HOUSE OF LORDS

Lord Slynn of Hadley Lord Steyn Lord Hutton Lord Hobhouse of Wood-borough Lord Scott of Foscott
OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT
IN THE CAUSE
REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT
(APPELLANT)
EX PARTE ADAN
(RESPONDENT)
REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT
(APPELLANT)
EX PARTE AITSEGUER
(RESPONDENT)

ON 19 DECEMBER 2000

LORD SLYNN OF HADLEY
My Lords,

I have had the advantage of reading drafts of the speeches of my noble and learned friends Lord Steyn and Lord Hobhouse of Woodborough. I gratefully adopt Lord Steyn's summary of the relevant facts and of the Statutory and Convention provisions involved. In the light of their opinions my own view can be stated more shortly.

It is common ground that if each of the appellants were sent back to the countries from which immediately they came to the United Kingdom, Germany would probably send back Adan to Somalia and France would probably send back Aitseguer to Algeria. Germany would do so because it considered that there was no state or government in Somalia which could carry out the persecution. France because it considered that the "persecution" which he feared was not tolerated or encouraged or threatened by the state itself. Thus in each case it was not conduct for which the state was accountable. It is also common ground that the United Kingdom would not send them back directly to Somalia and Algeria respectively if it was accepted that each was outside the country of his nationality owing to "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion (see Geneva "Convention relating to the status of refugees" 1951 Article 1 A). Thus even though the persecution was not threatened by the state or by an agency for which the state was responsible, Adan would not be sent back if the threat was from a rival clan to that to which Adan belonged and if the threat to Aitseguer was from the Groupe Islamique Armé in Algeria.

It appears that the Secretary of State accepts that under Article 33 of the Geneva Convention which provides that the United Kingdom shall not "expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion," such threats may come

from agencies other than the state. In other words that what is sometimes called the "protection" theory rather than the "accountability" is adopted. On the basis of the decision of the House [*Adan v. The Secretary of State* [1999] 1 A.C. 293] the Secretary of State's view is not only legitimate but right. He also accepts that for him to send back a person to a state which would send the applicant to the country where he feared persecution would itself be a breach of his obligations. (See re *Musisi ex parte Bugdaycay* [1987] A.C. 514.)

The present case however turns on section 2(2) (c) of the Asylum and Immigration Act 1996 which allows a person who has made a claim for asylum to be removed from the United Kingdom if, inter alia, the Secretary of State certifies that in his opinion

"the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention".

The sole or core question is therefore whether as a matter of law it is open to the Secretary of State to certify that in his opinion that condition has been fulfilled. Can he as a matter of law say that the government of Germany and France would not send Adan or Aitseguer back respectively to Somalia and Algeria "otherwise than in accordance with the Convention". Unfortunately there is a lack of uniformity in the interpretation of this provision between states.

As is apparent from the brief facts I have stated Germany and France take a very different view from the United Kingdom as to who as a matter of interpretation can be the perpetrators of the prosecution, a fear of which is relied on by the applicant, though the German and French positions may themselves have differences. It seems thus that if there is no recognised state in the territory (Germany) or no government which tolerates or encourages the persecution (France) the respective government will send the claimants back even if acts are threatened by others which, if done by the state, would amount to persecution within the meaning of the Convention. The reason is that in such cases they do not see that there is any persecution for which the state is accountable. The United Kingdom on the other hand will regard a threat of persecution in the territory on one of the specified grounds by a body other than the state and which is not tolerated or encouraged by the state as constituting a sufficient threat within the Convention.

The question thus narrows—may the Secretary of State say that he is satisfied that the other state will not send the applicant to another country "otherwise than in accordance with the Convention" if the other state adopts an interpretation of the Convention which the Secretary of State rejects but which the Secretary of State accepts is a reasonably possible or legitimate or permissible or perhaps even arguable interpretation.

It is understandable that comity between nations, parties to the Convention, might be seen to encourage that view but in my opinion that view is wrong. The question is not whether the Secretary of State thinks that the alternative view is reasonable or permissible or legitimate or arguable but whether the Secretary of State is satisfied that the application of the other state's interpretation of the Convention would mean that the individual will still not be sent back otherwise than in accordance with the Convention. The Secretary of State must form his view as to what the Convention requires (interpreted if his view is challenged by the courts). His is the relevant view and the relevant obligation is that of the United Kingdom. It seems to me that the Secretary of State may not send back an applicant if the Secretary of State considers that the other state's interpretation would lead to an individual being sent back by that state to a state where he has established a fear of persecution which the

Secretary of State finds to be covered by the Convention.

Just as the courts must seek to give a "Community" meaning to words in the Treaty of Rome ("worker") so the Secretary of State and the courts must in the absence of a ruling by the International Court of Justice or uniform state practice arrive at their interpretation on the basis of the Convention as a whole read in the light of any relevant rules of international law, including the Vienna Convention on Treaties. The Secretary of State and the courts of the United Kingdom have to decide what this phrase in this Treaty means. They cannot simply adopt a list of permissible or legitimate or possible or reasonable meanings and accept that any one of those when applied would be in compliance with the Convention.

In my view it is impossible for the Secretary of State to certify that the condition in section 2(2)(c) is satisfied, that the other state would not send the applicant back "in contravention of the Convention", if the interpretation of the other state and its application to particular facts would result in the Convention being applied in a way which the Secretary of State himself was satisfied was not in accordance with the Convention.

The phrase "otherwise than in accordance with the Convention" does not mean "otherwise than in accordance with the relevant state's possible reasonable, permissible or legitimate view of what the Convention means".

That persecution may be by bodies other than the state, for the purposes of the Geneva Convention, was accepted in *Adan (supra).* Nothing has been said in the present case which suggests that that might be wrong and in my view it was plainly correct. If Article 33 had intended his obligation to be limited to cases where a state carried out or tolerated the persecution, Article 33 would have said so. The Secretary of State must apply that interpretation to the application of section 2 (2) (c) of the 1996 Act as he must to his own obligation under Article 33 of the Convention.

In section 2(2)(c) it is his obligation not to send back the applicant which is in issue. If some other states interpret the Convention differently in a way which he considers not to be in compliance with the Convention he must carry out his obligation in the way in which he is advised or is told by the courts is right. To do so is not in any way contrary to the comity of nations or offensive to other states who interpret it differently and it does not begin to suggest malafides on their part.

There may be cases in which an interpretation adopted by the Secretary of State can be carried out in different ways and in such a case it may well be that the Secretary of State could accept that such other ways were in compliance with the Convention. But the Secretary of State is neither bound nor entitled to follow an interpretation which he does not accept as being the proper interpretation of the Convention.

I have no doubt that the Court of Appeal reached the right conclusion and I therefore agree with Lord Steyn and Lord Hobhouse that these appeals should be dismissed.

LORD STEYN

My Lords,

There are two appeals before the House from decisions on separate applications for judicial review, which were heard together and determined in a single judgment in the Court of Appeal: *Reg. v. Secretary of State for the Home Department, Ex parte Adan; Reg. v. Secretary of State for the Home Department, Ex parte Aitsegeur* [1999] 3 W.L.R. 1274 The central question is whether under section 2(2)(c) of the Asylum and Immigration Act 1996 ("the Act of 1996"), read with the 1951 Geneva Convention relating to the Status of Refugees (1951) (Cmd. 9171), and its Protocol

(1967) (Cmnd. 3906) ("the Refugee Convention"), the Secretary of State was entitled to authorise the removal of two asylum seekers to safe third countries on the basis that there is a permissible range of interpretations of protections of the Refugee Convention rather than one autonomous interpretation. The answer to this question turns on the construction of section 2(2)(c) of the Act of 1996 which has been repealed by the Immigration and Asylum Act 1999 ("the Act of 1999").

Adan's asylum application

Stripped of unnecessary detail, the sequence of events was as follows. Adan is a citizen of Somalia. She is now 28 years of age. She claimed asylum in Germany. She told the German authorities that she was a member of a minority clan and that she had been persecuted by majority clans dominant near Mogadishu. On 25 August 1997 the German Federal Office for the Recognition of Refugees rejected her asylum claim and refused her any other form of protection in Germany. She was ordered to leave Germany on pain of deportation to Somalia. She did not exercise her right of appeal against this decision. On 4 October 1997 she arrived in the United Kingdom and claimed asylum. On 3 February 1998 the Secretary of State asked the German authorities to accept responsibility under the 1990 Dublin Convention for determining Adan's asylum claim. (The full title of this Convention is the Convention determining the State responsible for examining Applications for Asylum Lodged in One of the Member States of the European Communities.) On 19 February 1998 the German authorities accepted responsibility for determining her asylum claim. On the same day the Secretary of State refused her asylum claim without consideration of its merits and certified under section 2 of the 1996 Act that Adan could be returned to Germany.

On 29 April 1998 a judge granted leave to Adan to move for judicial review of the Secretary of State's certificate. On 24 November 1998 the Divisional Court (Rose L.J. and Mitchell J.) dismissed the application: [1999] Imm. A.R. 114. On 22 January 1999 the Court of Appeal granted leave to appeal. By letter dated 23 June 1999, the Secretary of State informed Adan that he would not seek to return her to Germany, regardless of the outcome of the appeal, but that he would himself determine her claim for asylum. This was because the Secretary of State wished to adduce before the Court of Appeal fresh evidence about alternative forms of protection available in Germany. He accepted that he could have obtained such evidence in time to produce it to the Divisional Court. The Secretary of State accepted that it would not be right to seek to return Adan to Germany in reliance on new evidence. But, in the light of over 200 pending cases which raised similar issues, the Secretary of State wanted the Court of Appeal to hear the appeal and admit the further evidence. The Court of Appeal (Lord Woolf M.R., Laws and Mance L.JJ.) admitted further evidence and heard the appeal. On 23 July 1999 the Court of Appeal allowed Adan's appeal: [1999] 3 W.L.R. 1274.

Aitseguer's asylum application

Aitseguer is a citizen of Algeria. He is now 33 years of age. On or about 26 January 1998 he arrived in France. He did not claim asylum in France. On 9 February 1998 he arrived in the United Kingdom and claimed asylum. He claimed to be at risk from the Groupe Islamique Armé and said that the Algerian authorities are unable to protect him. On 12 February 1998 the Secretary of State asked the French authorities to accept responsibility under the Dublin Convention for determining Aitseguer's claim for asylum. On 20 April 1998 the French authorities agreed to do so. On 21 April 1998 the Secretary of State certified under section 2 of the 1996 Act that Aitseguer could be returned to France.

On 15 July 1998 a judge granted leave to apply for judicial review of the Secretary of State's certificate. On 18 December 1998 Sullivan J. quashed the Secretary of State's certificate: [1999] I.N.L.R. 176. Sullivan J. granted leave to appeal. On 23 June 1999 the Secretary of State wrote to Aitseguer in the same terms as contained in his letter to Adan, namely that he wished to adduce further evidence before the Court of Appeal and that he would not send Aitseguer to France but would himself determine his substantive asylum claim, regardless of the outcome of the appeal. The appeal was heard with that of Adan. The Court of Appeal dismissed the Secretary of State's appeal against the order of Sullivan J.

Different interpretations of the Refugee Convention

Article 1A of the Refugee Convention provides, so far as material:

"For the purposes of the present Convention, the term 'refugee' shall apply to any person who . . . (2) [As a result of events occurring before 1 January 1951 and] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence [as a result of such events], is unable or, owing to such fear, is unwilling to return to it."

The words in brackets were deleted by the 1967 Protocol. Article 33(1) provides:

"No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

There is a divergence in state practice concerning the interpretation of the word "persecuted" in article 1A(2). The majority of contracting states, including the United Kingdom, do not limit persecution to conduct which can be attributed to a state. A minority of contracting states, including Germany and France, do so limit it. The two different approaches have been referred to as the persecution theory and the accountability theory. The consequences of adopting one or other of these theories on the fate of refugees are vividly illustrated by the cases before the House.

In the case of Adan the German authorities have taken the view that governmental authority in Somalia has collapsed, so that there is no state to which persecution can be attributed. Adan claims to belong to a persecuted minority clan. She claims to be unaffected by the general exclusion from the Refugee Convention of victims of civil war simpliciter, as she would be able to demonstrate a differential impact: *Adan v. Secretary of State for the Home Department* [1999] 1 A.C. 293, 311B. Aitseguer claims to be a target of the Groupe Islamique Armé in Algeria. The Secretary of State accepts that there is a substantial risk that the French authorities would refuse his asylum claim on the ground that there was no state toleration or encouragement of the threats of this faction against Aitseguer, and therefore no persecution attributable to the Algerian state. The Secretary of State accepts that if Adan and Aitseguer were to be returned to Germany and France respectively, the restrictive view of article 1A(2) encapsulated in the accountability theory, which prevails in Germany and France, will probably cause them to be returned to Somalia and Algeria where they may face torture and death. This acceptance was, however, subject to a possible argument that there are alternative forms of protection in Germany and France which might protect Adan and Aitseguer.

The 1993 and 1996 Acts

In the United Kingdom applications for asylum are determined by the Secretary of

State. Section 6 of the Asylum and Immigration Appeals Act 1993 provides as follows:
"During the period beginning when a person makes a claim for asylum and ending when the Secretary of State gives him notice of the decision on the claim, he may not be removed from, or required to leave, the United Kingdom."
Section 2 of the Asylum and Immigration Act 1996 creates an exception to section 6 of the Act of 1993. It deals with removal of asylum seekers to "safe third countries" certified as such by the Secretary of State when he is of the opinion that the statutory conditions are satisfied. Section 2 of the Act of 1996 provides, so far as material:
"(1) Nothing in section 6 of the 1993 Act . . . shall prevent a person who has made a claim for asylum being removed from the United Kingdom if -
"(a) the Secretary of State has certified that, in his opinion, the conditions mentioned in subsection (2) below are fulfilled;
. . .
(2) The conditions are -
(a) that the person is not a national or citizen of the country or territory to which he is to be sent;
(b) that his life and liberty would not be threatened In that country or territory by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and
"(c) that the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention.
(3) This subsection applies to any country or territory which is or forms part of a member state . . ."
(My emphasis)
There is a right of appeal against a section 2 certificate: sections 2(1)(b); 3(1). But, where the certified country is a member state of the European Union, the appeal cannot be brought until after the asylum seeker has left the United Kingdom: sections 2(3); 3(2).
The Act of 1999
Section 169(3) of the Schedule 16 to the Immigration and Asylum Act 1999 repealed sections 2 and 3 of the 1996 Act. By section 11 of the 1999 Act, a member state of the European Union with which there are standing arrangements, such as the Dublin Convention, for determining which state is responsible for considering applications for asylum, is to be regarded as a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention. The asylum seeker has a right of appeal on the ground that removal to the member state will contravene section 6 of the Human Rights Act 1998: sections 11(2); 65. The Secretary of State can carry out the removal before the right of appeal is exercised if he certifies that the allegation that the removal would breach the asylum seeker's human rights is manifestly unfounded: sections 11(3); 72(2)(a). These provisions of the 1999 Act came into force on 2 October 2000. The issue raised in the present case may still arise in cases where the proposed removal is not to a member state under standing arrangements: section 12 of the 1999 Act.
The decision in the Court of Appeal
The Secretary of State's principal submission before the Court of Appeal was that under section 2(2)(c) of the Act 1996 it was a sufficient compliance with the statute if he considered that the approach of the third country was a reasonable interpretation of the Refugee Convention open to that country. In a detailed and careful judgment of the court Laws L.J. rejected this submission: [1999] 3 W.L.R.

1274. He held that the Secretary of State had to be satisfied that the practice in the third country was consistent with the true and international interpretation of the Refugee Convention. Article 1(A)(2) of the Refugee Convention extended to persons who feared persecution by non-state agents. Accordingly, the Secretary of State had not been entitled to issue certificates authorising the return of the asylum seekers to Germany and France.

The status of the appeals before the House

The outcome of the two appeals before the House will not affect the cases of Adan and Aitsegeur. But the appeals raise important issues which may require consideration in other cases, including cases of removal to countries outside the European Union. In accordance with the approach set out in *Reg. v. Secretary of State for the Home Department, Ex parte Salem* [1999] 1 A.C. 450 the House gave leave to appeal in the cases of Adan and Aitseguer. Leave was granted in the both cases so that the House could consider whether there is a material difference between a state where governmental authority has collapsed completely (as is the case in Somalia) and a state where governmental authority exists but is too weak to provide effective protection against persecution by non state actors (as is the case in Algeria). It was on this basis that Sullivan J. distinguished the ruling of the Divisional Court in Aitseguer's case from that of Adan. The Court of Appeal held that the two cases were indistinguishable: p. 1299C.

On the other hand, a third case before the Court of Appeal, named Subaskaran, added nothing to the issues and leave was not sought to bring it before the House.

The issues

In the context of a certificate issued under section 2(2)(c) of the Act of 1996 the following issues arise:

(A) Does article 1A(2) of the Refugee Convention have a proper international meaning, the interpretation of which is decided by the court as a question of law, in relation to the consideration of claims of persecution by non-state agents?

(B)

If so, what is that international meaning insofar as it is relevant in the present case?

(C)

Was the Secretary of State entitled to conclude that:

(i)

Germany was a safe third country in respect of asylum claims made by a person from a country where there was no state to protect her from persecution by non-state agents?

(ii)

France was a safe third country in respect of asylum claims made by a person from a country where there is a state but it is unable to provide protection from persecution by non-state agents?

(D) Was the Secretary of State entitled to rely on forms of protection other than the grant of asylum which are available in the state to which he is proposing to send the asylum seeker and, if so, by reference to what criteria?

In the circumstances of the two cases before the House issue (A) is the critical issue.

Issue A: Is there an autonomous meaning of article 1A(2)?

The starting point is section 2(2)(c) of the Act of 1996. It provides that one of the indispensable conditions to the granting of a certificate by the Secretary of State authorising the removal of an asylum seeker is that the government of the country to which he is to be sent (the third country) "would not send him to another country or territory otherwise than in accordance with the Convention". And that requires one

in the present context to turn back to article 33(1) of the Refugee Convention, which provides that no state "shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". It is accepted, and rightly accepted, by the Secretary of State that it is a long standing principle of English law that if it would be unlawful to return the asylum seeker directly to his country of origin where he is subject to persecution in the relevant sense, it would equally be unlawful to return him to a third country which it is known will return him to his country of origin: *Reg. v. Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] A.C. 514, at 532D-E. But counsel for the Secretary of State submits that this principle tells us nothing about the particular problem before the House, namely whether there is a true and international meaning of article 1(A)(2) of the Refugee Convention or simply a range of interpretations some of which the Secretary of State may be entitled to regard as legitimate and others not.

Section 2(2)(c) of the Act of 1996 is drafted in plain words. It requires certification by the Secretary of State that the third country would not send the asylum seeker to his country of origin "otherwise than in accordance with the Convention". The section does not express the condition in terms that refer to "the Convention as legitimately interpreted by the (third) country concerned". But that is exactly the meaning which counsel for the Secretary of State invites the House to give to section 2(2)(c). It would involve interpolation not interpretation. And there is no warrant for implying such words. It is noteworthy that such a legislative technique, expressly accommodating a range of acceptable interpretations, is nowhere to be found in respect of multilateral treaties or conventions incorporated or authorised by United Kingdom legislation. Such a remarkable result would have required clear wording. The obvious and natural meaning of section 2(2)(c) is that "otherwise than in accordance with the Convention" refers to the meaning of the Refugee Convention as properly interpreted.