopia. The Secretary of State granted her temporary admission pursuant to paragraph 21 of Schedule 2 to the Immigration Act 1971 ("the 1971 Act"). The somewhat tortuous subsequent history has been described by Lord Hope. It is sufficient to say that her claims were refused by the Secretary of State on 1 November 2004. By a decision promulgated on 1 February 2006, the Asylum and Immigration Tribunal allowed her appeal and held that her fear of persecution in Eritrea on Refugee Convention grounds was well-founded. Her status as a refugee was thereby established. The Secretary of State did not appeal against this decision. On 24 August 2006, she served a new notice of decision to refuse the appellant's application for leave to enter on the grounds of a fear of persecution in Ethiopia and on the following day gave notice of her intention to give directions for the removal of the appellant to Ethiopia. The appellant appealed these decisions, but on 25 September 2006, she started judicial review proceedings seeking an order that she be given leave to enter/remain in the United Kingdom as a refugee pursuant to the tribunal's decision of 1 February 2006 and an order

quashing the removal directions to Ethiopia. The appeal has been adjourned pending the outcome of the judicial review proceedings.

51. Two questions arise in these proceedings. The first is whether the appellant is "lawfully in" the United Kingdom within the meaning of article 32(1) of the Refugee Convention where she has been granted temporary admission, has submitted an asylum application, has been admitted to the state's appeal process and has been found to be a refugee by operation of that appeal process. The second is whether, if the appellant's presence in the United Kingdom is lawful but she loses her appeal against the removal directions to Ethiopia, the Secretary of State can terminate the temporary admission, thereby bringing the lawful presence to an end.

52. In summary, Mr Drabble QC submits that the meaning of the phrase "lawfully in their territory" in article 32(1) is to be determined not only by reference to the domestic law of the Contracting State. The normative requirements of the Convention must also be taken into account and on that basis the appellant's presence in the United Kingdom is lawful within the meaning of article 32(1) because she has temporary admission and has been permitted to embark on a substantive procedure to determine the question of whether she is entitled to refugee status and has been found to be a refugee. As regards the second question, Mr Drabble submits that, whatever the outcome of the Ethiopian appeal, the Secretary of State cannot terminate the appellant's lawful presence in the United Kingdom by bringing the temporary admission to an end and removing her to a territory where (i) she would be at risk of persecution (so as to place the Secretary of State in breach of article 33) and (ii) she would not be able to enjoy the full rights vouchsafed by the Convention (what were referred to in argument as "the panoply of rights").

53. Ms Giovannetti QC submits that the question whether a person is "lawfully" in the territory of a Contracting State is to be determined exclusively by reference to the domestic law of that state. As a matter of domestic law, a person is not lawfully in the United Kingdom if she does not have leave to enter or remain, but has merely been granted temporary admission pending examination of her case or pending removal: see section 11(1) of the 1971 Act which Lord Hope has set out at para 14 above. As regards the second question, Ms Giovannetti submits that, if the appellant's appeal against the removal directions is dismissed, then the Secretary of State will be free to terminate or not renew her temporary admission and there can at that stage be no question of the appellant's presence in the United Kingdom being lawful within the meaning of article 32(1).

The meaning of "lawfully in their territory" in article 32(1)

54. The general approach to the interpretation of the Convention is not in doubt: see the discussion by Lord Hope at paras 29 to 31 above. In summary, it is to be interpreted in good faith in accordance with the ordinary meaning of its terms read in their context and in the light of the object and purpose of the Convention. The starting point is the language. It is generally to be assumed that the parties to the Convention included the terms that they wished to include and on which they were able to agree and omitted other terms which they did not wish to include or on which they were unable to agree. They are not to be treated as having agreed to something they did not agree, unless it is clear by necessary implication from the text or from uniform acceptance by states that they would have agreed or have subsequently done so.

55. Some provisions of the Convention have an autonomous single meaning. Thus, in *R v Secretary of State for the Home Department, ex p Adan* [2001] 2 AC 477, the House of Lords held that there was a single autonomous meaning of the term "refugee" in article 1A(2). The meaning of this term cannot vary according to the differing interpretations of the Contracting States. It is not to be ascertained by reference to their domestic law. But there is no single autonomous meaning of the phrase "lawfully in the territory" in article 32(1). There is no international standard by reference to which lawful presence can be determined. That is not surprising. The power to admit, exclude and expel aliens is a widely recognised power of the sovereign state: a person has no right to live elsewhere than in his country of nationality and has no right to claim asylum: see the authorities to which Lord Hope refers at paras 32 and 33 above. Lord Bingham referred to this as a familiar, uncontentious and fundamental principle in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 at para 6. Of all the commentators, Professor Hathaway provides perhaps the strongest support for the case advanced by Mr Drabble. But even he acknowledges (with qualifications) the important part played by domestic law in determining lawful presence within the meaning of article 32(1) in his discussion in *The Rights of Refugees under International Law* (Cambridge, 2005). He says at pp 177-178:

> "As a starting point, the logic of deference to national legal understandings of lawful presence is clearly sensible. Not only is it correct that there is no uniform and comprehensive international standard by reference to which lawful presence can be determined but, as the debates cited above regarding temporary admission confirm, the drafters did generally intend for the third level of attachment to be determined by reference to national standards. Yet there is no indication that this deference was intended to be absolute, a proposition which—if carried to its logical conclusion—could result in refugees never being in a position to secure more than rights defined by the first two of the five levels of attachment agreed to by state parties……

> Interpretation of the notion of 'lawful presence' should therefore look primarily to domestic legal requirements, interpreted in the light of the small number of international legal understandings on point, in particular those reached by the drafters of the Refugee Convention. Deference to domestic law cannot therefore be absolute. At a minimum, the domestic meaning of lawful presence should not be adopted for refugee law purposes where to do so would be at odds with the normative requirements of the Refugee Convention."

56. What is the position under United Kingdom domestic law? Without statutory intervention, it might be difficult to decide whether a person who has been granted temporary admission pending determination of her application for asylum is lawfully present in the territory. It is not self-evident that she is not lawfully present in these circumstances. After all, she is physically present in the territory and her presence has been authorised by the state, admittedly for a limited period. But the power to grant temporary admission is conferred by Schedule 2 para 21 of the 1971 Act. It was open to Parliament to define its legal effect and it did so in section 11(1) of the 1971 Act. In *Bugdaycay v Secretary of State for the Home Department; In re Musisi* [1987] AC 514, Lord Bridge rejected the argument that, because Mr Musisi had been granted temporary admission pending the determination of his application for leave to enter, he was lawfully present within the meaning of article 32(1). The effect of section 11(1) of the 1971 Act was that he was deemed not to have entered the United Kingdom at all. The reasoning of Lord Bridge (although not the result) was said to have been wrong by the House of Lords in *Szoma v Secretary of State for Work and Pensions* [2006] 1 AC 564 at para 24. Like Lord Hope, I agree with Lord Bridge's reasoning and would hold, for the reasons given by Stanley Burnton LJ, that the criticism of it in *Szoma* was not well-founded.

57. The position in domestic law is, therefore, now clear: the appellant is not lawfully present in the United Kingdom. There is nothing in the language of article 32 itself which suggests that lawful presence should not be judged by reference to domestic law. Moreover, there is support elsewhere in the Convention for the view that the grant of temporary admission pending the determination of an application for asylum does not give rise to lawful presence within the meaning of article 32(1). The phrase "lawfully in [a] territory" is also used in articles 18 and 26. Article 18 provides that the Contracting States shall accord to a refugee "lawfully in their territory" treatment "as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies". Article 26 provides that each Contracting State shall accord to refugees "lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same

circumstances". It is most unlikely that the Contracting States intended that refugees who apply for asylum and are given temporary admission while their application is being considered should be accorded rights of this kind. It seems to me far more likely that they intended such rights to be given to refugees who have established some real right to stay in the territory. I agree with what Lord Hope says at para 36.

58. More generally, an interpretation of article 32(1) which defers the question of lawful presence to the domestic law of the territory of refuge is consistent with the fundamental principle that the power to admit and expel is a power of the sovereign state.

59. Nor do I find it surprising that the generous protection afforded by article 32 should be confined to those whose claims for asylum have succeeded. The fundamental objective of the Convention is to protect persons who have a well-founded fear of persecution for the reasons stated in the article 1A(2) definition. Article 33 (the duty of *non-refoulement*) is an essential part of that protection. That is the principal duty owed to refugees. This is the point made by Lord Bingham in *R (Yogathas)v Secretary of State for the Home Department* [2003] 1 AC 920 at para 9:

> "The second consideration is that the Convention is directed to a very important but very simple and very practical end, preventing the return of applicants to places where they will or may suffer persecution. Legal niceties and refinements should not be allowed to obstruct that purpose. It can never, save in extreme circumstances, be appropriate to compare an applicant's living conditions in different countries if, in each of them, he will be safe from persecution or the risk of it."

60. It is true that, where a person is recognised as a refugee and is granted asylum, the signatory states are under a duty to discharge many other obligations under the Convention. But the existence of the article 32(1) duty, which is plainly owed to refugees who have been granted asylum, does not detract from the fact that the overriding aim of the Convention is to provide refugees with protection against persecution.

61. Article 33 applies to refugees whether they are lawfully present in the territory or not. It applies to any refugee to whom the Convention applies. It provides the protection that lies at the heart of the Convention. Article 32(1) does not provide protection to a refugee against the risk of persecution. It provides protection against expulsion in any circumstances except on grounds of national

security or public order. It undoubtedly provides this additional protection to the refugee who has been granted asylum. Bearing in mind the fundamental object of the Convention, it is not surprising that it was intended by the Contracting States that this degree of protection was not to be accorded to a refugee who has been given temporary permission to remain in a territory pending the determination of her claim to asylum. If a refugee who is claiming asylum is to be protected from the risk of persecution, she needs the protection afforded by article 33. She does not need the additional protection afforded by article 32(1).

62. We were shown various passages in the travaux préparatoires. But in my view, they contain no clear indication that the parties to the Convention intended that the benefit of article 32(1) should be conferred on refugees who have not been granted asylum.

63. There is no consensus among the commentators that lawful presence within the meaning of article 32(1) should be given an autonomous Convention interpretation or what that meaning should be. For that reason, I do not think that it is profitable to set out their differing views in any detail. I have already referred to what Professor Hathaway says. As we have seen, he suggests that lawful presence should be determined primarily by reference to domestic law, but modified if necessary to reflect the normative requirements of the Convention. I do not know how this would work in practice. It seems to me that this is a difficult interpretation and one which would be likely to give rise to much uncertainty and dispute. A different view is expressed in Goodwin-Gill and McAdam *The Refugee in International Law* (3rd edition) (2007) at p 524-525 where the editors say that in principle there appears to be no reason why the temporarily present refugee should not be subject to the same regime of deportation as applies to aliens generally. They suggest: "On balance, article 32 may be interpreted as a substantial limitation upon the State's power of expulsion, but with its benefits confined to lawfully resident refugees, that is, those in a State on a more or less indefinite basis." Professor Hathaway disagrees with this view. He says (loc cit at p 173, footnote 97) that it is no more than an assertion and that no legal argument is offered to justify "this clear deviation from the express provisions of the Convention, relying instead on a bald appeal to the importance of achieving consistency with relevant state practice".

64. In my view, if it had been intended to restrict the power of the Contracting States to decide whether a refugee is lawfully present in its territory, this would surely have been stated explicitly. Where the Convention limits the power of a state to expel a refugee, it says so in terms: see articles 32 and 33. There are no circumstances in which a refugee may be expelled in breach of article 33. But if a refugee is to enjoy the additional protection afforded by article 32(1), she must be lawfully present in the territory. As to what that means, I see no warrant for interpreting the article as prohibiting the expulsion of a refugee who is not lawfully

present on the basis of domestic law, but whose expulsion would contravene Convention norms. Whether a refugee would have the benefit of the panoply of Convention rights in a territory to which she is expelled cannot have any bearing on the question whether she is lawfully present in the territory from which she is being expelled. In any event, Professor Hathaway and Mr Drabble are seeking to add a further restriction to the power to expel a refugee which cannot be found in article 32(1) or 33. Applying the principles of interpretation to which I refer at para 5 above, I find it impossible to say that it is clear by necessary implication from the text that the Contracting States would have agreed to such an additional restriction to the power of expulsion.

65. I should add that Mr Drabble concedes that there is no breach of article 32(1) in immediately returning (i) an individual who arrives in the United Kingdom after residing in an obviously safe third country and (ii) an individual who can be sent to another Dublin Convention country so that her status can be investigated there. I agree with this concession. But it is difficult to see, on Mr Drabble's argument, why such individuals are not lawfully present in the United Kingdom. They are likely to have been given temporary admission and their cases will have been considered. I do not see why lawfulness of their presence is any different from that of others who are granted temporary admission, but whose cases are more difficult to determine.

66. For all these reasons, I would therefore hold that there is nothing in article 32(1) which requires us to disapply section 11(1) of the 1971 Act and say that a refugee who is given temporary admission pending determination of her status is lawfully in the United Kingdom.

Termination of temporary admission

67. If (as I have held) the appellant is not lawfully present in the United Kingdom within the meaning of article 32(1), clearly she does not enjoy the protection afforded by that provision. It is rightly conceded by Ms Giovannetti that to attempt to remove the appellant from the United Kingdom before the application for asylum (including any appeals) has run its course would be improper. She has no intention of doing that. But if the appeal against the removal directions to Ethiopia is dismissed, the appellant will not be able to invoke article 32(1) as a reason for avoiding expulsion, although she may well have other grounds for doing so.

Conclusion

68. For these reasons as well as those given by Lord Hope, I would dismiss this appeal.