COURT OF APPEAL (CIVIL DIVISION)

28 JANUARY 2000

COUNSEL: A Nicol QC and H Southey for the Appellant; E Grey for the Respondent PANEL: PETER GIBSON, WALLER, BUXTON LJJ

JUDGMENT:

BUXTON LJ:

The progress of the case leading up to this appeal, and the appeal itself, has to some extent been impeded by procedural and structural difficulties. I mention that not merely because these have caused problems of a technical nature but also because they have not helped in clarifying the issues that were either before the courts below or are before this court. I shall seek to explain why that is and how it affects the judgment in this case.

Mr Zaitz is a Polish national who arrived in this country and claimed asylum as long ago as August 1993. His occupation in Poland was that of a self-employed musician. His claim to persecution for a Convention reason is based on his conscription for military service under the general arrangements for such service that obtained at that time in Poland. When he was called for service he did not attend, as he was required to do. Eventually, after a process to which I shall have to refer in more detail, he was sentenced to nine months' imprisonment for refusing military service.

He was released from custody before starting to serve that sentence to await the birth of his child. It was then that he left Poland and came to this country.

The Secretary of State refused Mr Zaitz's claim to asylum in a letter dated January 1995. The basis of his decision was set out in the final substantive paragraph of that letter which read:

"Having taken account of all the evidence available, the Secretary of State is not satisfied that you have a well founded fear of persecution in Poland within the terms of the 1951 United Nations'

Convention relating to the Status of Refugees. It is not considered that a wish to avoid military service is grounds in itself to grant asylum. You have not, in the view of the Secretary of State shown that your participation in military service would have been contrary to your genuine political, religious or moral convictions, or for valid reasons of conscience. The Secretary of State is also aware that, by your own account you were afforded several opportunities to take your case before properly constituted review bodies. He is also satisfied that the sentence imposed on you by the court in Poland is not disproportionately severe.

"It is worth noting at this stage, for reasons the relevance of which will become apparent, that in that letter the Secretary of State did not take the position that objection to military service on the grounds of genuine, political or moral conviction could not be the basis of a claim of persecution in terms of the Convention. Rather, he put in issue the genuineness of that belief on the part of Mr Zaitz. Mr Zaitz appealed against that decision. His appeal was originally rejected by a special adjudicator. The matter was appealed to the Immigration Appeal Tribunal and remitted to a different adjudicator. In my view, nothing turns on that part of the process. The second adjudicator, Mr Olsen, conducted a hearing on 28 October 1997. He heard oral evidence from Mr Zaitz who was cross-examined on behalf of the Secretary of State. The special adjudicator also had before him a bundle of written material. He summarised that as being opinions from a Dr Frances Pine, who is a lecturer in Social Anthropology at the University of Cambridge, and from a Mr Howard Clark of an organisation called War Resisters' International, a report from Amnesty International, and statements by two other persons who had been imprisoned as a result of their refusal to do military service in Poland."

In the Polish system the possibility exists of conscientious objectors applying to perform an alternative to military service. Those claims are considered in the first instance by panels within the armed forces, although there is some dispute as to whether and to what extent there is a civilian component in those panels, and thereafter on appeal to a provincial recruiting board. That process was the subject of consideration before the special adjudicator.

Mr Zaitz gave evidence to the adjudicator about the nature of the process in his own case. It is important to quote the special adjudicator's summary of that evidence in full, as Mr Zaitz was accepted by the special adjudicator as having been a credible witness. At page 4 of his adjudication, the special adjudicator said:

"He decided from the time of his secondary school studies that he was not going to serve in the military. He genuinely believed that if he told the military how he felt he would be offered alternative service. In May 1992 when he finished his education he had been called before the military panel to decide if he was going to do his military service then or later. He applied for alternative service with the support of his family and had expected to be required to do work in hospitals or in some cultural field. He still did not know why he had not been allowed to do this as he had thought the alternative was automatic but he had been refused that right by the panel of military representatives. When he had appealed to the next level he had appeared before a panel who had not listened to him and had laughed at him. He had explained that it was as a result of his ethical beliefs rather than his religious beliefs but they had not seemed to understand that.

He made a further appeal to the Provincial Recruiting Board which consisted of two representatives of the military and some civilians. He found that appearance humiliating. He was aware of a number of other people who had appealed at the same time and then they compared their reasons for refusal they were exactly the same which indicated that each case had not been decided on its particular merits. Because of their attitude it had come as no surprise to the Appellant when his application was refused. His final appeal was to the Administrative Court in Poznan which was again unsuccessful and in February 1993 he was taken to a military base where he was held in detention and interviewed for three days. They appeared to be investigating all the issues of his refusal and he was treated like a criminal. He suffered psychologically as he was a genuine believer in pacifism. He said that it was very difficult to prove that you are a pacifist because it depended on what was inside you."

The special adjudicator also had a written report from Mr Howard Clark of War Resisters' International. That body is confessedly concerned with the gathering of information about pacifism and the reaction of governments to it, and actively in support of anti-militarist organisations. Mr Clark set out his credentials to give evidence to the special adjudicator in the following terms:

"For the past 12 years I have been the Coordinator of War Resisters' International, working in the international secretariat in London. Founded in 1921, WRI is registered as an [Non Governmental Organisation] with the UN Economic and Social Council and with the Unesco. WRI is a network of around 80 pacifist groups in around 40 countries. Throughout its existence, WRI has maintained country files on the situation of conscientious objectors. I am the supervisor of WRI's Conscription and Conscientious Objection Documentation Project, funded by the Joseph Rowntree Charitable Trust.

I was closely involved with Wolnosci Pokoj, the movement campaigning for CO rights in Poland in the period 1985-1988, and was myself arrested on my third visit to Poland in this capacity in 1987. I have subsequently visited Poland twice, in 1990 and 1993, meeting objectors and finding about their conditions."

He goes on to say that his knowledge of the situation for objectors is drawn on testimony heard by himself and his colleagues from reports and from testimony by Polish objectors. He had had, as he said unusually, a meeting with Mr Zaitz himself and reported on that meeting. He gave his own assessment of the genuineness of Mr Zaitz's pacifism. The special adjudicator gave

considerable weight to Mr Clark's evidence. Mr Clark said of the exemption system in Poland at page 2 of the report:

"The practice of examination of conscience in Poland is at best unpredictable, and usually hostile. The primary responsibility of Recruiting Boards is to meet the personnel needs of the military. Creating placements for alternative service was an acute problem in the early 1990s, with protests from forestry workers and others who felt threatened by this source of cheap labour. The panel acting for the Recruiting Board tends to have a preponderance of military representatives, and usually includes a padre or some other church representative. The clergyman will in many cases invoke his theological knowledge to refute the possibility that a Catholic can be a pacifist. Applicants for alternative civilian service are cross-examined by the Board, a process that discriminates against less articulate and less educated COs. The mode of argumentation has been criticised for being academic, and surely this is borne out by the language of the Decision on Jacek Zaitz. The Provincial Recruiting Board in Lalisz stresses 'higher moral rigour' and 'categorical moral imperative'. Jacek [Mr Zaitz] is a simple rock and roller, more at home talking about John Lennon's 'Imagine' than about theories or belief systems. The Boards have also been criticised for concentrating on the acceptability of the objector's belief rather than assessing his sincerity."

That is evidence in the decision of the board in this case. In order to understand the case, it is necessary to quote the conclusions of the special adjudicator at length. I start at the bottom of page 7 of the adjudication:

"The first question to be decided was whether the Appellant had satisfied me according to the lower standard of proof that he was a genuine conscientious objector. Having heard him give.evidence and having read in detail the basis of his claim and the documents submitted in support of it, I am satisfied that he is a genuine pacifist who for reasons of conscience considers military service to be anathema. I am fortified in this conclusion by reading the report from Howard Clark dated 5 February 1997 in which he also concluded that the Appellant was 'an instinctive pacifist'. The very fact that the Appellant has taken the matter as far as he has and not accepted what many would regard as the easy option of simply completing his military service or going to prison, convinces me that he is genuine in his beliefs. Turning to consider the procedure for granting alternative service in Poland, I again place great reliance on the views expressed by both Howard Clark and Dr Frances Pine who states: 'It seems to me that the likelihood of a conscientious objector in Poland receiving what would in this country be considered to be a fair and unbiased hearing is very slim'."

The adjudicator then referred to Mr Clark's evidence about the atmosphere and background, as far as pacifism is concerned, in Poland and to the passage that I have already read out in which he put his criticism of the way boards conduct their business in the context of this particular case. The adjudicator then went on to refer to the work of Professor Hathaway in his well-known book "The Law of Refugee Status". He quoted the following passage:

"The failure to recognise the legitimacy of conscientious objection, and to provide for an appropriate and proportionate non-combatant alternative, may in and of itself constitute a sufficient threat to human rights to ground a claim to refugee status based on implied political opinion."

Consistent with the position taken in the decision letter, the Secretary of State had not made submissions to the special adjudicator that would lead him to think that he could not accept the general view expressed by Professor Hathaway. The Secretary of State's representative before the special adjudicator relied on the refusal letter and said that the issues raised in the appeal were whether there was provision for an alternative service in Poland, whether a proper appeal system was in place which provided for a fair hearing and whether the appellant himself was a conscientious objector.

As we have seen, the special adjudicator decided the latter question in the appellant's favour. He then went on to address the other matters. He said in his adjudication:

"I am satisfied on the evidence before me that the procedure adopted in Poland for dealing with the Appellant's appeal amounted to a failure to recognise the legitimacy of his conscientious objection. Although in theory a non-combatant alternative was provided, in practice it was not a realistic alternative offered to this Appellant.

Bearing in mind that the Commission on Human Rights adopted a resolution in March 1989 expressly recognising the right to conscientious objection and similarly the Council of Europe recommended that anyone liable to conscription for military service who for compelling reasons of conscience refuses to be involved in the use of arms shall have the right to be released from the obligation to perform such service on conditions set out therein. I have concluded that the Appellant has not been provided with a viable alternative to military service in practice.

It has not been challenged that as a result of the failure of his appeals in Poland the Appellant is liable to be committed to prison for nine months on his return. I do not therefore have to speculate as to whether or not he will be persecuted if he goes back to Poland. It is virtually certain that he will be immediately committed to prison. Because he has been denied his primary human right to.have a conscientious objection, the question of whether such imprisonment is disproportionate does not strictly arise. However, it has been submitted on his behalf that bearing in mind the evidence relating to the treatment of 'prisoners of conscience' in prison in Poland and the effects that such a period of imprisonment would have on the Appellant and his family after release, any imprisonment would in the circumstances of the present case be disproportionate. I have great sympathy with that submission accepting as I do the statement of Mr Urbaniak and Mr Jaroski that people who are imprisoned as a result of their conscience are put in a cell with convicted murderers and rapists and serving such a sentence has a negative impact on both physical and psychological well-being.

In all the circumstances I find that the Appellant has a well-founded fear of persecution based on his political opinion if he were now to be returned to Poland and I accordingly allow this appeal."

The Secretary of State appealed against that determination, as he was entitled to do, to the Immigration Appeal Tribunal. It is important to note the only ground upon which that appeal was brought. It is set out in a number of places but most conveniently at page 4 of the IAT's determination:

"The Special Adjudicator accepted that the appellant had a sincere moral and conscientious objection to military service. However, his finding that the appellant would suffer a disproportionately severe punishment for his refusal to undertake military service is perverse and an error in law, since there is a procedure for granting an alternative service to military service in Poland. The appellant had exhausted the appeal system but had been sentenced to a period of nine months' imprisonment only. The Secretary of State, with reference to para 167-174 of the Handbook determining Refugee Status, relies on the case of Boban Lazarevic (12922), reported in 1997 IMM AR 251."

That concludes the grounds of appeal. I will not comment further at this stage on the appropriateness of those grounds or whether the adjudication of the special adjudicator gave rise to those grounds at all. I will rather read in full, because although it extends the judgment it is important to see how this matter was decided, the ruling in that appeal of the Immigration Appeal Tribunal. However, I should say three things. First, I accept that the Immigration Appeal Tribunal can differ, in a proper case, from findings of fact made by the special adjudicator. Secondly, I accept also that the Immigration Appeal Tribunal is not necessarily bound by the grounds of appeal put before it, provided that procedurally a fair opportunity is given to meet anything argued before it that does not emerge from the grounds. Thirdly, in this case, we apparently do not know how the argument developed. Neither Mr Nicol QC nor Miss Grey appeared on that occasion and the tribunal sets out nothing of the argument. I do not complain about that in itself. What we are principally interested in is what they decided. But since what they decided appears to be something different from what was put before them in the grounds, it would perhaps have been illuminating if, from one source or another, we could know how the hearing developed. However we do not.

The Immigration Appeal Tribunal finding is as follows:

"The adjudicator's findings raise two issues: whether the approach by the Polish authorities to those claiming a conscientious objection is fair or is so unfair as to lead to a conclusion that those affected by it are persecuted and whether the punishment given to the respondent was disproportionately severe. We have carefully considered all the evidence before us, including the skeleton argument submitted by Miss Vidal",

who at that time appeared on behalf of Mr Zaitz.

"The first issue is one that raises in our view a difficulty. Where there are procedures in place to accommodate conscientious objectors in a sovereign state, the question surely arises as to what extent it is within the jurisdiction of the appellate authorities in the United Kingdom to seek to analyse and make judgments on those procedures and indeed what criteria the appellate authorities are to apply in coming to a conclusion whether procedures are 'fair', assuming that the term unfair, in that context is to be equated with persecution.

In Stefan and others [1995] Imm Ar 410 Collins J held that the Secretary of State had had an obligation to consider whether, the applicants in that case had had their claims for asylum fairly and properly heard in France. The adjudicator had been obliged to decide whether the particular French judge had acted in a way which was unfair to the applicants when they applied for asylum in France.

It may be that we are obliged to approach this case in the same way: if that is so, we find that the evidence before us is inadequate. We have reports from War Resisters International and others criticising the approach of the Polish authorities: Amnesty International criticises the sentence imposed on the first respondent and concluded that the 'reasoning of the Polish Recruitment authorities in this case to be excessively restrictive' (emphasis added). There is a report on file from a firm of Polish lawyers which sets out the system of alternative service and appeals.

Obviously those whose applications to the Board and on appeal are refused will be dissatisfied with the system. There is however a system in place for alternative service and none of the reports we have seen suggest that the system has no practical effect. We note that the respondent sought deferment of his sentence pending the birth of his child and that in fact occurred, which also to us suggests that it is not a system without a humanitarian discretion which is exercised.

The first respondent asserts that the members of the Board were hostile to him. That is a subjective view which may well be coloured by his unsuccessful appeal. We find nothing in the acceptable evidence to suggest that the procedures were unfair or that the respondent did not have an opportunity to have his case considered within those margins of procedural propriety which every national state must be permitted to adopt in relation to its citizens and their constitutional obligation to perform military service.

As to the question of the severity of the punishment, we note that the relevant law can lead to the sentences of up to fifteen years. In all the circumstances we cannot accept that a sentence of nine months was excessive punishment: on that we disagree with the adjudicator.

The appeal is allowed."

I have set out the very limited terms in which the Secretary of State appealed to the Immigration Appeal Tribunal. The Secretary of State accepted that the special adjudicator had found that the applicant had a sincere and moral objection to military service and would, if returned to Poland, be subjected to nine months' imprisonment for refusing that service. It was not submitted either that those findings were not in law relevant to the issues before the special adjudicator, or that he was wrong in the findings that he made. Nor could the first of those contentions reasonably have been advanced since, before the special adjudicator, the Secretary of State submitted that it was indeed a relevant question for the special adjudicator's decision whether the applicant

was a genuine conscientious objector. No question was then raised as to whether, and if so in what terms, punishment for refusing to perform military service fell within the Convention at all.

In this court, however, the Secretary of State served a respondent's notice which did seem to put those two latter questions firmly in issue. The additional grounds upon which it was said that the tribunal's decision should be affirmed were as follows:

"1. As a matter of law, punishment for refusal to perform military service in a democratic state in peace time is not of itself sufficient ground for a claim for refugee status.

2. It is necessary as a matter of law to show that the reason for his alleged persecution is a Convention reason and the appellant has failed to do that.

3. It is for the domestic authorities of the home country to determine whether the refusal to perform military service is justified. Only if the domestic procedures have been shown to be unfair or to amount to a breach of substantial justice could there be a claim and that has not been shown here."

The first two of those grounds, and the first part of the third ground, widen the issues in this appeal far beyond what had been in issue before either of the tribunals below. Although the notice was, we are told, served on the appellant's solicitors and on the court, it is an unfortunate fact that it did not find its way either into our papers or into the brief of leading counsel representing the appellant. However, Mr Nicol properly told us that he was not handicapped in dealing with the new contentions because they had been repeated and amplified in the Secretary of State's skeleton argument served on him well before the hearing and, of course, seen by the court. Nor had Mr Nicol indicated to his opponent that he objected to these points being raised. But, perhaps with some encouragement from the court, he said that he felt obliged on behalf of Mr Zaitz to raise the issue of whether the appeal should be widened in this way.

We ruled it should not and that the appeal should be confined to the issues which were before the IAT. In so ruling, we accepted that this court certainly has jurisdiction to consider points, especially points of law, that had not been taken below; but as a matter of discretion, we did not think that that course should be taken in this case.

We have three reasons for that view. First, the case has been considered at many levels, including two hearings before special adjudicators and two hearings before the IAT, without it ever being suggested, as it now is, that the whole basis upon which Mr Zaitz put his case, and on which he succeeded before the special adjudicator, is unfounded. In our view, it would be extremely unfair to him as an asylum seeker to be deprived at this very late stage of the ruling that the special adjudicator made in his favour on a basis never before raised.

Second, no explanation has been given as to why the points not having been taken earlier. We consider that the Secretary of State should be alive to important points of public law and not see himself as entirely free to introduce them only at a late stage of the process.

Third, we do not think it desirable that this court should be asked to rule on what was said to be, and might appear to be, fundamental issues affecting the asylum system without the benefit of seeing a judgment on those issues given by the specialist tribunal which regularly deals with such matters. We have no doubt that we would have received very full and helpful assistance from Mr Nicol and Miss Grey had we embarked on the course we were invited to take, but we would have.been dealing with the points, effectively, as a court of first instance: which in this case we do not think would have been desirable.

I return to the ground upon which the Secretary of State complained to the IAT, to which I have already referred. In my judgment, the complaint that the finding that the appellant would suffer a disproportionately severe punishment for his refusal to undertake military service was perverse simply did not address whatever complaint that might properly be made in respect of the special adjudicator's determination.

It will be recalled that the special adjudicator held that on his earlier findings, which are not complained of in the notice, the question of disproportionality of punishment did not arise at all: although he did go on to say that the evidence that he heard and which he had accepted made him feel that if that question were asked of him he would certainly answer it in the affirmative.

In my judgment, in deciding the question of disproportionate sentence in that way, the special adjudicator was right to hold that, because Mr Zaitz had been denied his primary right to have a conscientious objection to military service, the question of whether his imprisonment was disproportionate did not arise. That is because (although the special adjudicator did not put it quite in this way) the latter issue only comes under consideration where the applicant does not have a convention reason for refusing service, but the punishment inflicted on him for such a general refusal is made disproportionate to the norm for separate and persecutory reasons. That appears clearly from para 169 of the United Nations Handbook:

"A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion."

That paragraph, and its reference to disproportionality, is directed at deserters or draft evaders, that is persons who do not have a conscientious reason for not taking part in military service. It was therefore not open to the Secretary of State to complain to the tribunal, as he did, that the special adjudicator's conclusion on this point was perverse. Nor was it for the tribunal to hold, as it purported to do, that the sentence either was or was not excessive, however that latter question might be judged. The proper question, not asked in the proceedings below and not in issue before this court, was whether the punishment inflicted on Mr Zaitz was sufficient to sustain the finding that he had been "persecuted" for the established and accepted Convention reasons. For the reasons accepted by the Secretary of State, although not quite in that context, it was open to the adjudicator to reach that conclusion.

Where does that leave the case before the Immigration Appeal Tribunal and the Secretary of State's appeal from it? The burden of the complaint before us as to the findings of the special adjudicator, and of the reasons why the Immigration Appeal Tribunal was justified in reversing him, concentrates on the findings of the special adjudicator and thereafter of the Immigration Appeal Tribunal as to the fairness and acceptability of the procedure for granting an alternative service to military service in Poland, a procedure that I have already described. But, on the findings of the special adjudicator and on the way in which that matter was presented in the Secretary of State's appeal to the Immigration Appeal Tribunal, it seems to me that the question of the fairness or reasonableness of that procedure simply does not arise. That is because the finding of the special adjudicator that Mr Zaitz was a sincere and moral conscientious objector was not at any stage of that process said not to be open to it. As I have already repeated, a finding of fact on that question was said by the Secretary of State before the special adjudicator to be one of the tasks that the special adjudicator had to perform. And it is not disputed that if he returns to Poland Mr Zaitz will be sentenced to nine months' imprisonment.

Therefore, on the findings of the special adjudicator that are not challenged, Mr Zaitz is found to be a conscientious objector. It is not suggested that persecution for a Convention reason cannot be found on that basis. He will suffer punishment which the special adjudicator found to be persecution if he returns to Poland, and he will suffer that punishment because he refuses on the grounds of conscience to undertake military service.

The reference in the grounds of appeal to the procedure backs that up. It is not suggested that the special adjudicator's finding on the procedure was wrong or not open to him. Rather, the procedure was simply stated to be there as a datum demonstrating that, since the sentence had been imposed after a procedure, the finding that it was disproportionate was perverse. That is a contention that it is not possible to uphold.

That is not how the Immigration Appeal Tribunal approached the matter. They said that there were two questions engaged by the appeal, the first and most substantial being whether the approach by the Polish authorities to those claiming conscientious objection was so unfair as to lead to a conclusion that people subjected to it are persecuted. They concluded, differently from the special adjudicator, that that contention in respect of Poland cannot be upheld. That does not seem to me to be the proper question in this appeal before the Immigration Appeal Tribunal.

Therefore, what I say hereafter will in my view be obiter. Nonetheless, since that question was addressed and since it took up almost the whole of the argument before us, I will consider it.

Miss Grey, for the Secretary of State, said that the Immigration Appeal Tribunal had been justified in reversing the special adjudicator for two rather separate reasons. The first was that the tribunal was justified in relying upon what was said by Collins J in the case of R v SSHD ex parte Stefan [1995] Imm AR 410 about the approach to be taken by courts in this country when they are considering the validity or effectiveness of decisions taken by courts of another country. I understood her to argue at one stage that, faced with the present problem, the special adjudicator should have done what the Immigration Appeal Tribunal may have done (though I am not satisfied that they did take that view). The special adjudicator should have applied the 'Stefan principle' to his assessment of the nature and effect of the procedure in Poland. The special adjudicator is not of course to be criticised for not doing so because nobody for a moment suggested to him that that was how he should approach the matter; but in the context of this case I leave that point aside.

Secondly, I also understood Miss Grey to say that the assessment of the evidence by the special adjudicator had been sufficiently unsatisfactory for it to be justified for the Immigration Appeal Tribunal to substitute its own finding. I deal with those matters in turn.

The case of Stefan was a third country case: an area of the law in which there has been considerable development since that case was decided. The task of the court in Stefan and of the many courts in this country that have considered third country cases since then was quite different from the task facing the special adjudicator. The question of a third country case is whether, in assessing the likelihood of persecution if the applicant is returned to his country of origin, the court of the third country that has dealt with that matter will deal with it in accordance with the Convention.

In those circumstances it is hardly surprising that considerations of comity of the sort that were emphasised by Collins J in Stefan play a considerable part. Miss Grey properly reminded us that some of the difficulties of reconciling that approach with the international meaning and international application of the Convention have led to a much more detailed consideration of the problem, most notably in this court in the case of R v SSHD ex parte Adan [1999] 4 All ER 774, [1999] 3 WLR 1274.

In a case such as this, where the question is not as to the decision of a foreign court in respect of the activities in another country, but more directly as to whether the arrangements in the country of origin are or are not in breach of the convention, then I do not think that the principle set out in Stefan applies at all. It certainly does not apply as some sort of overriding or dispositive consideration based solely on the fact that the decision has been taken by a court rather than by a government official. In deciding whether a person fears persecution for a Convention reason in his native country, the courts of this country, in my judgment, are bound to consider that question by applying the Convention and by assessing the facts as best they can from the information before them. Naturally, in a case such as this, where there is a structured system in the country of origin, then the courts in this country would look at it very carefully before finding that it does not comply with the requirements of the Convention. There is no indication that the special adjudicator did not do that. In my judgment he was not prevented, by any consideration of the sort to be found in third country cases, from dealing with the matter (and I use this term advisedly) on its merits.

For that reason, therefore, and because we are dealing with an entirely different jurisprudence, I do not think it helpful to try to force the facts of this case into the framework set out by this court in the case of Adan. If one is going to do that, Miss Grey was constrained to say that applying, however artificially, the analysis set out in the judgment of this court at page 1293 of the report to which I have referred, the question was a matter of fact and not a matter of law. With respect, I somewhat doubt that: but if that is so it is a matter in the first instance for the judgment of the tribunal of fact, that is the special adjudicator.

It is perhaps fair to say that, when questioned by the court, Miss Grey may not have finally placed the dispositive weight on Stefan that she was originally minded to do. If thus there is no barrier, as in my judgment there is not, of a technical nature to the court considering the issue as an issue of fact, we are then forced back to the assessment made by the special adjudicator of whether Mr Zaitz was persecuted for a Convention reason and the different opinion on that question adopted by the Immigration Appeal Tribunal, however little such an approach was open to them on the grounds of appeal before them.

It is not necessary to repeat what the tribunal said of the findings of the special adjudicator. Mr Nicol criticised the approach of the Immigration Appeal Tribunal in detailed terms and I agree with what he said.

Summarising it as best I can, first, the tribunal doubts the credibility of the applicant and is not prepared to act on it, describing his characterisation of the members of the board as a subjective view, despite the fact that the special adjudicator who heard his evidence accepted it. It is possible for a tribunal, even if it has not heard the witness, not to accept evidence that had been accepted by the court below. But if it is going to take that course, it has to give cogent reasons. Here there are none, apart from those which I have just set out.

Secondly, there was detailed material before the special adjudicator which he carefully and conscientiously considered as to the general system in Poland. It is clear that the Immigration Appeal Tribunal was not prepared to act on that evidence. They said in that respect that those whose applications to the board on appeal are refused will be dissatisfied with the system.

But they say nothing to indicate why they do not accept the evidence of ostensibly highly respectable witnesses, well informed on the subject, including Amnesty International and including a person who holds an important academic post at Cambridge University. It was open to the tribunal to take a different view from the special adjudicator, but they gave no indication whatsoever why they were doing so. Accordingly, therefore, even if the matter can be approached on the basis that the tribunal approached it, in my judgment they were wrong in law not to accept the findings of fact made by the special adjudicator to the extent that they were influenced in their approach by applying to this case the case of R v SSHD ex parte Stefan [1995] Imm AR 410

For those reasons I would allow Mr Zaitz's appeal to this court. I would quash the decision of the Immigration Appeal Tribunal and I would restore the ruling of the special adjudicator who allowed Mr Zaitz's appeal from the Secretary of State's refusal of asylum.

Some observations in this judgment may be thought to be critical of the way the case has been conducted on behalf of the Secretary of State. None of those criticisms, if they be such, are directed at Miss Grey who came into the case at a very late stage and, faced with unexpected obstacles, stuck vigorously and helpfully to her task in the face of considerable difficulties.

WALLER LJ:

For the reasons given by my Lord, I agree that this appeal should be allowed and with the directions proposed with him.

PETER GIBSON LJ:

Although we are differing from the Immigration Appeal Tribunal and, despite the forceful arguments advanced by Miss Grey with great resourcefulness after being taken by surprise with the objection to the points raised in the respondent's notice, I would also allow the appeal for the reasons given by my Lord, Lord Justice Buxton, with which I am in entire agreement.

JUDGMENT

Appeal allowed.

SOLICITORS:

Wilson & Co, Tottenham; Treasury Solicitor