IN THE SUPREME COURT OF JUDICATURE IATR 96/0264/D
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand
London WC2

Thursday 13 February 1997

B e f o r e:

LORD JUSTICE SIMON BROWN
LORD JUSTICE HUTCHISON
LORD JUSTICE THORPE

BOBAN LAZAREVIC

Appellant

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - - -

MR. I LEWIS (Instructed by Messrs. Sutovic & Hartigan, London W3 6NE) appeared on behalf of the Appellant

MR. D PANNICK QC & MR. M SHAW (Instructed by Treasury Solicitor) appeared on behalf of the Respondent

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96/1056/D

LOOL ISAAK NOOH

Appellant

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

MR. N BLAKE QC & MR. R HUSSAIN (Instructed by Messrs. Wilson & Co., Tottenham 2) appeared on behalf of the Appellant

MR. D PANNICK QC & MR. M SHAW (Instructed by Treasury Solicitor) appeared on behalf of the Respondent

96/0860/D

ZORAN RADIVOJEVIC

Appellant

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - - -

MR. I LEWIS (Instructed by Messrs. Sutovic & Hartigan, London, W3 6NG) appeared on behalf of the Appellant

MR. D PANNICK QC & MR. M SHAW (Instructed by Treasury Solicitor) appeared on behalf of the Respondent

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IATRF 96/0974/D

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

- v -

HASSAN HUSSEIN ADAN

Respondent

- - - - - -

(Handed down judgment prepared by
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Official Shorthand Writers to the Court)

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MR. D PANNICK QC & Mr. M SHAW (Instructed by Treasury Solicitor) appeared on behalf of the Appellant

MR. N BLAKE QC & MR. R HUSSAIN (Instructed by Messrs. Wilson & Co., Tottenham) appeared on behalf of the Respondent

J U D G M E N T
(As appproved by the Court)

Thursday 13 February 1997

LORD JUSTICE SIMON BROWN: These appeals concern four asylum seekers - two Somalis and two Yugoslavs - who no one suggests can at present properly be returned to their own countries, but who the Secretary of State asserts, and the Immigration Appeal Tribunal has held, are nonetheless not entitled to refugee status.

The appeals raise a number of difficult questions as to the proper construction and application of the 1951 Convention relating to the Status of Refugees (as amended by the 1967 Protocol) (the Convention), one of them so apparently fundamental that it seems remarkable that we are now, 46 years on, confronted with it for the first time.

That fundamental question (hereafter Issue 1) concerns the very definition of the term refugee in Article 1A (2) of the Convention, the first paragraph of which reads:

> "1A. 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 bracketed clauses, although deleted by the 1967 Protocol, remain relevant to the issue of construction.

Issue 1 is whether it is always necessary for a person unable to return to his home country to show a current well-founded fear of persecution or whether a historical fear may sometimes suffice - whether, to put it more precisely, the Secretary of State is right in submitting that to be a refugee a person must in every case have a current well-founded fear of persecution were he to be returned to his country of origin, or whether (as the appellants argue) if in fact he is currently "unable ... to avail

himself of the protection of" his country of origin, it is sufficient that at some time past he has come to be abroad through fear of persecution - fear which made him either flee his country of origin or, if he was already abroad, remain abroad due to circumstances arising in his country of origin during his absence (a refugee *sur place* as such are known).

This central issue arises, of course, independently of the facts of these individual cases. It is nevertheless, I think, helpful to have their basic facts in mind when identifying
(a) the practical advantages of being recognised as a refugee, as opposed to being refused recognition, (even though, as stated, these appellants and others like them are not in any event facing return home), and (b) the circumstances in which its resolution is likely to prove decisive of an asylum claim.

The basic facts of the four cases are these.

A. The Somali Cases

Adan is aged 32 from Northern Somalia, a member of the Habrawal sub-clan of the Isaaq clan; Ms Nooh is aged 46 from Mogadishu, in the south, a member of the Marehan sub-clan of the Darod clan. Both arrived in the UK in October 1990 (Adan after fleeing Somalia in June 1988 and taking two years to make his way here) and claimed asylum on arrival. Both were refused asylum by the Secretary of State but were granted exceptional leave to remain (a policy applied particularly to Somalis), Adan in July 1992, Ms Nooh in September 1992. Both appealed against the Secretary of State's refusal of refugee status and succeeded before special adjudicators, Adan in September 1995, Ms Nooh in October 1995. Both, however, then lost before the Tribunal when the Secretary of State appealed, Adan in December 1995, Ms Nooh in March 1996. Leave to appeal was refused in each case by the Tribunal but later granted by the Court of Appeal.

In neither case was there any question regarding the appellant's credibility, nor indeed as to the background circumstances in Somalia. Rather the appellants lost before the Tribunal on Convention issues, notably Issue 1 (which if decided in their favour would of itself have secured them recognition as refugees), and on a further question (Issue 2) as to the nature of the risk to which a person must be exposed during inter-clan fighting before the undoubted danger they face can properly be regarded as persecution (persecution being serious harm inflicted for a Convention reason). I shall have to return briefly to the facts when eventually I come to decide Issue 2. For present purposes, however, it is sufficient to note, first that it is accepted that both appellants fled Somalia as a result of a well-founded fear of persecution for Convention reasons; second, that Somalia remains riven by clan and sub-clan based ethnic conflict involving widespread killing, torture, rape and pillage; and third, that the country's infrastructure has broken down to the extent that neither appellant can obtain effective protection from any recognised State authority so that each would face a risk to life upon return to Somalia (if such return were physically possible, which realistically it is not). The Tribunals nevertheless found that the appellants were not at risk of Convention (as opposed to indiscriminate)

danger. In Adan's case the Tribunal said this:

> "(It must be shown) ... that the civil war or unrest and inter-clan tribal fighting which an appellant feared, would, over and above the usual state of civil war have exposed him or her to persecution on account of his or her previous political beliefs or membership of a particular clan, and ... this is the point which we must consider."

And a little later the Tribunal concluded:

> "... we find that there is no evidence (Adan) would suffer persecution on account of his membership of the Habrawal sub-clan of the Isaaq clan, from members of the armed groups of other clans or sub-clans, and we find that, while we accept that inter-clan fighting continues, that fighting and the disturbances are indiscriminate and that individuals of all sections of society are at risk of being caught up therein, and that the situation is no worse for members of the Isaaq clan and the Habrawal sub-clan, than for the general population and the members of any other clan or sub-clan."

The Tribunal in Ms Nooh's case expressly adopted that same approach and concluded that she too was in no worse position than the population as a whole. In her case, moreover, the Tribunal added a second, independent reason for rejecting her claim to asylum:

> "... if (Ms Nooh) was to be able to travel to her traditional homelands, she would not suffer harassment and these areas can be regarded as "safe areas". We accept that (Ms Nooh) might have to travel through "unsafe" areas to reach her homelands, but the fact remains that, having regard to the present situation in Somalia, (she) has been granted exceptional leave to remain in the United Kingdom."

B. The Yugoslav Cases

Both appellants are Serbs, nationals of the former socialist Federal Republic of Yugoslavia. Lazarevic is aged 38, Radivojevic 33. Both performed military service some years before 1991 when a state of war was declared in Yugoslavia. Lazarevic arrived in the UK in March 1991, obtained entry for six months as a visitor, left in February 1992 for a holiday in Spain, and returned to the UK in March 1992. Only then did he claim asylum. He was granted temporary admission but his applications for asylum and leave to enter were both refused in November 1994. Radivojevic arrived in the UK in November 1991 (via Mexico where he had gone in October with a theatre group from Yugoslavia), obtained six months leave to enter as a visitor, and in April 1992 claimed asylum. He was refused both asylum and leave to remain in May 1994.

The essential basis of both claims was that the appellants were draft evaders on grounds of conscience for which they feared inappropriate or excessive punishment on return. The appeals of both appellants were dismissed successively by special adjudicators (who in each case made damaging findings as to their credibility and sincerity), and by the Tribunal (Lazarevic's appeal in January 1996, Radivojevic's in May 1996). In essence it was decided that neither appellant had any conscientious objection to military service, that in those circumstances it mattered not that the conflict had been condemned by the international community, and that draft evaders per se are not a social group within the Convention. The Tribunals, however, gave both appellants leave to appeal to this Court.

Unlike the Somali appellants, both the Yugoslav appellants remain here unlawfully as over-stayers. At present, however, they cannot be returned to Yugoslavia. The simple reason for this is that Yugoslavia is refusing to accept the return of all refused asylum-seekers until a bilateral agreement is signed with the UK. No such agreement is apparently even on the horizon. Were they, however, now able to return, both appellants would be safe from persecution for draft evasion: on 18th June 1996, with immediate effect, Yugoslavia passed an Amnesty Law granting amnesty to all conscripts who, between 1982 and December 1995, deserted, evaded conscription, or left the country before call-up papers were received.

Issue 1 arises with regard to the Yugoslav appellants in this way. They, it is said, are plainly unable to avail themselves of the protection of their home country, being unable to return there. Were they able, therefore, to establish that they had earlier been abroad in the UK for fear of Convention persecution, that, on the appellants' contended for construction of Article 1A (2), would be sufficient for their purpose. It would be nothing to the point that they cannot possibly have any present fear given the recent Amnesty.

It is time now to indicate in broad outline something of the advantages enjoyed by those whose

refugee status is recognised over those refused asylum (be they lawfully here like the Somalis with exceptional leave to remain, or unlawfully here as overstayers like the Yugoslavs).

That those recognised as refugees are irremovable is, of course, obvious. But that, it will be appreciated, gives them no advantage over these appellants who, in present circumstances, are irremovable anyway. And if circumstances change so that it does in future become possible to return them to their own countries - because control is restored to the warring areas of Somalia or because a bilateral agreement is signed with Yugoslavia - then they could still be returned even if they had been recognised as refugees. Article 1C (5) provides:

> "This Convention shall cease to apply to any person falling under the terms of Section A if: ... (5) he can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality."
> (A similar provision exists with regard to the stateless).

There are, however, significant advantages beyond irremovability in being recognised as a refugee. In the first place, there are advantages under the Convention. For example, under article 28 refugees are entitled to travel documents to enable them to travel abroad, and under article 23:

> "The contracting states shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals."

They may not, therefore, be deprived of benefits (as, in the UK, refused asylum-seekers are).

Secondly, under national law too, there are significant advantages in recognition, albeit conferred as a matter of discretion. One advantage is that refugees obtain indefinite leave to remain after four years, whereas those granted exceptional leave must generally wait for seven years. Similarly, refugees are entitled to immediate family reunion whereas those with exceptional leave normally have to wait four years and, moreover, a special policy is applied to Somali refugees enabling them to bring in their extended families.

The other matter which it seems to me helpful to consider before finally addressing Issue 1 is just when it is likely to be determinative of whether or not refugee status in fact arises. An understanding of that, coupled with an appreciation of the advantages of recognition, provides, I believe, a useful context in which to decide the central point of construction.

As will readily be seen, the point can only ever be decisive when an asylum-seeker is in reality unable to return home: if he can return home then he must, unless only he can establish a present fear of persecution. Equally the point will never be decisive unless the fear of persecution existed at some time past but has now ended. The coincidence of these two circumstances will be rare, which doubtless explains why the issue has not previously arisen (save at Tribunal level). It is said to arise here in the case of the Yugoslav appellants because, they argue (although the Secretary of State disputes), they were in the past at risk of persecution, and because Yugoslavia now refuses to let them in although, if it did, it would not persecute them; and in the case of the Somali appellants because, argues the Secretary of State, the only protection they would be denied on return would be from general (i.e. indiscriminate as opposed to persecution-based) harm, so that their present fear is merely of danger rather than of persecution.

With these considerations in mind I turn at last to address the issue of construction. The arguments upon it ranged, I should note, far and wide. All agree that the Convention, and not least Article 1, is in many respects most unsatisfactorily drafted - deficiencies attributed by contemporary commentators to shortness of time, political compromises, a reluctance to depart too radically from earlier drafts, and so forth. There being, of course, no international tribunal empowered to rule authoritatively upon the Convention (unlike the position with the ECHR) it is left to the courts of each Contracting State to construe it as best they can with such assistance as may be found in the *travaux preparatoires* (admissible under Article 32 of the Vienna Convention), legal commentaries past and present, the UNHCR handbook and, of course, the decisions of other Contracting States.

I have to say that, promising although some of this material appeared at various stages during the course of argument, in the end I have found it of precious little help in resolving the core issue. The genesis of Article 1A (2), for example, proved interesting but ultimately unilluminating. Grahl-Madsen, a well-recognised authority on the Convention, says at page 151 of his work, The Status of Refugees in International Law (1966):

> "The phrase 'is outside' means the same as the previous more elaborate draft phrase: 'has had to leave, shall leave or remains outside'. The chosen phrase consequently includes persons who have fled from their home country ('escapees') as well as those who have become refugees sur place. This has been confirmed in a number of decisions."

Whatever light that casts upon the concept of refugees *sur place*, it leaves untouched the central issue which now confronts us.

I return, therefore, to Article 1A (2) itself. This provision, although already set out in extenso above, I now propose to break down into a series of clauses which for convenience I shall also number. A refugee is someone who:

1. (a) owing to well-founded fear of being persecuted for [a Convention reason] is outside the country of his nationality, and

(b)(i) is unable to avail himself of the protection of that country, or

(ii) owing to such fear, is unwilling to avail himself of the protection of that country;

or who:

2. (a) not having a nationality and being outside the country of his former habitual residence,

(b)(i) is unable to return to it, or

(ii) owing to a well-founded fear of being persecuted for [a Convention reason] is unwilling to return to it.

The strength of the Secretary of State's argument (for saying that no one is entitled to refugee

status unless at the time his claim is determined he is in present fear of persecution were he to be returned home) lies in the use of the phrase "is outside" in clause 1(a); its weakness lies in the difficulty in finding convincing reasons why the definition also includes clause 1(b). As to clause 1(b)(i), Mr Pannick QC submits that this further test is needed to deal with "people who have a well-founded fear and who would wish to return (for example, to work for the opposition to an evil regime, or to carry out their normal work despite the threat of persecution from opposition forces which the government cannot control) but who are simply unable to return." As to clause 1(b)(ii) - a clause qualified, unlike clause 1(b)(i), by the requirement that the applicant's unwillingness be "owing to such fear" - that additional element in the definition Mr Pannick seeks to explain thus: "the second alternative, being unwilling to return, does need to be qualified. That is because there may be many reasons why a person is unwilling to return. So the draftsman has made it plain that a mere unwillingness is not enough. He must be unwilling because of "such fear", that is the current well-founded fear previously mentioned."

Returning to clause 1(a), as a matter of language it seems to me that the phrase "is outside", although couched in the present tense, could sensibly be construed to have any one of three meanings. It could mean, as Mr Pannick submits it does, is outside owing to a well-founded fear of persecution still current at the time the asylum application is under consideration; or it could mean has at some time however long in the past come to be outside on account of such fear, and for whatever reason has never thereafter left; or, and this I understand to be Mr Blake QC's finally preferred submission for the appellants, it could mean has come to be outside (or, being already outside, not to return) owing to past persecution and still remains abroad on that account, in the sense that the causal link remains operative and has never been broken.

Difficult although I recognise it may theoretically be on occasion to decide whether the causal link required under that third formulation remains intact, I venture to suggest that this is an area of

decision-making where in any event a broad-brush approach is generally required and that upon such an approach the problem presented is far from insoluble. Ordinarily the decision-maker - be it the Secretary of State, the Special Adjudicator or the Tribunal - will focus on the temporal connection between the persecution suffered or threatened which originally caused the asylum-seeker to escape or remain here, and the date of his claim to refugee status. Assuming that there has been no substantial delay between the two and that there was no obvious intermediate opportunity to return home which reasonably he should have been expected to take, I would expect the necessary causative link to be found established.

There is, therefore, nothing in the language of clause 1(a) which to my mind compels acceptance of Mr Pannick's construction. Still less does his argument derive any support from Article 33 although he enthusiastically prayed it in aid. 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 [a Convention reason]."

It is Mr Pannick's submission that Article 33 expressly only benefits those who are at present risk of danger on return, that *ex hypothesi* it does not apply in the circumstances here postulated (i.e. no present fear but an inability to return - or at any rate return safely because of generalised danger), that accordingly the UK could properly return home for example these two Somali appellants, and that its very non-application exposes the falsity of Mr Blake's argument as to the width of Article 1A (2). I unhesitatingly reject this submission. It examines the problem from the wrong end. In my judgment it is Article 1 (and for present purposes 1A (2)) which must govern the scope of Article 33 rather than the other way round. That approach is to my mind supported, rather than, as Mr Pannick submitted, contradicted, by the speeches in R v Secretary of State for the Home Department ex parte Sivakumaran [1988] 1AC 958, a case concerned with whether the well-founded fear has to be subjectively or objectively assessed. As Lord Goff said at page 1001, " ... the non-refoulement provision in Article 33 was intended to apply to all persons determined to be refugees under Article 1 of the Convention." By the same token, therefore, as Article 33 precludes refoulement even of those

who face persecution short of threats to "life or freedom" provided only that it involves serious harm (a position now, we are given to understand, recognised by the Secretary of State despite the provisions of Rule 180 B (c) of HC725 and the suggestions to the contrary in Ravichandran v Secretary of State for the Home Department [1996] IAR 97), so too does it forbid returning home anyone who qualifies under Article 1A (2) properly construed - or for that matter anyone who may qualify on different grounds under Article 1A (1) or the second limb of Article 1D.

Article 33, therefore, to my mind provides no help in construing Article 1A (2). In any event, as I have sought to explain, non-refoulement constitutes part only of the benefits attaching to refugee status and, as indicated, the part presently least important to these appellants who cannot be removed anyway. Their concern rather is not to remain here in limbo - without benefits, without security, unable to travel, unable to bring in their families - but instead to enjoy the specific advantages to which refugees are entitled under both international and domestic law. They seek, in essence, the protection of this country and a new home here.

Why, however, asks Mr Pannick, should that be available to asylum-seekers merely because they have suffered or feared persecution at some time past? Others, he points out, who have no past history of persecution, may equally be marooned here unable to return to their country of origin, and yet no one suggests that they too (save for the stateless as to whom a discrete difficulty of interpretation arises under Article 1A (2)) are entitled to recognition as refugees. Take, for example, the Yugoslav appellants, unless they are able to establish that at some time past they were in the UK through fear of persecution, rather than merely prosecution, for draft evasion in Yugoslavia.

This is not, I acknowledge, an easy question to answer. And yet I think one can discern within the Convention signs that past persecution was indeed intended to have a continuing relevance when it comes to determining entitlement to refugee status. There is the fact that, prior to the 1967

amendments, refugee status had to derive from events occurring before 1st January 1951. There is Article 1A (1) which provides for "historic" refugees. There is the proviso to Article 1C (5) which allows an Article 1A (1) refugee "to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality." And there must surely have existed in the authors of the Convention a feeling that those displaced from their homelands by the horrors of the Holocaust years, and were still unable to return, were particularly deserving of refugee status and the protection and security that that would bring. So far as the stateless are concerned, moreover, the latter part of Article 1A (2) (my clauses 2(a) and 2(b)(i)), construed literally, requires of those presently unable to return home nothing more (save only that until 1967 they had to show that they were displaced as a result of events prior to 1951). The position, however, with regard to the stateless, is, as I recognise, of only marginal relevance in all this and, indeed, as Mr Pannick points out, my clause 2(a) has been construed by the Canadians as if in fact it were qualified (as clause 1(a) is) by a requirement to be "outside" for fear of Convention prosecution - see the relevant Canadian legislation (enacted no doubt in the light of Canada's construction of the Convention) as set out in Ward v Attorney General of Canada [1993] 2RCS 689.

Let me therefore return to the language of Article 1A (2) itself, and in particular its first part dealing with foreign nationals - my clauses 1(a), 1(b)(i) and 1(b)(ii) - where in my judgment the answer to this conundrum must be found. I regard the single most telling point in all this to be the difficulty, indeed as I see it the impossibility, of attributing any useful purpose whatever to clauses 1(b)(i) and (ii) if Mr Pannick is right about clause 1(a). His illustrations of their intended role, ingenious though they are, seem to me not merely unpersuasive but to dissolve entirely on close analysis. If Mr Pannick is right in saying that the applicant must always establish a well-founded present fear, then, if that relates to the risk of non-government persecution for a Convention reason (i.e. persecution against which the foreign state is unable to protect him), he will by definition be able to say that he is unable to avail himself of that state's protection. And if his present fear is of governmental

persecution, he will by definition be able to establish that he is unwilling to return for a Convention reason. In either event, therefore, clauses 1(b)(i) and 1(b)(ii) would add nothing; both would be otiose. Indeed, as Mr Pannick was constrained to accept, on his approach to this Article, no protection other than protection against persecution for a Convention reason could ever have any relevance for Article 1A (2) purposes whereas it seems clear from all the commentaries that the concept of protection is intended to go a good deal wider than this. As paragraph 99 of the UNHCR Handbook puts it:

> "What constitutes a refusal of protection must be determined according to the circumstances of the case. If it appears that the applicant has been denied services (e.g. refusal of a national passport or extension of its validity, or denial of admittance to the home territory) normally accorded to his co-nationals, this may constitute a refusal of protection within the definition."

Whilst therefore I readily accept that Issue 1 is one of very considerable difficulty, and that anomalies may appear to arise on either view, I have concluded that Mr Blake's arguments are to be preferred and that an asylum-seeker unable to return to his country of origin may indeed be entitled to recognition as a refugee provided only that the fear or actuality of past persecution still plays a causative part in his presence here.

Issue 2

This Issue arises only in regard to the Somali appellants and addresses the circumstances in which persecution for a Convention reason can properly be said to arise in the context of civil war.

There is a great deal of literature upon the subject, only a tiny part of which can sensibly be included in this judgment. A convenient starting point is perhaps the beginning of paragraph 164 of the UNHCR handbook, in a section headed "Special Cases: War Refugees":

> "Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention ... ."

That said, other paragraphs of the handbook clearly recognise that refugee status may indeed arise out of civil war:

> "91. The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."

(This is the so called internal flight alternative and is certainly consistent with - Mr Blake argues supportive of - my conclusion on Issue 1 insofar as it exemplifies how refugee status may arise when there is an overall failure to provide protection at home giving rise to persecution in part of the country and ineffective internal protection from generalised danger in the rest.)

> "98. Being unable to avail himself of such protection [the protection of his Government] implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. ..."

This has been recognised too by foreign courts. Take, for example, this passage from the judgment of the Canadian Federal Court of Appeal in Salibian v Minister for Employment and Immigration [1990] 3FC 250 to 258:

> "A situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated or, even, by all citizens on account of a risk of persecution based on one of the [Convention] reasons ..."

Perhaps the best general exposition of the position is to be found in Professor Hathaway's 1991 Canadian publication, The Law of Refugee Status, passages in which were urged upon us by both parties. The interested reader should really study the whole of the section from pages 90 - 97 under the heading: "Assessing Risk within the Context of Generalised Oppression." I shall content myself, however, with these brief passages from pages 93 -95:

> "Because ... refugee law is concerned only with protection from serious harm tied to a claimant's civil or political status, persons who fear harm as the result of a non-selective phenomenon are excluded. Those impacted by natural calamities, weak economies, civil unrest, war, and even generalised failure to adhere to basic standards of human rights are not, therefore, entitled to refugee status on that basis alone.
>
> This having been said, refugee law does extend protection in even these situations where there is some element of differential intent or impact based on civil or political status. The genuineness of claims grounded in a form of broadly based harm, like all others, is a function of two basic issues. First, is the anticipated state-tolerated harm of sufficient gravity to constitute persecution? If so, is there a connection between the risk faced and the claimant's race, religion, nationality, social group or political opinion? If the harm is both sufficiently serious and has a differential impact based on civil or political status, then a claim to Convention refugee status is made out, however many people are similarly affected.

> By way of example, the victims of a flood or earthquake are not *per se* Convention refugees, even if they have fled to a neighbouring state because their own government was unable or unwilling to provide them with relief assistance. If, on the other hand, the government of the home state chose to limit its relief efforts to those victims who were members of the majority race, forcing a minority group to flee to another country in order to avoid starvation or exposure, a claim to refugee status should succeed because the harm feared is serious and connected to the state, and the requisite element of civil or political differentiation is present. ...
>
> Similar examples would be the sheltering of only members of a particular political group during civil insurrection or war ... however many people may be affected, the relevant issues are the seriousness of the harm that may eventuate, and its linkage to civil or political status.
>
> ... the historical framework of the Convention makes clear that it was designed to protect persons within large groups whose fear of persecution is generalised, not merely those who have access to evidence of particularised risk. The primary intended beneficiaries of the Convention were the many displaced victims of the Second World War and the ideological dissidents from Eastern Europe, virtually all of whom were assumed to be worthy of protection by reason of their group-defined predicament. When refugee law evolved through the [1967] protocol to protect refugees from outside Europe, no new conceptual limitations were added, as a result of which there is no basis in law for reading a particularised evidence rule into the Convention-based regime.
>
> Second, it is logically inconsistent from either a humanitarian or human rights perspective to refuse cases arising from broadly-based persecution."

Mr Pannick fixes upon Professor Hathaway's reference to the requirement that the harm feared or suffered have "a differential impact based on civil or political status" before a claim to asylum is made out, and argues that on the Tribunal's above-quoted findings of fact in Adan's case, although all members of whatever clan are targeted and therefore at serious risk of harm from rival clans, his clan is at no greater risk than others (indeed at one point the Tribunal suggests that his clan and sub-clan are presently dominant) so that the "differential impact" is missing. The putative refugee, he submits, must at the very least be able to point to some group within the area of civil war less at risk than his own and this Adan cannot do.

That, however, Mr Blake contends involves a misreading of Hathaway: "differential" in the quoted passage refers simply to a difference based upon a Convention reason. The position in other words is not that in a Convention-based conflict (i.e. a conflict in which the warring parties are animated by Convention considerations) only the under-dogs are refugees, but rather that all are refugees save only those who are being targeted by neither side but who nevertheless suffer (perhaps as acutely as any clan members) from the fall-out of civil war, i.e. the innocent spectators.

Given that in reality virtually all civil wars will by their very nature be Convention-based (the opposing factions divided by issues of race, politics or the like), the difficulty of

Mr Blake's argument lies in the proposition that all who may be identified with the interests of either side, even if active participants in the conflict, are potential refugees, and the only people excluded from Convention protection are those put incidentally, even if equally, at risk. It is far from obvious why those who prosecute, perhaps even promote, a civil war should be better placed under the Convention than those lucklessly endangered on the sidelines. Just possibly, however, some limitation upon so apparent an injustice is to be found in the provisions of Article 1F which disapply the Convention from those who have "committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes", or have "been guilty of acts contrary to the purposes and principles of the United Nations" (although the scope of these provisions was not explored in argument and is, I suspect, distinctly narrow).

Whilst, therefore, I readily acknowledge this unappealing aspect of Mr Blake's case and see no real escape from it,

Mr Pannick's competing argument that one simply casts around for a current under-dog - to see if there is some other group presently at lesser risk - seems to me no more inviting.

Once again I confess to finding this a difficult issue. On balance, however, I have come to prefer Mr Blake's arguments, concluding as I do that they more faithfully reflect the evident intentions of those responsible for the Convention and give better effect to its broad humanitarian instincts.

The present issue, I should note, arises solely in the context of hostilities occurring in countries where the state authorities have lost all control, where those threatening or inflicting the harm are known as "agents of persecution". As it is put in paragraph 65 of the Handbook:

> "Persecution is normally related to action by the authorities of a country ... Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection." (My underlining).

The Convention is, in short, concerned in the last analysis to provide substitute protection (surrogate protection as it is sometimes called) for those who cannot find it from the authorities in their own country. That is not, of course, to say that all who are put at risk by national, let alone international, conflict are thereby candidates for refugee status. On the contrary, as noted in paragraph 164 of the Handbook (see above), persons compelled to leave their country of origin for those reasons are not ordinarily so regarded.

Since writing this section of my judgment there has come to my attention an Act adopted by the member states of the European Union pursuant to Title VI of the Treaty setting out their Joint Position as at 4th March 1996 on the meaning of the term "refugee" in the Convention. This has, as I understand it, no legal force but is clearly intended to establish administrative and diplomatic norms of interpretation. Much of it is instructive. Section 6 reads thus:

> "Civil war and other internal or generalized armed conflicts.
>
> Reference to a civil war or internal or generalized armed conflict and the dangers which it entails is not in itself sufficient to warrant the grant of refugee status. Fear of persecution must in all cases be based on one of the grounds in Article 1A of the Geneva Convention and be individual in nature.
>
> In such situations, persecution may stem either from the legal authorities or third parties encouraged or tolerated by them, or from *de facto* authorities in control of part of the territory within which the State cannot afford its nationals protection.
>
> In principle, use of the armed forces does not constitute persecution where it is in accordance with international rules of war and internationally recognized practice; however, it becomes persecution where, for instance, authority is established over a particular area and its attacks on opponents or on the population fulfil the criteria in section 4 [section 4 discusses 'persecution'].
>
> In other cases, other forms of protection may be provided under national legislation."

My own conclusion is, I believe, supported by that exposition, in particular by its acknowledgment that in the context of civil war or internal armed conflict persecution may stem from "*de facto* authorities in control of part of the territory within which the State cannot afford its nationals protection." Whilst, of course, each case must be decided on its own merits, it is perhaps worth

quoting also paragraph 2 of the Joint Position:

> "Individual or collective determination of refugee status
>
> Each application for asylum is examined on the basis of the facts and circumstances put forward in each individual case and taking account of the objective situation prevailing in the country of origin.
>
> In practice it may be that a whole group of people are exposed to persecution. In such cases, too, applications will be examined individually, although in specific cases this examination may be limited to determining whether the individual belongs to the group in question."

Before returning finally to the details of these appeals to see how my conclusions on the two main issues affect their outcome, I would add just this. Lest anyone be troubled that this judgment opens the Convention gates more widely to asylum-seekers than has hitherto been recognised, this thought should be borne in mind: it is a matter for the Secretary of State whether, in the long-term, refugees are to be allowed to settle in the U.K. He is, it seems to me, perfectly entitled to give them sanctuary here only for the limited period of their actual need, returning them to their countries of origin once their conflicts end and their borders re-open. Article 1C (5) expressly so allows. That is not to say that I am recommending a change in the present practice. Such a decision has nothing whatever to do with this court. I only observe that the four-year rule is discretionary and that already, as I understand it, it operates prospectively rather than retrospectively in the sense that time runs from the date of recognition, not from when the applicant first fulfilled the criteria for refugee status. Doubtless this delay itself often allows foreign conflicts to resolve and in the result asylum-seekers to be returned home rather than settled here.

In the light of my conclusions on the issues of principle, very little more need be said as to the facts of the two Somali cases. Although we were taken in very considerable depth through the recent troubled history of that country, it is sufficient to record the following. In the parts of Somalia from which these two appellants fled there have been well-documented inter-clan struggles for power over several years. When Adan fled the north, President Barre (of the Darod clan) was persecuting the Isaaqs. During Adan's absence abroad the agent of persecution shifted when in 1993 Egal became President. The Special Adjudicator, however, found that if Adan returned, President Egal would prove

unable to offer him effective protection. She said this:

> "If he were now to be returned to Somalia, assuming that to be physically possible, there is a reasonable degree of likelihood that he would be in danger of persecution by reason of his membership of the Isaaq clan or the Habrawal sub-clan and in particular because of the political opinion that would be attributed to him by reason of his membership of the Habrawal sub-clan, namely that he was a supporter of Egal."

Ms Nooh's case is yet more clear-cut. In her part of the country General Aideed's faction has at all times remained the dominant force. The Special Adjudicator in her case said this:

> "I am satisfied that inter-clan fighting has gone on since 1993 to a greater or lesser extent. ... the Hawyye under General Aideed have established an ascendancy over other factions in Mogadishu, and the Marehan have largely been pushed into enclaves in central and south-western Somalia where their position remains under threat. I am also satisfied that, in the areas outside the self-declared Republic of Somaliland, there is no formal government and there are no effectively operating agencies of government. There are fiefdoms subject to rival warlords. These are all matters of general public knowledge. ... Ms Nooh, because of clan intermarriage, has a set of conflicting perceived allegiances, which would render her personal position particularly dangerous. She would be at great risk in Mogadishu, because of being a Marehan, and because she was known as a former supporter of Barre. ... she cannot look to find any greater safety anywhere else in Somalia."

The evidence in Ms Nooh's case, indeed, suggests that after she had fled precisely what she had herself feared occurred to most of her family: thirty-one members were raped or murdered.

It is right to record that Mr Pannick in argument was substantially less concerned to defend the decisions in the Somali cases than to argue the Secretary of State's case on the disputed points of principle. The Secretary of State, indeed, had already conceded that Ms Nooh's appeal must succeed (although only to the extent of requiring a redetermination by the Tribunal, whereas Mr Blake contends for more, namely a final decision upholding Ms Nooh's claim to refugee status).

My final conclusions on the two Somali appeals can be stated as follows:

1. Having decided Issue 1 in their favour, their appeals necessarily succeed: in each case it is accepted that they fled in fear and it is not suggested that either of them could and should thereafter have returned home.
2. Even had Issue 1 been decided against them, I would still allow both appeals having regard to my conclusion upon Issue 2. This would be decisive even in Adan's case given that his sub-clan apparently remains at risk in the continuing clan-based conflict in northern Somalia.

3. Even were both Issues decided against the appellants,

Ms Nooh's appeal must in my judgment nevertheless succeed. As Mr Pannick came close to conceding, even were he right on Issue 2, no factual basis existed (certainly none was explained) for finding Ms Nooh at no greater risk than the population as a whole. On the contrary, there was uncontroverted evidence that her family connections put her at a substantially greater risk than most. As to the Tribunal's conclusion that she would be safe in her homelands, they gave no reason for ignoring the danger of her having to travel through unsafe areas to get there, and in any event appear to have overlooked the Special Adjudicator's finding that "she cannot look to find any greater safety anywhere else in Somalia."

4. There is no need to remit either of these cases to the respective Tribunals. These are statutory appeals rather than judicial review challenges, and it is open to this Court under the provisions of RSC Order 55 rule 7 (5) to substitute our decision for that given below. It is not even as if the Tribunals here heard any evidence: all the relevant facts had been found by the Special Adjudicators.

5. I would therefore allow both the Somali appeals and restore the determinations of the Special Adjudicators in their favour.

As for the two Yugoslav appeals, I have had the advantage of reading in draft Hutchison LJ's judgment upon them. I find myself in full agreement with it. For the reasons he gives I too would dismiss their appeals.

LORD JUSTICE HUTCHISON: I have had the advantage of reading the judgment of Simon Brown L.J. in draft and I agree with his conclusions on the issues of law with which he deals and on the Somali cases. The observations that follow are concerned with the Yugoslav cases.

I need add very little to Simon Brown L.J.'s brief summary of the facts. I emphasise (which is of considerable significance, given the arguments advanced on behalf of these appellants) that neither of them was believed when he asserted conscientious objection to military service as the reason for not answering his call-up.

For the appellants Radivojevic and Lazarevic Mr. Lewis accepts that both have been disbelieved as to their reasons for draft evasion and that as a result they are to be regarded as persons who have chosen for other than conscientious reasons to refuse to serve in the army. He also accepts that, by reason of the amnesty, they are not now at risk of punishment for draft evasion. He maintains, however, that they are refugees within the meaning of Article 1 A (1) of the Convention, and that this is so whether or not Mr. Blake is correct in arguing that it is unnecessary for a claimant who asserts that he is unable to return to his country to show that he has a current well founded fear of persecution for a Convention reason.

Mr. Lewis's first submission is that the denial of return is itself persecution. Insofar as it is necessary to show a current well-founded fear of persecution for a convention reason, he contends that these appellants are already subject to such persecution because the denial of their country's protection inherent in the refusal to re-admit them amounts to persecution by reason of their membership of a social group - namely
draft-evaders alternatively failed asylum-seekers - or by reason of their political opinions.

If that argument is rejected then, adopting Mr. Blake's submission as to the distinction that

article 1 A (1) draws between those unwilling and those unable to return, Mr. Lewis contends that his clients can satisfy the requirement to show that they are outside their country owing to a well-founded fear of persecution for a convention reason on the basis that in the particular circumstances of this case (and notwithstanding the adverse findings as to their credibility) the risk, prior to the amnesty, of prosecution for draft evasion amounted to a well-founded fear of persecution for a convention reason and suffices.

These arguments require determination of the following questions:-

1. Can refusal to permit the return of a person to the country of his nationality amount to persecution?
2. Are the appellants, either as draft evaders or as failed asylum seekers, members of a particular social group: and if so, does the refusal of readmittance amount to persecution of them by reason of their membership of such group? Alternatively, is it to be inferred from the refusal that they were being persecuted for their political views?
3. Is it necessary for a person unable to return to show a current well-founded fear or may a historical well-founded fear suffice? (Mr. Blake's first point).
4. Can the appellants show what Mr. Lewis concedes to be essential to their claim - that they were, when their claims were determined, outside their country by reason of a well-founded fear of persecution for a convention reason?

I shall consider each of these questions.

1. <u>Denial of re-entry as persecution.</u>

The Convention contains no definition of persecution. Mr. Lewis submits that its meaning is to be determined by having regard to the context in which it appears and to the objects of the

Convention. He places particular reliance upon and asks us to adopt Professor Hathaway's formulation, to be found in his work The Law of Refugee Status (1991) where, at page 104, he says:

> ..... persecution may be identified as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection.

On the following pages, where the author is considering the nature of the state's duty of protection, one finds these observations:

> ..... the international community has recognized that there are certain basic rights, including both freedom from interference and entitlement to resources, which all states are bound to respect as a minimum condition of legitimacy. (106)

He mentions, among other instruments, the International Covenant on Civil and Political Rights, which was the subject of a United Nations General Assembly Resolution of 19th December 1966 and came into force on 23rd March 1976, Article 12 paragraph 4 of which provides:

> No one shall be arbitrarily deprived of the right to enter his own country.

Mr. Lewis also relies on passages in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the Convention, paragraph 98 of which reads:

> Being unable to avail himself of .... protection [of his country] implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war on other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, or may indeed be an element of persecution.

Mr. Lewis argues that, as the prohibition against return has been in force since 1994, it has

plainly been sustained: and that since it is a decision of government it is also systemic - a word which he suggests, in my view rightly given the context, means institutionalized. The result is that over a prolonged period there has been, and continues to be, a complete failure of domestic protection. It is in such circumstances that an individual requires the surrogate protection of the international community. Again he relies on Professor Hathaway:

> Refugee law is designed to interpose the protection of the international community only in situations where there is no reasonable expectation that adequate national protection of core human rights will be forthcoming. Refugee law is therefore "substitute protection" in the sense that it is a response to disfranchisement from the usual benefits of nationality. As Guy Goodwin-Gill puts it, ".... the degree of protection normally to be expected of the government is either lacking or denied".
>
> This means that in addition to identifying the human rights potentially at risk in the country of origin, a decision on whether or not an individual faces a risk of "persecution" must also comprehend scrutiny of the state's ability and willingness effectively to respond to that risk. Insofar as it is established that meaningful national protection is available to the claimant, a fear of persecution cannot be said to exist. This rule derives from the primary status accorded to the municipal relationship between an individual and her state, and the principle that international human rights law is appropriately involved only when a state will not or cannot comply with its classical duty to defend the interests of its citizenry. Andrew Shacknove has helpfully phrased this principle in terms of a breakdown of the protection to be expected of the minimally legitimate state:
>
> Persecution is but one manifestation of the broader phenomenon: the absence of state protection of the citizen's basic needs. It is this absence of state protection which constitutes the full and complete negation of society and the basis of refugeehood.

The second paragraph of this quotation shows that the author has uppermost in his mind the question of protection within the state's borders but there is, it seems to me, no reason to think that it does not apply equally to those other important aspects of the rights and duties that apply between a State and its citizens. Paragraph 99 of the Handbook makes this clear.

Mr. Pannick's submissions on this part of the case were mainly directed to arguing that, assuming, as the Tribunal in Radivojevic were inclined to accept, that refusal of entry could amount to prosecution, there was a finding that on the facts here it did not. He did, however, argue that a person

could not be a refugee simply by virtue of his being prohibited from returning, and posed the question: "How can one say that the applicants are outside their country owing to a well-founded fear of persecution?" I shall deal with this question in due course in a different context - it must be remembered that I am here considering with a very limited point, which does not include an enquiry as to whether any persecution is for a Convention reason.

If a State arbitrarily excludes one of its citizens, thereby cutting him off from enjoyment of all those benefits and rights enjoyed by citizens and duties owed by a State to its citizens, there is in my view no difficulty in accepting that such conduct can amount to persecution. Such a person may properly say both that he is being persecuted and that he fears [continued] persecution in the future. I see no reason, given the scope and objects of the Convention, not to accept Professor Hathaway's formulation; and I am encouraged to do so by the fact that Simon Brown L.J. cited it in terms which at least implied approval in Ravichandran [1996] Imm. AR 97 at 107. However, even accepting that refusal to permit return can constitute persecution for a Convention reason, I would not myself accept that that would be so in the case of those who, like these appellants, are anxious at all costs not to return: how can they be said to be harmed by such a refusal? I shall return to this in the context of the second of the questions raised by Mr. Lewis's submissions, to which I now turn.

2. Persecution for a Convention reason?

Mr. Lewis submits that draft-evaders - not only those who are motivated by conscientious objection but also those who, like his clients, simply avoid military service for their own ends - are properly to be regarded as a particular social group. One should focus, he argues, not on the reasons for the evasion but on the reasons the prosecutor has for pursuing the prosecution: it is the membership of the club that is important, not the reasons its members may have had for joining. This argument, which at first sight seems, to me at any rate, unattractive, is dependent upon Mr. Lewis's assertion that the conflict or anticipated conflict in which the appellants were being called up to serve

was one which was condemned by the international community as contrary to the basic rules of human conduct. In such a case, he argues, any punishment for draft evasion is to be regarded as persecution, irrespective of the motives of the evader. He relies on the Handbook, paragraph 171:

> Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

Mr. Lewis also drew our attention to a Tribunal decision in Drvis (13129) 25th March 1996, on page 4 of which one finds the following observations:

> The adjudicator does not seem to have made a positive finding that the hostilities referred to have indeed been condemned internationally. But it is agreed that they have been.
>
> Nor did he consider whether there was a serious possibility that the appellant may be prosecuted and possibly convicted of draft evasion.
>
> In our view if there was such a likelihood then the level of punishment is irrelevant. No one can be required to participate in hostilities which are internationally condemned and therefore any persecution by the state for failing to participate or taking steps to avoid serving them may result in deprivation of liberty. This is persecution within the Convention.

In my view there can be no doubt that a person who on grounds of conscience objects to participating in an internationally condemned conflict can legitimately assert that the risk of prosecution for his actions amounts to a risk of persecution. As Mr. Pannick submitted, a person who objects to fighting on the strength of such genuinely held views is impliedly expressing a political view and the convention provides protection. However, I cannot accept that persons in the position of these appellants can claim to be in fear of persecution after refusing for extraneous reasons to fight - can seek, as Mr. Pannick put it, to take opportunistic advantage of the nature of a war which excited them not at all. I understand the basis of the appellants' argument, which involves that they were doing the right thing for the wrong reason and should, because it was the right thing, not be punished: so punishment equals persecution. It seems to me, however, that it is impossible sensibly to say that it is persecution on account of their political opinion. Mr. Lewis accepts that none of the cases in which

the question of internationally condemned conflicts has been considered involves an applicant whose objection to serve was based on reasons other than reasons of conscience. In this connection I must say that, in any event, I regard as unsustainable the suggestion that mere prosecution for draft-evasion involves the imputation of political opinion to the defendant. The most obvious inference, where a person does not answer his call up, is that he has reasons of his own for refusing to serve in the forces, as was the case with these appellants on the findings of the adjudicators and the tribunals.

I should however express my views on the submission that, even though opportunistic rather than conscientious draft-evaders, the appellants are part of a "particular social group".

Before considering a recent Court of Appeal authority on the meaning of this term I shall refer to Professor Hathaway's commentary between pages 157 and 161 of the work from which I have already quoted. Having pointed out that this fifth group was introduced into the Convention definition by a late amendment with little explanation and was adopted without discussion, he says:

> Who were the intended beneficiaries of this provision? On the one hand, it is argued that membership of a particular social group should be seen as "clarifying certain elements in the more traditional grounds for persecution", those being race, religion, nationality, and political opinion.

He refers to the fact that for a time, in Canada, this view prevailed, with the result that:

> ..... the notion of membership of a particular social group became largely superfluous, since the groups which were recognized - illegal expatriates, human rights activists, and various anti-government associations - could already be protected under the rubric of one of the other four categories.

On page 158 Professor Hathaway identifies the view at the other extreme:

> Alternatively, the plea has been made to interpret membership of a particular social group as an essentially all-embracing "safety net", requiring only some recognizable similarity of background among group members.

The author then, having explained in terms which I find convincing why this approach also is erroneous, propounds his own view in favour of what he calls a "middle ground position which avoids

reading "membership of a particular social group" as either redundant or all-inclusive". This, he says was defined by the United States Board of Immigration Appeals in Matter of Acosta (Interim Decision 2986, March 1, 1985), and I quote part of the passage he cites from that authority:

> Thus, the other four grounds of persecution enumerated ... restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution. Applying the doctrine of ejusdem generis, we interpret the phrase "persecution on account of membership [of] a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution.....

It was to this formulation, among others, that the Supreme Court of Canada referred when considering the meaning of the term in Ward v Attorney General of Canada [1993] 2 RCS 689 at 739:

> The meaning assigned to "particular social group" in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in Mayers, supra, Cheung, supra, and Matter of Acosta, supra, provide a good working rule to achieve this result. They identify three possible categories:
>
> (1) groups defined by an innate or unchangeable characteristic;
> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence.
>
> The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.

The meaning of the term "a particular social group" has recently been considered by this court

in Secretary of State for the Home Department v Savchenkov [1996]Imm. AR 28. Mr. Lewis, who broadly accepted the Acosta/Ward approach to construction of the phrase, conceded that this decision presented him with a difficulty, which he sought to meet by the submission that the damaging passages were obiter dicta.

Savchenkov was a case in which the issue was whether a Russian security guard, threatened with assault and death by gangsters in his native country, had a good claim for political asylum. One of the matters which it was necessary for him to establish was that he was a member of a particular social group. The tribunal, reversing the adjudicator, found that he was, and that the group, constituted those whom the "mafia" approached and who refused their demands - this was said to give them a recognizable social attribute. An alternative contention, which the tribunal had rejected, was that the relevant group consisted of the body of security guards who had been specially trained to provide security for hotels in St. Petersburg as a kind of organized force.

Giving the leading judgment McCowan L.J. said (33):

> Mr. Pannick appearing for the Secretary of State said that article 1 (A) 2 of the convention should be interpreted by reference to the following four principles. Before I read them it is well to bear in mind when reading them that Mr. Blake for the respondent specifically said - to make it clear - that he does not quarrel with any one of those four. They are:
>
> (1) The convention does not entitle a person to asylum whenever he fears persecution if returned to his own country. Had the Convention so intended, it could and would have said so. Instead, asylum was confined to those who could show a well-founded fear of persecution on one of a number of specific grounds, set out in Article 1 A (2);
>
> (2) To give the phrase "membership of a particular social group" too broad an interpretation would conflict with the object identified in (1) above;
>
> (3) The other "Convention reasons" (race, religion, nationality and political opinion) reflect a civil or political status. "Membership of a particular social group" should be interpreted ejusdem generis.
>
> (4) The concept of a "particular social group" must have been intended to apply to social

> groups which exist independently of persecution. Otherwise the limited scope of the Convention would be defeated: there would be a social group, and so a right to asylum, whenever a number of persons fear persecution for a reason common to them.

Later, after considering Ward and citing part of the passage that I have cited, the Lord Justice said (36):

> I cannot see on what basis it can be said that the group to which the Immigration Appeal Tribunal see the respondent as belonging is one whose members voluntary associate, or one associated by a former voluntary status. There is here no evidence that the respondent ever associated with other members of the alleged group. That group as far as we know has not associated, they do not meet, they do not know of the existence of the other alleged members. Those threatened by the mafia in Russia, no doubt, have a multitude of different interests and characteristics. I am comforted in that reaction by a decision of the Federal Court of Australia. That is the case of Morato v Minister for Immigration, Local Government and Ethnic Affairs [1992] 106 ALR 367. We have in the bundle a copy of the report from the Australian Law Reports, the decision being one on 2nd March 1992. The only relevant facts are these:
>
> > ..... M applied for refugee status claiming that he had persecution in Bolivia by virtue of his being "a member of a particular social group", that being a group of persons who not only have provided information to the police but who have been prepared to give evidence, and have given evidence, in support of the police.
>
> It was held, dismissing the application:
>
> > The concept of "membership of a particular social group" involves the idea of a group of people who can demonstrate cohesiveness and homogeneity. Here, there was no suggestion that M was other than an individual who has informed on a member of a particular family and no suggestion that he is a member of a group of people who share similar characteristics.

Finally, dealing with the cross-appeal which sought to revive the alternative argument, McCowan L.J. said:

> As to the cross-appeal, this avers that the respondent is at risk of persecution because of his employment as a security guard. The adjudicator was against him on that point. The Tribunal thought his advocate before them wise not to put much weight on it. In my judgment, it cannot stand up to analysis. The respondent does not have a fear of persecution by the mafia because he is a security guard but because he refused their advances. Had he welcomed them he would not have been persecuted.

Evans L.J. and Pill L.J. delivered concurring judgments.

I would observe:

(1) That the third of the four stated principles agreed between counsel has been characterized by Morritt L.J. in Quijano v Secretary of State for the Home Department (unreported, 18th December 1996) as not forming part of the ratio of the case. Morritt L.J. continued (transcript page 9):

> Of course a particular social group will often have a particular civil or political status but I do not think that that is a necessary condition for making the social group particular for the purposes of the definition. Such a requirement is not to be found in the express terms of the definition. Nor, in my view, is such a requirement necessarily to be implied even if, as was common ground, that which makes the social group particular must be of the same nature as the classical Convention reasons of race, religion, nationality or political opinion. To add the requirement of some distinguishing civil or political status would narrow the types of persecuted minority capable of being recognized as entitled to asylum without, in my view, sufficient justification.

Thorpe L.J., on the other hand, was prepared to accept principle 3. He said (transcript page 7):

> Although it [the third agreed principle] may not strictly be the product of the ejusdem generis rule it is in my judgment a sensible and necessary addition in order to determine whether a social group is particular for the purposes of Article 1.

In his judgment in the same case Roch L.J. said (page 12):

> I would subscribe to the third principle identified by counsel in the case of Savchenkov v Secretary of State for the Home Department [1996] 1 AR 28 according to which the phrase "social group" should be interpreted, provided that it is accepted that there may be other "Convention reasons" in addition to race, religion, nationality and political opinion which can clothe a social group with "a civil or political status" which may emerge in the future by the application of the "ejusdem generis" rule.

If I have correctly understood this paragraph, the view of Roch L.J. about principle (3) more nearly accords with that of Morritt L.J. than with that of Thorpe L.J. What can, however, be said with confidence is that their judgments at least raise a question as to the binding effect of,

or possibly the need to amend or qualify, principle (3) in the quoted passage from Savchenkov.

(2) Laws J. in Ex parte de Melo (unreported 19th July 1996) expressed the view that the ratio of Savchenkov "is found in the proposition that the social group asserted must exist independently of the fact of persecution".

(3) McCowan L.J.'s references to "voluntary association" echo the second, but not the first or the third of the groups categorized in Ward.

In these circumstances I am prepared, for the purposes of the decision in the instant case, to treat Savchenkov as supporting a construction consistent with rather than more restrictive than that favoured by Professor Hathaway based on Acosta and Ward. This accords with Mr. Lewis's submissions; he accepts that the words have to be construed ejusdem generis with the other four grounds, but not in the restricted sense accepted in counsel's proposition three in Savchenkov. He argues that all Yugoslav draft-evaders do constitute a particular social group. It is not necessary that there should have been any voluntary association between its members, any fraternization or cohesion. By their voluntary acts they have the status of draft-evaders; they have a common characteristic, a shared experience. It is immutable, part of their history which they cannot change. It matters not, in these circumstances, whether they are draft-evaders by reason of conscientious objection or for reasons of self-interest.

I cannot accept these arguments, which seem to me to involve a wholly unjustifiable extension of the meaning of the phrase "particular social group". In the passage in Ward on which Mr. Lewis relied the words "innate or unchangeable characteristic" and (on which he particularly relied) "associated by a former voluntary status, unalterable due to its historical permanence" are altogether inapt to describe the tenuous connection that exists between all the different categories of draft-evaders. Moreover, I accept Mr. Pannick's submission that the group, if there were one, could

only be those with conscientious objections.

I should record that in any event it seems to me impossible sensibly to assert that the alleged social group consisted of draft-evaders: if it existed at all it must have comprised all failed asylum-seekers; and they could not conceivably be said to constitute such a group.

Mr. Pannick also submitted that it was at least questionable whether it was established that the appellants, had they not evaded call up, would have been required to serve in an internationally condemned war. In support of this contention he relied on passages in the tribunal decisions - page 9 in the case of Radivojevic and pages 6 and 13 in the case of Lazarevic. Having considered these passages, which in the light of my earlier conclusions I do not consider I need cite, I am persuaded of the correctness of this submission.

3. Is a current well founded fear necessary in a case of a person unable to return?

On this issue, as I have already said, I agree with the conclusion of Simon Brown L.J. and I gratefully adopt his reasoning.

4. Outside country of nationality for Convention reason?

This fourth question only arises in the context of the following assumptions, namely (1) that the third question has been answered favourably to the appellants (as I, in agreement with Simon Brown L.J., have held that it should be) and (2) that the second question, insofar as it asks whether the appellants as draft-evaders are members of a particular social group or are to have attributed to them particular political views has also been answered in their favour (as I have held that it should not be). Accordingly, on the view I take of the case it is academic; but in case I am wrong in relation to

the second question I shall consider it. I must, to do so, assume that historically the appellants, by reason of being draft-evaders, were at risk of prosecution and that prosecution would have amounted to persecution for a convention reason.

It seems to me (as indeed I have earlier indicated) that the findings of the adjudicators and the tribunals on credit are fatal to the applicants on this question. If one asks whether, even at the time when the appellants were at risk of prosecution, fear of prosecution or of being made to fight against their fellow countrymen was the reason or one of the reasons for their being out of their country, the answer in the case of both appellants is that on the basis of the adjudicators' findings as to credit, accepted in each case by the tribunals, they were not. I cannot accept as realistic Mr. Lewis's submission that this appeal should succeed on the basis that the tribunals did not consider the question of historical well-founded fear because it seems to me implicit in the findings that the adjudicators made and the tribunals accepted on the applicants' credibility that at no time did they genuinely hold any such fear.

LORD JUSTICE THORPE: I have had the great advantage of reading in draft the judgments of my lords, Simon Brown LJ and Hutchison LJ, on these four appeals. I am in complete agreement with their conclusions and, save in one respect, with their reasoning. With some diffidence I wish to record that I would accept Mr Pannick's submissions on issue one.

During his exposition of the evolution of the convention Mr Blake showed how it passed from revision by the General Assembly at its Fifth Session to consideration by a Conference of Experts. A commentary on the history, contents and interpretation of the Convention written by Nehemia Robinson and published in 1953 by the Institute of Jewish Affairs, New York contained a section on Article 1 and the definition of the term refugee. The first paragraph of Mr Robinson's contemporaneous commentary is in the following terms:

> "It was pointed out at the Conference that Article 1 was not drafted very properly. First, its heading is too narrow; it deals not only with the definition of a 'refugee' but also with the exclusion grounds, and the geographical scope of application. Second, the sequence of the paragraphs is not very logical (for instance, para (6) would logically belong to the end). Third, three separate sections (d, e and f) beginning with the same words 'This Convention shall not apply ...' were drafted instead of being combined into one. Fourth the texts contain expressions about which even Members of the Conference were not sure what they actually meant. There are further obscurities dealt with below. These deficiencies were due mainly to the shortness of the time available and the reluctance of several delegations to change a text which had been adopted by the General Assembly."
>
> If that was the contemporary view of the obscurity of the text it is not surprising that its interpretation 45 years later continues to perplex even specialist and skilled interpreters.

Mr Pannick drew attention to this passage in introducing his written submissions. Having heard Mr Blake's argument on issue one he drafted a 14 page response in which he set out his submissions on the content of the Convention, the odd consequences to which Mr Blake's submission leads, and the absence both of judicial authority and of any clear statement in any other material before the court to support Mr Blake's submission. This was an attractively clear and comprehensive presentation of the respondent's case on issue one. The only distinct flaw that I could perceive lay in the introduction of Article 33(1) as a limitation to the interpretation of Article 1A. This flaw is fully exposed in the

judgment of my lord, Simon Brown LJ.

Thus in the end I accept Mr Pannick's submission that:

1. The terms of Article 1 are sufficiently obscure to allow a number of plausible interpretations to be advanced.

2. In the round the interpretation for which he contends is as permissible as any other.

3. His construction has the virtue of simplicity and ease of application. If the appellant's construction prevails the application of the Convention in individual cases may be rendered complex and uncertain in those cases from States, such as Somalia and Rwanda, whose recent history has been so volatile.

Accordingly, perhaps over influenced by pragmatic considerations, I would accept Mr Pannick's submissions on the first issue. However that acceptance would not alter the outcome of any of these appeals.

Appeals allowed in the cases Adan & Nooh; Leave to appeal to House of Lords refused.

Appeals refused in cases of Lazarevic & Radivojevic; leave to appeal to appeal to House of Lords refused; legal aid taxation.