Neutral Citation No [2003] EWCA Civ 25

Case No: C2/2002/2644/2645

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
The Hon Mr Justice Goldring

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24th January 2003

B e f o r e :

LORD PHILLIPS OF WORTH MATRAVERS, MR
LORD JUSTICE WALLER
and
LORD JUSTICE SEDLEY
- -

ZL AND VL	**Appellants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT and LORD CHANCELLOR'S DEPARTMENT	**Respondents**

- -
- -

Ms Frances Webber and Ms Louise Hooper (instructed by **Morgan Hall** for the Appellants)
Miss Monica Carss-Frisk, QC and Miss Samantha Broadfoot (instructed by **The Treasury Solicitor** for the Respondents)

- -

JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Lord Phillips, MR :

This is the judgment of the court to which all members have contributed.

1. The applicants before the court are mother ('ZL') and son ('VL'). In form they seek permission to appeal against a judgment of Goldring J. delivered on the third day of last month. In reality they renew applications for permission to seek judicial review of decisions of the respondent, the Secretary of State for the Home Department, to reject the applicants' asylum and human rights claims and to certify that those claims are 'clearly unfounded', pursuant to s.115(6) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). That section introduces a new regime intended to ensure that those who make claims for asylum that are clearly unfounded can be promptly removed. This is achieved by requiring such persons to pursue any statutory rights of appeal that they enjoy from outside the jurisdiction rather than suspending their removal pending the resolution of their appeals.

2. These are the first cases under the 2002 Act to reach this court. They are important because the applicants complain that, insofar as procedures have been followed in implementing the new regime, those procedures are unfair, and insofar as no procedures have been introduced, this also is unfair. The applicants contend that, until fair procedures are in place, decisions such as those taken in their cases are and will be unlawful.

3. The applicants are members of an extended family, most of whom arrived in this country on 8 November 2002 from the Czech Republic and sought asylum. The head of the family, ZL's husband, had arrived some days earlier, with two dependants. His asylum and human rights applications were rejected by the Secretary of State but, because he arrived before the 2002 Act came into force, he is entitled to remain in this country, pending the hearing of the appeal which he is bringing before an adjudicator.

4. The applicants claimed asylum immediately on arrival and were at once moved to Oakington. On 11 November they were there interviewed in relation to their asylum claims. On 14 November their claims were rejected, certificates were issued under s.115(6) of the 2002 Act and they were issued with removal directions. ZL has since been given an undertaking by the Secretary of State that she and her dependants will not be removed pending the determination of her husband's appeal. We have been informed that, after the hearing before us, in January 2003, VL returned voluntarily to the Czech Republic. He has not sought permission to withdraw his appeal before us and we shall, accordingly, rule upon it in this judgment.

The statutory framework

5. A person who is refused leave to enter the UK under the 1971 Act may appeal against the refusal to an adjudicator on the ground that his removal in consequence of the refusal would be contrary to the Refugee Convention: s.69(1), Immigration and Asylum Act 1999 ("the 1999 Act"). A similar right of appeal exists against removal directions to an illegal entrant by virtue of s.69(5) of the 1999 Act.

6. A person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the UK, acted in breach of his human rights, may appeal to an adjudicator against that decision: s.65(1) of the 1999 Act.

7. The Lord Chancellor is empowered to make rules for regulating the exercise of the rights of appeal conferred by Part IV of the 1999 Act (including ss.65 and 69) by Schedule 4 paragraph 3 of the Act. The current rules made under paragraph 3 are the Immigration and Asylum Appeals (Procedure) Rules 2000.

8. The procedure rules provide *inter alia* for notice of appeal to be given where an appellant makes an appeal within the UK, no later than 10 days after notice of the decision was received (rule 6(1)); and from outside the UK against a decision made in-country not later than 28 days after departure (rule 6(2)(a)). There is

no time limit for the respondent to forward the appeal documents to the appellate authority under rule 10, nor any time limits within which appeals are to be heard and determined.

9. The appeals provisions of the 1999 Act will be repealed and replaced by Part 5 of the 2002 Act as from a date to be appointed: ibid s.114. S.115 (with which this case is concerned) came into force on 7 November 2002 on the passing of the Act, by virtue of s.162(2)(w).

The Nationality, Immigration and Asylum Act 2002

10. Section 115(1) of the Nationality, Immigration and Asylum Act 2002 provides:

> "A person may not bring an appeal under section 65 or 69 of the Immigration and Asylum Act 1999 (human rights and asylum) while in the United Kingdom if-
>
> (a) the Secretary of State certifies that the appeal relates to a human rights claim or an asylum claim which is clearly unfounded, and
>
> (b) the person does not have another right of appeal while in the United Kingdom under Part IV of that Act."

These applications concern paragraph (a).

11. Section 115(5) provides:

> "Where a person in relation to whom a certificate is issued under this section subsequently brings an appeal or raises a question under section 65, 69 or 77 of that Act while outside the United Kingdom, the appeal or question shall be considered as if he had not been removed from the United Kingdom."

12. Section 115(6) provides:

> "If the Secretary of State is satisfied that a person who makes a human rights claim or an asylum claim is entitled to reside in a State listed in subsection (7), he shall issue a certificate under subsection (1) unless satisfied that the claim is not clearly unfounded."

13. Section 115(7) lists ten States that will accede to the EU in 2004. They include the Czech Republic.

14. Subsection (8) provides:

> "The Secretary of State may by order add a State, or part of a State, to the list in subsection (7) if satisfied that:
>
> (a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and
>
> (b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention."

The issues

15. The applicants seek to quash the decisions of the Secretary of State to refuse their asylum applications and to certify their claims as clearly unfounded on the following grounds:

i) their claims were processed, rejected and certified before the 2002 Act had been promulgated;

ii) the decisions were taken in the absence of procedural safeguards;

iii) the procedures to which the applicants were subjected were unfair;

iv) the decisions to certify were unsound.

The late promulgation of the 2002 Act

16. The 2002 Act received the Royal Assent on 7 November 2002. The provisions of s.115 were brought into immediate effect. The Act was not, however, published by the Queen's Printer until 28 November 2002. It was in the interim between these two dates that the procedures with which this appeal is concerned were carried out. By virtue of the new provisions of s.115 the effect of the decisions that the applications were clearly unfounded was to suspend all rights of appeal while the applicants remained in the United Kingdom. What, if anything, is the effect of the delay in promulgating the Act?

17. It is beyond argument that an Act of Parliament takes legal effect on the giving of the Royal Assent, irrespective of publication. This rule of our domestic law is not, however, echoed in the jurisprudence of the European Court of Human Rights. In cases where the justification for a prima facie invasion of a Convention right depends on the State's having acted "in accordance with a procedure prescribed by law" (Article 5) or "in accordance with the law" (Article 8) or "as…prescribed by law" (Articles 9, 10 and 11), the Court declines to recognise national laws which are not adequately accessible: see *Sunday Times v United Kingdom* (1979) 2 EHRR 245, para. 49. The principle of legal certainty is also a pillar of the law of the European Union: see *Administration des Douanes v Gondrand Frères* [1981] ECR 1931, paras. 17-18. The Supreme Courts of the United States and Canada, while recognising, like the Strasbourg Court, that common law doctrines may pass the test of legal certainty, have likewise set their faces against laws which cannot be known with precision: see *Grayned v Rockford* 408 US 104, 108 (1972); *R v Thomsen* [1988] 1 SCR 640, 650-1. Where it has been within the jurisdiction of the English courts to rule on such issues, they too have made it clear that legal certainty is an aspect of the rule of law: see *Black Clawson Ltd v Papierwerke AG* [1975] 591, 638, per Lord Diplock.

18. We mention this weight of authority because the non-promulgation of a statute which has been enacted by Parliament with (in part or in whole) immediate effect is a matter of constitutional importance which goes well beyond such questions as whether lawyers can nevertheless work out from Hansard what the Act in its final form will say. The procedure for promulgation, according to Erskine May *Parliamentary Practice* (22nd edition, 1997), is that:

> "As soon as a public bill has received the Royal Assent, a print of the Act in the form in which it was finally passed is prepared in the Public Bill Office of the House of Lords….
>
> After examination of the text to ensure that it is correct, a proof copy … is certified by the Clerk of Public Bills in the House of Lords and sent to the Queen's Printer, and a request is sent to the Controller of the Stationery Office to issue instructions for its immediate publication." (p.571).

19. It is to be noted that the Royal Assent is given, ordinarily pursuant to the notification procedure provided for by s.1(1)(b) of the Royal Assent Act 1967, after completion of the Parliamentary passage but often before a perfected text exists: see Bennion, *Statutory Interpretation* (4th edition, 2002), §38.

20. By Letters Patent of 1888, the Controller of Her Majesty's Stationery Office is ex officio the Queen's Printer (Bennion, op. cit., §45). According to its website, HMSO "operates as part of the Cabinet Office under the ministerial control of the Minister for the Cabinet Office". It follows, as it seems to us, that both offices are parts of the executive. The Public Bills Office, on the other hand, acts on behalf of the Clerk to the Parliaments, who in turn acts in relation to Bills on behalf of the Crown in Parliament (see Bennion, op.cit., §45). Such functions are evidently part of the proceedings of Parliament, for according to Erskine May (op.cit., p.95)

> "Officers of the House take part in its proceedings principally by carrying out its orders, general or particular."

21. We have been told by counsel appearing for the Home Office and the Lord Chancellor's Department, in answer to the Court's inquiry, that the final proof of the 2002 Act was received by the Queen's Printer – necessarily, therefore, from the Public Bills Office - on 21 November, 16 days after it received the Royal Assent. HMSO took a further week to print and publish it.

22. Article IX of the Bill of Rights 1688 provides:

> "That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament."

It appears to us that this provision puts it beyond our jurisdiction to seek information about or to comment in any way upon the period of time between the giving of the Royal Assent to the Nationality, Immigration and Asylum Act 2002 and the transmission of the perfected text to the Queen's Printer. Our inquiry has therefore been limited to ascertaining when it was that the latter was in a position to print and publish the Act. By that date, everything in issue in this appeal had happened. The applicants had been interviewed on 11 November, four days after s.115 came into force, and had had their claims certified and been given notice of refusal on the 14th. Throughout that time no text of the Act was accessible.

23. It may be that Parliament will wish to consider what is set out above. We confine ourselves to the legal implications of those aspects of it of which we are entitled to take cognizance. These do not include – as they might well do in another case – a consideration of the validity of the exercise of executive powers which invade a Convention right in reliance on an inaccessible law, since no Convention right (save possibly that conferred by Article 13, which is not scheduled to the Human Rights Act 1998) is directly engaged by what has happened to the applicants. But they do, in our judgment, include the question of what ordinary fairness demands of a minister who knows – or believes he knows – what the final text of a new law will contain, when dealing with important interests of people who do not.

24. Put shortly, the question is whether the Home Secretary was entitled - for he was not obliged - to consider the applicants' claims under s.115(6) at a time when the Act could not be read or its contents known with certainty. Miss Carss-Frisk QC has pointed out that the main agencies offering advice and representation to asylum-seekers held at Oakington, the Refugee Legal Centre and the Immigration Advisory Service, as well as the Immigration Law Practitioners' Association, had followed the passage of the Bill and had enough information – or access to it - to know what the Act contained. This may well be right, though it does not necessarily answer the constitutional objection to the executive's reliance on unpromulgated legislation. But the solicitor acting for these applicants was a private practitioner who has deposed to the Court that, although he received ILPA's regular updating packs, he had not yet learnt at the time he dealt with these claims that the new Act was in force. While ignorance of the law will not excuse anyone, even a lawyer, the reason for the applicants' solicitor's ignorance places in relief the issue of the fairness of using s.115 in the period before the Act was promulgated.

25. Miss Carss-Frisk points out that little of what happened to these applicants was dependent on the new Act. Removal is a long-standing procedure under the Immigration Act 1971. Processing of claims has always been part of the asylum procedure. Out-of-country appeals are not new: they have always been a feature, for example, of entry clearance refusals. What is new is the consequential block on in-country appeals once a claim has been certified as clearly unfounded. But, as Ms Webber points out, this in itself matters a great deal. The very fact that certification coexists with a continuing right of appeal is an acceptance that a claim may turn out to have been certified in error. If it has been, the claimant will meanwhile have been returned not – as in other cases – to a safe third country but to the very place where he or she faces persecution or ill-treatment. As will appear later in this judgment, careful consideration was needed of what burden and standard of proof s.115(6) might now create, and of how far (if at all) the very fact of listing countries under s.115(7) created a presumption of adequate protection. We do not accept that it is a sufficient answer that the section – which had been introduced during the Bill's passage – was enacted in unchanged form. It is an aspect of the rule of law that individuals and those advising them, since they will be presumed to know the law, should have access to it in authentic form.

26. In this situation, Miss Carss-Frisk has not been able to point to anything which required the Home Secretary to entertain s.115 certifications before the Act was promulgated. The fact that s.115(6) says that he "shall issue a certificate" does not create such an obligation: it simply provides for the consequences once he has embarked on consideration of an asylum or human rights claim from a listed state. Whatever the political or administrative imperatives, it was not legally necessary to act in anticipation of the promulgation of the Act. The question is therefore whether it was fair to do so. If it was, then the Home Secretary was without doubt entitled to act as he did; but if it was unfair, it is the duty of the court to, at least, consider intervening.

27. We shall in due course have to consider in a little detail the procedure by which asylum applications are processed at Oakington. For present purposes it suffices to note that the procedure is a 'fast track' procedure, which was not altered in any material respect on the coming into force of s.115 of the 2002 Act. The difference that s.115 makes is that, apart from the right to seek judicial review, the Oakington process may be the one and only opportunity open to an applicant to establish his or her right not to be removed to the country in which the risk of persecution is alleged to prevail. No longer can the applicant be confident that there will be a further opportunity to present evidence, on appeal to an adjudicator, before being removed.

28. Had there been no right to apply for judicial review, the applicants might well have been able to show that ignorance of the effect of s.115 had resulted in injustice. Additional material has been placed before us by the applicants without objection from Misss Carss-Frisk. It is expert evidence of conditions in the Czech Republic. Evidence of this type has customarily been adduced, after an adverse initial decision, at the stage of appeal to the adjudicator or even on subsequent appeal to the Immigration Appeal Tribunal. Had those acting for these applications been aware that there might be no in-country appeal, they might have succeeded in placing at least some of this material before the interviewing officer at Oakington. Alternatively, it might have been possible, by manifesting a wish to adduce such material, and by giving some indication of its nature, to have persuaded the interviewing officer that it was not fair to proceed with the fast track procedure and thus to have bought enough time to introduce this material before the critical decision was taken.

29. In the event, however, the material has been placed before us and we have had regard to it. We have also concluded (see below) that a s.115 decision is one which the court is as well placed as the Home Secretary to take, and we go on to review the evidence in that light. We consider that this cures, in the cases before us, the unfairness which we accept would otherwise have resulted from the use of s.115 before it was promulgated.

Absence of procedural safeguards

30. Ms Webber's skeleton argument anticipated that the Secretary of State might contend that there was no requirement of procedural fairness. She contended that asylum cases frequently engaged human rights and

that, since the introduction of the Human Rights Act 1998, it was, as a matter of public law, incumbent on this country to have in place fair procedures when considering such cases. In the event, Miss Carss-Frisk did not challenge this contention. We think that in this she showed wisdom. This court would not readily be persuaded that, where what is at stake is whether to send an asylum applicant back to the country where the applicant claims to be at risk of persecution, there is no requirement to give the applicant a fair hearing.

31. There is no prescribed procedure for processing claims for asylum to which section 115 applies. The procedure in fact adopted is, as we have said, essentially the same as has been operated at Oakington under the 'fast track' procedure. There has been one change. The interviews are carried out by an Executive Officer. Before the final decisions are taken, however, each case is considered by a 'second pair of eyes', who will be a Higher Executive Officer, or Senior Executive Officer.

32. Mr Ian Martin, the Deputy Director of the Immigration and Nationality Directorate ('IND'), with responsibility for asylum processing at Oakington, has provided details of the process in a witness statement, as follows:

> **Day O:** The applicant arrives at Oakington.
>
> **Days 1 and 2:** There is a scheduled consultation with an on site legal representative … or the opportunity to consult the applicant's own appointed outside representative. If any medical attention is required, this will be provided. Immediate medical appointments are available throughout the period of stay at Oakington.
>
> **Day 3** The asylum interview takes place. The applicant's legal representative and own interpreter, in addition to the interpreter provided by the Immigration and Nationality Directive, are entitled to attend. The applicant has the opportunity to consult privately with the legal representative before and after the interview. As soon as the interview is completed, a copy of the interview notes is provided both to the applicant and to the applicant's representative.
>
> **Day 4 and 5** These are set aside for the submission of any further evidence, information or representations. It is possible for the applicant to see a legal representative during this period.
>
> **Day 6 and 7** The decision is made and served, with the certificate and removal directions where applicable. The decision is served personally and the legal representative may be present. If for any reason the legal representative is unable to attend, the decision is faxed to the representative. There is an opportunity for further private consultation immediately after the decision has been served and at any point until the applicant is removed.

33. In *R (ex parte Saadi & Others)* [2002] UKHL 41; [2002] 3 WLR 3131 the House of Lords gave detailed consideration to the fast track procedure at Oakington and held that detention under that procedure was 'proportionate and reasonable'. Miss Carss-Frisk sought to rely upon this decision as demonstrating that the House of Lords had given the procedure at Oakington a clean bill of health. We do not consider that this conclusion can be drawn from the result in *Saadi*. The issue in *Saadi* was not whether the procedure at Oakington was fair. The issue was whether it was lawful to detain asylum applicants for the short period necessary to process their claims at Oakington. At the same time it is fair to say that if the procedure at Oakington were manifestly unfair this fact would have been likely to have been identified during the passage of *Saadi* through the courts.

34. When considering the procedure at Oakington it is essential to bear in mind what it is intended to achieve. Lord Slynn's speech in *Saadi* is a convenient source of the Secretary of State's policy in relation to the use of Oakington. Oakington is intended for the processing of claims that it is reasonable to believe can be

processed in the period of about seven days that the applicant will be detained. It is intended that up to 13,000 asylum seekers a year will be processed at Oakington. The Immigration Minister, Mrs Barbara Roche has explained:

> "Oakington will enable us to deal quickly with the straightforward asylum claims. It is in everyone's interest that both genuine and unfounded asylum seekers are quickly identified. Genuine asylum seekers can be given the support they need to integrate into society. And those with unfounded claims can be sent home quickly thereby sending a strong signal to others thinking of trying to exploit our asylum system."

35. In an earlier statement, quoted by Lord Slynn, Mr Martin said this about Oakington:

> "The intention is that, during a period of approximately seven days, the examination of an asylum seeker's claimed entitlement to enter or remain in the United Kingdom as a refugee should be conducted and completed, and a decision whether to grant or refuse leave to enter or remain on that basis made and communicated to him. If it is not possible to decide the claim within these timescales, the asylum seeker will usually either be granted temporary admission or moved to another place of detention.
>
> In this way, the Oakington procedure is intended to help facilitate the entry into the United Kingdom of those who are entitled to do so, and to prevent the entry (and facilitate the removal) of those who are not entitled to enter and would be making an unauthorised entry.
>
> Information suggests that approximately 91% of Applicants accepted into the Oakington process have their claims decided during their time at Oakington. The other 9% were released without a decision, their claims proving not to be straightforward. Of those whose claims were decided and refused, some 82% were certified, half of these as manifestly unfounded. The average stay is one of between seven and ten days. Approximately 80% of all Applicants accepted into the Oakington process have been released on temporary admission, with 20% further detained in secure accommodation.
>
> I accept that detention at Oakington is not based on a fear of absconding. Rather, it is in the interests of speedily and effectively dealing with asylum claims, to facilitate the entry into the United Kingdom of those who are entitled to do so and the removal from the United Kingdom of those who are not. This is very much concerned with 'the prevention of unlawful immigration' and 'the prevention of unauthorised entry'."

36. A natural reading of this statement suggests that Oakington was intended to enable speedy processing both of those who were likely to be able speedily to demonstrate that they had valid claims to asylum and those whose claims were likely to be capable of being rapidly demonstrated to be unsound. In this respect the Secretary of State's policy appears to have changed. Ms Webber, on behalf of the applicants, has placed before us a statement of Mr Adrian Matthews, the manager of the office of the Refugee Legal Centre at Oakington. This informs us that, since November 7 2002 only claims covered by s.115(7) of the 2002 Act are being processed at Oakington. The situation at present, as we see it, is as follows. In this respect the Secretary of State's policy appear to have changed.

37. The majority of claims that are made for asylum are rejected. Most claimants are considered not to have a well-founded fear of persecution for a Convention reason in the countries from which they have come. In many of these cases it is considered possible to determine swiftly that the claims are clearly unfounded. Oakington is currently intended to identify such cases, so that the claimants in question can be speedily removed. This will, indirectly, be of benefit to valid asylum claimants. If unsound claims are processed speedily, they will cease to clog the system, thereby delaying the processing of valid claims. In many of these cases it is possible to determine swiftly that the claims are clearly unfounded.

38. It seems to us that the reason for currently restricting those sent to Oakington to applicants from the Section 115(7) states, is that they are likely to contain a high proportion whose applications will be speedily demonstrated to be manifestly unsound. If the new procedure is not to result in injustice, such applicants must be given a fair opportunity to demonstrate, at the least, that they have, or may have, an arguable case.

39. How long do applicants need if they are to be given a fair opportunity to demonstrate that they have, or may have, an arguable claim to asylum? Is the time that they are allowed, and the assistance that is made available, adequate to enable them to place evidence before the interviewer, and the 'second pair of eyes', insofar as such evidence exists, which demonstrates that their case is not unsustainable? This calls for consideration of the nature of the material that is likely to be required to demonstrate that the applicant has, or may have, an arguable case.

What needs to be proved?

40. To demonstrate that he (for convenience we shall use the masculine) is entitled to asylum the first thing that the asylum seeker needs to show is that he has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. He also has to show that he is unable, or owing to such fear, unwilling to avail himself of the protection of that country – see Article 1A(2) of the Convention. In practice this means that the decision-maker must be persuaded either that there is systematic persecution by agents of his home state or that there is a systematic failure on the part of that state to protect citizens against persecution by non-state agents. In either case the applicant must show that he reasonably fears that he will be persecuted if sent home – see the discussion in *Horvath v Home Secretary* [2001] 1 AC 489.

41. Asylum applications lead the Secretary of State, the Immigration Appeal Tribunal and, on occasion, the courts to consider in depth whether a particular state is one where persecution of a particular class or group takes place. Conclusions on this question will, in the case of those countries responsible for large numbers of asylum seekers, be based upon or supported by a large body of detailed information about the state in question. The conclusion reached (though it will not usually conclude the asylum claim) is likely to be one of the following; (i) the state is not one where persecution currently takes place; (ii) the state is one where persecution of members of the group or class is, on occasion, encountered; (iii) the state is one in which persecution of members of the group or class is endemic.

42. Where an asylum applicant seeks refuge from a state which is recognised as one where members of the group or class to which he belongs are subject to persecution, the evidence that he adduces is likely to be limited to his own experience of the ill-treatment to which he, members of his family or other members of his group or class have been subjected. The interviewer's knowledge of the prevalence of persecution in the applicant's home state is likely to assist his case. Such applicants will not, however, be sent to Oakington.

43. The terms of s.115(8) of the 2002 Act shed some light on the reason for the special provisions of s.115(6). Parliament's assumption can be deduced to be that the 10 states listed in s.115(7) share the same qualities as those which will be enjoyed by any state added to the list under the provisions of s.115(8). That is that in general in each of the 10 states there will be no serious risk of persecution of persons entitled to reside in that state. S.115(6) assumes that claims of applicants from any of the states listed in s.115(7) are likely to be clearly unfounded. The Secretary of State is required to certify such claims, unless he is satisfied that this is not the case.

44. While this is the scheme of the relevant provisions, they do not establish conclusively that the states in s.115(7) are states where, in general, there is no risk of persecution. Lithuania is one of the countries listed there. In *Svazas v Secretary of State for the Home Department* [2002] EWCA Civ 74 this court considered two appeals from Lithuanian asylum seekers. The appellants claimed that they had suffered

repeated incidents of police brutality on account of their membership of the Communist party. In the leading judgment Sedley LJ commented:

> 'the picture established by the IAT can be paraphrased as one of a nascent democracy in which the constitutional guarantees of proper treatment of citizens by the police are, despite the professed will and endeavours of the government, systematically or at least endemically violated'.

45. This demonstrates the importance of giving careful consideration to the facts of the individual case as well as to the import of the body of evidence that is likely to have accumulated in relation to the particular state under consideration, evidence with which the officers at Oakington and the members of the IAT are likely to be familiar. The fact that the state is listed in s.115(7) is not a substitute for this exercise.

46. In the case of some of the states listed in s.115(7) consideration by the Immigration Appeal Tribunal of previous asylum claims has already led to the conclusion that the state is, in general, free of the risk of persecution. One such state, as we shall show, is the Czech Republic. An asylum-seeker from such a state faces a hard task in seeking to demonstrate that he has, or may have, a well-founded fear of persecution. Evidence of his personal experience will have to be cogent if it is to raise an arguable case that he has experienced persecution, with the systemic involvement or want of protection on the part of the state that persecution requires, rather than random ill-treatment by non-state agents which does not engage the responsibility of the state.

47. In such circumstances, an asylum seeker may wish to adduce extrinsic evidence in order to demonstrate that the premise that the state was free of persecution was not sound, or has ceased to be sound. This is such a case, for those acting for the applicants put in evidence before Goldring J. a statement about conditions in the Czech Republic from Dr Chirico, which was amplified by a further statement from Dr Chirico that was placed before us.

48. Does the fast track procedure at Oakington afford the asylum seeker a fair opportunity to demonstrate that he has, or may have, an arguable case? In his statement Mr Matthews has expressed concern that the tight timescale at Oakington may prevent applicants, despite the assistance that is available, from putting forward all the matters that are relevant to their asylum claims. Particular concern is expressed about traumatised claimants. At the same time it is clear from his statement that, in the conditions prevailing when the appellants were interviewed, the Refugee Legal Centre was finding it possible to provide satisfactory assistance to those who were being processed.

49. In our judgment there is no reason why the fast track procedure at Oakington should not afford adequate opportunity for asylum claimants to demonstrate, where this is the case, that they have, or may have an arguable case. (We do not accept - indeed we do not understand - Miss Carss-Frisk's submission that a case may be arguable but still be found to fail.) That question is likely to depend upon their individual experiences. The procedures in place afford them an opportunity to give evidence of these, and those assisting them an opportunity to make representations on the import of the evidence. How full an opportunity fairness requires will depend on the content of each claim. Mr Matthews makes the point that in some cases medical evidence will be required to support a protection claim and that, in such circumstances, it is likely to prove impossible to bring a suitably qualified medical expert onto the site in the time available. In such cases, and in analogous cases, we would expect it to be recognised that the fast track procedure is not appropriate and the decision deferred. We recognise the possibility that a traumatised applicant may repress relevant evidence, perhaps for a considerable period, but we do not see how any reasonable procedure can cater for the possibility that an applicant may not take advantage of the opportunity offered to put the material facts in his possession before the interviewing officer.

50. Mr Matthews also refers to difficulties in obtaining other types of expert evidence, for example in relation to country conditions or the authentication of documents. As to the latter point, in a case where the authenticity of documents remains in doubt and the issue of their authenticity is critical, we do not see how

a claim can properly be declared clearly unfounded. The former point calls for more detailed consideration.

51. Plainly the individual asylum applicant is unlikely to be in a position himself to obtain and adduce expert evidence about country conditions in seven days or at all. The individual's own experience may raise a question as to whether, at least in the part of the country from which he has come, persecution is occurring. We refer below to such a case. In such a case the applicant's claim will not be clearly unfounded and the claim should not be certified. Where expert evidence of country conditions is adduced, this is likely to have been prepared or collated on the instructions of one of the organisations providing support to asylum applicants. This is, we believe, an ongoing process and not one driven by any individual application. The evidence of Dr Chirico provides an example of this process. He has in the past provided very detailed evidence about conditions in the Czech Republic in support of asylum applications and the evidence from him placed before us is essentially an update. We do not consider that the fast track procedure at Oakington precludes the presentation of and reliance on such evidence by those assisting applicants.

52. Ms Webber complained that the fast track procedure removed previous safeguards which, in her submission were essential to fairness. The notes of the interviews were not read back to the applicants. They were not given provisional decisions or informed of the matters which were likely to defeat their applications, so that they could try to meet the points raised. There is nothing in the first point. The applicants and those advising them were given the notes of the interviews. As to the second point, it was open to the applicants and those acting for them to make submissions in the two days after the decisions had been taken. We would emphasise once again that the object of the fast track procedure is to give applicants the chance to demonstrate that they have, or may have, an arguable case. We consider that the procedure affords them a fair opportunity to do this.

53. For these reasons we do not consider that Ms Webber has made good her submission that the procedure at Oakington is inherently unfair.

54. In her grounds of appeal Ms Webber also contended that the decisions of the Secretary of State were unlawful because they were taken in the absence of adequate safeguards and procedures for out-of-country appeals. We dissuaded her from advancing oral argument in support of this ground, for we could not, and cannot, see how this could advance her case. The significance of the change in procedure is that it results in asylum seekers being removed to the country where they say they fear persecution before they can appeal. It is the prospect of removal that is their principal concern. If their fears are well-founded, the fact that they can appeal after they have been returned to the country where they fear persecution is scant consolation. We cannot see that the nature of the appeal procedures has any impact on the question of whether the decisions to refuse the applicants' asylum claims and to certify the claims were lawful.

55. Having rejected the challenge to the procedures, we turn to consider the challenge to the decisions themselves.

The test

'Clearly unfounded'

56. Section 115(1) empowers – but does not require – the Home Secretary to certify any claim "which is clearly unfounded". The test is an objective one: it depends not on the Home Secretary's view but upon a criterion which a court can readily re-apply once it has the materials which the Home Secretary had. A claim is either clearly unfounded or it is not.

57. How, if at all, does the test in s.115(6) differ in practice from this? It requires the Home Secretary to certify all claims from the listed states "unless satisfied that the claim is not clearly unfounded". It is useful to start with the ordinary process, such as s.115(1) calls for. Here the decision-maker will –

i) consider the factual substance and detail of the claim

ii) consider how it stands with the known background data

iii) consider whether in the round it is capable of belief

iv) if not, consider whether some part of it is capable of belief

v) consider whether, if eventually believed in whole or in part, it is capable of coming within the Convention.

If the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded; if not, not.

58. Assuming that decision-makers – who are ordinarily at the level of executive officers - are sensible individuals but not trained logicians, there is no intelligible way of applying s.115(6) except by a similar process of inquiry and reasoning to that described above. In order to decide whether they are satisfied that the claim is not clearly unfounded, they will need to consider the same questions. If on at least one legitimate view of the facts or the law the claim may succeed, the claim will not be clearly unfounded. If that point is reached, the decision-maker cannot conclude otherwise. He or she will by definition be satisfied that the claim is not clearly unfounded. Miss Carss-Frisk for the Home Secretary has properly accepted that this is the correct approach.

59. There are two linked explanations for the difference of language. One is that, as the applicants' counsel submits, there is a simple legal distinction between the case of specified countries deemed to be free in general from persecution of minorities by the state or with its acquiescence, to which return is mandatory once a claim is found to be unsustainable; and other countries, to which the Home Secretary may not think it right to require return as a precondition of appeal even though their case has been found on first consideration to be without substance. In the latter class, s.115(1) does not require him to certify; in the former class, s.115(6) compels him to do so. This distinction does not, in itself, afford a complete explanation for the profusion of negatives. But their use corresponds with and emphasises the reason for the dual statutory scheme: that in the specified states, as s.115(8) shows, the background facts can be expected to weigh against a valid asylum claim.

60. As we shall explain, an issue of credibility arose in this case in relation to ZL. The Secretary of State gave her the benefit of the doubt and his decision did not turn on credibility. Where an applicant's case does turn on an issue of credibility, the fact that the interviewer does not believe the applicant will not, of itself, justify a finding that the claim is clearly unfounded. In many immigration cases findings on credibility have been reversed on appeal. Only where the interviewing officer is satisfied that nobody could believe the applicant's story will it be appropriate to certify the claim as clearly unfounded on the ground of lack of credibility alone.

Conditions in the Czech Republic

61. After the Secretary of State had made his decisions and certified the claims as clearly unfounded, ZL disclosed that she had been raped by a member of the Czech police. Up to that point the claims were

founded upon the assertion that the claimants and their family had been repeatedly harassed by skinheads because they were Roma and that there was an insufficiency of protection by the state police.

62. The sufficiency of state protection of Roma against harassment by skinheads in the Czech Republic has been the subject of exhaustive and repeated consideration in asylum proceedings. On 18 December 2000 in *Olga Puzova and others v Secretary of State for the Home Department* (date notified 9 March 2001) the Immigration Appeal Tribunal heard five conjoined appeals by Roma from the Czech Republic. All complained of attacks and harassment by skinheads and of a lack of sufficiency of protection by the police. The Tribunal had voluminous documentary material about conditions in the Czech Republic, emanating from the UNHCR and many other bodies. The Tribunal also had a Report by Dr Chirico and Dr Chirico was called to give oral evidence. The account of his evidence occupied 56 paragraphs of the Tribunal's determination and reasons. The Tribunal expressed some concern about his objectivity.

63. After exhaustive consideration of the evidence, the Tribunal found:

> "On the evidence before us, it cannot be said that it has been shown that the state is unable or unwilling to provide the level of protection which it is its duty to provide on the basis of the test laid down in the judgments in *Horvath*.
>
> ….
>
> That there is some loose organisation of the skinheads we do not doubt but, bearing in mind the relative numbers of skinheads in comparison with the Roma population, the attacks are in general terms random, clearly frequently opportunistic and primarily carried out by strangers to the victim. It might be that an individual claimant who could show that he was being so targeted to the knowledge of the state authorities, and that they had failed in their specific duty to him… would be entitled to invoke the principle of surrogacy because of a failure in the state system specific to that claimant, but it is not, on the facts we have found, an argument which can be successfully advanced in putting forward a general claim to persecution as a class."

64. The Tribunal went on to consider each applicant's case in turn, and rejected each. The Tribunal ended its determination:

> "In summary, we are satisfied that any claim that Czech Roma are by reason of their ethnicity alone entitled to refugee status is unsustainable and that each case must be looked at on its own facts to see whether those facts show to the relevant standard that the specific claimant has a well founded fear of persecution for a Convention reason. Following *Horvath*, it is likely that those who can succeed in showing such a fear on the basis of feared actions of non state actors will be the exception since there is currently in place in the Czech Republic a system of criminal law which offers effective protection to Czech citizens generally, including Czech Roma. Applying the appropriate test, none of the appellants succeeds in discharging the burden upon them and each of the appeals before us is dismissed."

65. This court has subsequently attached considerable weight to the Tribunal's decision in *Puzova,* and rightly so. As Brooke LJ remarked in *Koller v Secretary of State for the Home Department* [2001]EWCA Civ 1267:

> "In a branch of jurisprudence which is fact-rich, it was very much a matter for this expert tribunal (which must be receiving many applications from unhappy Roma people of central Europe) to apply the principles they have been told to apply by the House of Lords in *Horvath.*"

In that case the application of a Czech Roma national married to a Roma was dismissed.

66. On 23 April 2002 in *Hrbac v Secretary of State for the Home Department* (Date determination notified 7 June 2002) Collins J. presided over the Tribunal on an appeal by a Czech citizen, living with a Roma. In the determination, after reference to the most recent US State Department Report on the Czech Republic, the Tribunal said this:

> "It is noted that in practice, Roma face discrimination in such areas as education, employment and housing. But positive steps are being taken to deal with the discrimination: see section 5 of the Report. However, we recognise that there is still an attitude of mind which results in discrimination against, and on occasions violence towards Roma (or those such as the appellant who are regarded as betraying their own race by living with a Rom) and that the government measures are not as effective as they should be. Nonetheless, the will is there and it is impossible ever to guarantee safety from attacks by individual elements. The same point may be made in respect of some parts of the United Kingdom where racial violence has manifested itself. The position in the Czech Republic is such that it will in our view be impossible for a Rom or anyone who has suffered as a result of discrimination against Roma to establish a well-founded fear of persecution. We recognise, of course, that the situation may change for the worse; if it does, any such change will be taken into account."

67. This observation might be treated by interviewing officers at Oakington as an invitation to 'rubber stamp' any Czech applications for asylum as clearly unfounded. It would not be right to do so. Even if, in general, the Czech Republic affords sufficient protection, there must remain a possibility of localised persecution in circumstances where there may be arguments against relocation and, as Collins J. observed, there is always the possibility that the position in the Czech Republic may change.

68. Ms Webber, with our permission, referred us to the agreed note of a judgment delivered by Gibbs J. on 10 December 2002 in which he gave permission for judicial review of a decision to certify as clearly unfounded a claim for asylum made by a Czech Rom. The applicant's account of the treatment that he had experienced included serious assaults by skinheads, pursuit by his attackers when he moved to another town some distance away, fire-bombing, and reports by the applicant to police on about 20 occasions, which produced no positive response. Gibbs J. referred to the observation of the Tribunal in *Hbrac* that we have referred to above. He commented:

> "To my knowledge this is not the only judicial comment to that effect. However, this is not the only view, or not the only arguable view, and in spite of growing confidence in judicial decisions and country information about the Czech authorities' ability to provide protection, the stage has not been reached where it can be said as a blanket rule of law or as an irrebuttable presumption that no claim raising well-founded fear of persecution or Article 3 on return could be made out. Indeed Adjudicators have found in favour of such claimants.
>
> The Secretary of State is required to consider on an individual basis whether the claim is bound to fail…"

69. We would endorse those comments. Many asylum claims from the Czech Republic are likely to be clearly unfounded, but some will raise issues that are not susceptible to fast track determination in that they are based on alleged experiences which, if true, present an arguable case and which cannot be dismissed as incapable of belief.

Dr Chirico's recent evidence

70. Dr Chirico has recently been called to the Bar. In 2001 he completed a three-year British Academy Post-Doctoral Fellowship at the School of Slavonic and East European Studies at University College London. For two years before that he lived and worked in Prague, where he was the Czech Republic local monitor for the Budapest-based European Roma Rights Centre ('ERRC'), a non-governmental organisation which aims to monitor the human rights situation of Roma in Europe. He is a frequent visitor to the Czech Republic and has many contacts there. He produced a careful and detailed 16 page report, which was placed before us. We have considered it with care.

71. Dr Chirico's Report is, in effect, a challenge to the conclusion of the IAT in *Puzova* that there is, in general, in the Czech Republic a sufficiency of protection from state agents against ill-treatment of Roma by skin-heads. Dr Chirico's Report suggests (i) that attacks on and harassment of Roma by skinheads in the Czech Republic are growing; (ii) that, at local level at least, skinheads often have the support of the police; (iii) that, although there have since 1995 been institutional and legislative changes designed to combat racial crime, the implementation of the changes by the police and the courts has been inadequate.

72. Dr Chirico gives details of three serious crimes against Roma in respect of which the criminal justice system has shown shortcomings. We note, however, that in relation to two of them the perpetrators were ultimately tried and convicted and that the Ministry of the Interior has been vigorous in castigating local shortcomings. Indeed, much of the material that Dr Chirico relies upon emanates from the Ministry.

73. Dr Chirico singles out Plzen, where the applicants resided in the Czech Republic as having a particularly bad record of racist violence, linked to a growing number of members of the skinhead movement. In 2000 the Ministry of the Interior recorded between 16 and 19 racist crimes in the municipal district, and these were only the crimes that were reported.

74. We do not find that Dr Chirico's evidence shakes the conclusion of the IAT that the Czech Republic provides, in general, a sufficiency of protection against racial crime, and attacks on Roma in particular. While the skinhead movement appears to be growing in strength, so does the determination of the central authorities to crack down on racial crime. We accept, however, that Dr Chirico describes a volatile situation and one in which there is cause for concern at the possibility of localised complicity or sympathy between skinheads and the police. It is with these considerations in mind that we turn to the evidence given by the applicants of their own experiences.

The applicants' experiences

75. Ms Webber complained that ZL's interview was not so structured as to elicit from her details of the experiences of her family. Indeed, when she started to speak about what had happened to her husband, it is alleged that she was told 'this is not your husband's claim, it is your claim'. Clearly, when considering the risk of persecution, it was relevant to have regard not merely to the experience of the applicant but to what she had to say about those of her family. We propose to consider the picture in the round.

76. In 1998 ZL's husband arrived in this country with ZL, and four dependant children. The eldest of these, VL, is the second applicant before us. He is now aged 20 and has a dependant partner and an infant son, born in England in December 2001. The other children were Marek, a boy born in November 1984, Petra, a daughter born in November 1986 and Monika, a daughter born in December 1993. The family claimed asylum. ZL's husband had been unemployed for four years, and he accepted that one of the reasons that he had come to England was the prospect of getting work here. He said, however, that his primary concern was the safety of his family. He said that his children had been beaten up and his wife was afraid to go out because of the activities of skinheads. The family was refused asylum and leave to enter and their claim was certified as 'manifestly unfounded' under section 5(4)(b) of the 1993 Act. ZL's husband appealed and the decision of the adjudicator, promulgated on 25 October 2000 has been placed before us.

He rejected the appeal and confirmed the certification. He found that the authorities in the Czech Republic were able and willing to provide protection for the family.

77. The family was not removed to the Czech Republic, but established itself in this country. In the first three months of 2002 three members of ZL's husband's family died – his father, his brother and his sister's son. This led him to return with his family to the Czech Republic, and they left England in August. They did not find things easy on their return. They got back to their flat on a housing estate in Plzen on 11 August. On the following day ZL's husband was collected and taken by the police to a police station, where he was questioned and held for five hours, before being brought back by the police to the flat. On 14 August ZL went with her husband and her mother to visit relatives in Dobrany. There they went to a restaurant, where they were refused service and abused by the staff.

78. On 15 August VL was verbally abused by three skinheads and then punched in the face. At that moment a local police car arrived on the scene and the skinheads ran off. The police took a statement of the incident from VL. On 16 August ZL and her daughter suffered racial abuse from two young boys when travelling on a bus. None of the other passengers intervened. On 19 August 6 skinheads arrived outside VL's home. He believed that they included the skinheads who had attacked him 4 days earlier. They taunted and abused him from outside his windows. He phoned the police who came to the scene. He gave the police a description of the men. The police told him that if they appeared again, he should phone the police and they would come as quickly as possible.

79. ZL complained that Petra, who is asthmatic, received treatment from the doctor in Plzen that was not as effective as the treatment that she had been receiving in England. She also complained that this daughter, who had completed her secondary education in England, was denied a place on a further educational course because she was unable to produce documents that were called for. When ZL tried to enrol Monika in the local school she was told that there was no vacancy.

80. At some point, precisely when is not clear on the evidence, the family decided to return to England. ZL's husband left towards the end of October with two of the children – Marek and Monika. ZL and the rest of the family were to follow a little later. We shall consider in a moment the events that befell them in the last week before they left. At this point, however, we pause to consider whether it is arguable that the family's decision to return to England was motivated by a well-founded fear of persecution if they remained in the Czech Republic.

81. We are in no doubt that it was not. The incidents suffered by the family on their return to the Czech Republic were unpleasant, but they fell well short of amounting to persecution or violation of Article 3 rights, even if there was reason to think that the police were turning a blind eye to them. That was, however, far from the case. In the case of most of the incidents the police were not notified. ZL spoke in her interview of complaining to the manager in a shop or restaurant and being advised that they could do nothing 'as there was no proof'. On the occasion of the two more serious incidents spoken to by VL the police appear to have responded in an appropriately supportive manner.

82. We find it significant that when ZL was asked why the family had returned to the United Kingdom she answered:

> "The reason was after the shock [of the deaths of her husband's relatives] we went home, but my children were growing up here during the puberty years, they were attending school here and they learnt to live among local people here. They felt safe here and they were growing up with a chance they will become someone. During the time they lived in this country they were not harmed. …."

83. Later, she added:

"I want my children to have a good life. They are under threat there."

These are compelling reasons for Roma in the position of the applicants and their family to wish to live in this country rather than the Czech Republic. They are not, however, reasons which engage either the Refugee Convention or the Human Rights Convention.

84. In the decision letters which were written to each applicant on 14 November 2002 the Secretary of State stated that the treatment that the applicants had experienced in the Czech Republic did not reach the threshold of infringing Article 3 of the Human Rights Convention and that sufficiency of protection was provided by the Czech authorities. He certified each of the claims as clearly unfounded. For the reasons that we have set out above, we can see no basis for challenging his decisions.

Events after ZL's husband had left for England

85. In the week before ZL and VL and the remainder of the family left for England VL's infant son was ill with a temperature. His parents took him to the doctor who had previously been the family doctor. The doctor declined to treat the baby because he did not have a Czech National Health Registration Card. Because the child had been born in London and his parents did not have a birth certificate, it was not possible immediately to obtain a Czech Registration Card. While one cannot but sympathise with the parents in this predicament, the doctor's conduct did not amount to persecution.

86. ZL's claim to asylum was rejected on 14 November. On 20 November her solicitor, who had been privately instructed by her husband, met with her to give her advice and to discuss her pending application for judicial review. At this meeting, in a state of great distress, she told her solicitor that she had been raped by a policeman on 29 October. She had told no-one about this and was very concerned that her husband should not learn of it. She had gone to a restaurant on that evening with her sons. Her sons had been set upon and beaten by three non-Roma youths. She had sent them home and telephoned for the police. Two policemen arrived in a car. They were not from the Metropolitan Police, but from the Special Forces. They told her that she would have to go back to the police station with them so that they could check her identity. Instead they drove her into the country, where one of them took her into the woods and raped her while the other remained in the car. He then left her in the woods, after threatening her that she should tell no-one what had happened as she would not be believed and he could cause trouble for her children. It took her two hours to walk home.

87. This account was conveyed to the interview officer. In a supplementary decision letter dated 13 December 2002 he stated that the Secretary of State had doubts about her account, but that if she had been the victim of a sexual assault, he was still satisfied that there was a sufficiency of protection in the Czech Republic. There was nothing to suggest that the Czech authorities did not take action against police officers who abused their powers or committed serious crimes against members of the Roma community. The rejection and certification of ZL's claim was confirmed.

88. We have given careful consideration as to whether the horrifying experience described by ZL so strengthens her claim as to preclude a finding that it is clearly unfounded. Can it be argued that the act of rape by the police officer was an incident that, added to the others, reflected systematic abuse of Roma by state agents, capable of amounting to persecution or violation of Article 3 rights? While Dr Chirico has spoken of reports of degrading treatment and harassment by police of minority groups and in particular Roma, these have been of such a nature as to permit the representatives of the Czech Government to contend that they were the result of 'lack of sensitivity rather than harassment'. Dr Chirico speaks of the police failing, on occasion, to investigate the racist crimes reported to them rather than being the authors of such crimes. No police force is free of the rogue officer who abuses his authority, and of colleagues who will turn a blind eye. The very serious offence alleged by ZL was, on the evidence, a rogue event.

89. Can it be said nevertheless that the incident indicates an unwillingness or inability on the part of the Czech authorities to protect Roma, so as to demonstrate an insufficiency of state protection? The requirement is not that all crime should be prevented, but that proper steps should be taken to protect Roma and to pursue those who commit crimes against them. Dr Chirico informs us that allegations of serious crimes by the police fall to be investigated by the Ministry of the Interior, not by the local force. There is no evidence that indicates that the Ministry of the Interior would not have pursued the perpetrator of the rape alleged by ZL, had she reported this.

90. Ms Webber criticised the representatives of the Secretary of State for not having explored with ZL why it was that she did not report the rape to the police. The suggestion, as we understand it, is that her silence may have been because she was not confident in the sufficiency of the protection that she would receive. This ignores the understandable fact that ZL did not feel able to confide to anyone what had happened – not to friends, family nor, initially to those assisting her with her asylum application or to the interviewing officer. We do not believe that any adverse inference can be drawn in relation to the sufficiency of state protection from the fact that ZL did not feel able to report that she had been raped.

91. Despite the sympathy that we feel for ZL, we have not been able to fault the conclusion of the Secretary of State that she has not made out an arguable case that she has a well-founded fear of persecution within the Refugee Convention if removed to the Czech Republic.

Article 8 of the Convention

92. ZL's husband cannot be removed pending in-country right of appeal to an adjudicator under s.69 of the 1999 Act. ZL argued that, in these circumstances, the Secretary of State's decision to remove her arguably infringed her right to respect for family life under Article 8 of the Convention. This point did not rank large in Ms Webber's oral submissions. We consider that it has no merit. ZL's application was made separately and later than that of her husband, he having arrived some days before her. His asylum application and request for permission to remain in this country had just been refused. It cannot be argued that Article 8 precluded the Secretary of State from ruling against ZL's claim for asylum in these circumstances. Nor can it be argued that Article 8 prevented him from issuing a certificate which required ZL to pursue any appeal from outside this country. Were ZL's husband's appeal to succeed, any consequent requirements of Article 8 could be adequately considered in the context of an out of country appeal by ZL. This conclusion is not invalidated by the fact that the Secretary of State decided to permit ZL to remain in this country pending determination of her husband's appeal.

93. For the reasons that we have given, we dismiss the appeals from the decisions of Goldring J. Both applications for permission to seek judicial review are refused.