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In the House of Lords.

ON APPEAL

BETWEEN:

THE QUEEN

— and —

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

EX PARTE

- (1) SARAVAMUTHU SIVAKUMARAN
- (2) SKANDARAJAH VAITHIALINGAM
- (3) NADARAJAH VILVARAJAH
- (4) NAVARATNASINGHAM VATHAHAN (by his next friend JEGANATHAN ASOKAN)
- (5) VINASITHAMBY RASALINGAN
- (6) KANDIAH NAVARATNAM

THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR) INTERVENING

CASE FOR THE INTERVENER

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IN THE HOUSE OF LORDS

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)

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-and-

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THE ISSUE IN THIS APPEAL

1. The issues in this Appeal are the meaning of the term "well-founded fear" in the definition of a refugee contained in Article 1 A(2) of the 1951 Convention relating to the Status of Refugees and the standard required to prove it. App, Pckt E

THE GOVERNING LEGAL PROVISIONS

2. In 1954 the United Kingdom ratified the 1951 Convention relating to the Status of Refugees (hereinafter called the 1951 Convention). In 1968 she ratified the 1967 Protocol relating to the Status of Refugees (hereinafter called the 1967 Protocol). The definition of a refugee is contained in Article 1 of the 1951 Convention, as amended by Article 1 2 of the 1967 Protocol. By the terms of these Articles, a refugee is a person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a 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"

3. Those who qualify as refugees under Article 1 are entitled to benefit, inter alia, from the following provisions in the 1951 Convention:

Article 31: Refugees unlawfully in the country of refuge

Article 32: Expulsion

Article 33: Prohibition of expulsion or return ("refoulement")

4. The Statement of Changes in Immigration Rules (1983) (H.C. 169) (hereinafter called the Immigration Rules) refer to the 1951 Convention and the 1967 Protocol. The relevant Immigration Rules are as follows:

"Refugees

16. Where a person is a refugee, full account is to be taken of the provisions of the Convention and Protocol relating to the Status of

Refugees (Cmd.9171 and Cmd.3096). Nothing in the rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments".

"PART VII. ASYLUM

73. Special considerations arise where the only country to which a person could be removed is one to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Any case in which it appears to the immigration officer as a result of a claim or information given by the person seeking entry at a port that he might fall within the terms of this provision is to be referred to the Home Office for decision regardless of any grounds set out in any provision of these rules which may appear to justify refusal to leave to enter. Leave to enter will not be refused if removal would be contrary to the provisions of the Convention and Protocol relating to the Status of Refugees".

By reason of these provisions, it is the duty of the Secretary of State, and in case of judicial review, it is the duty of the Courts to take full account of the 1951 Convention and the 1967 Protocol.

SUMMARY OF ARGUMENTS

5. The Appellants have submitted that "well-founded fear" must contain as a necessary element "a risk of actual persecution" whereas the Respondents claim that a well-founded fear is established if there is a subjective fear on one of the Convention grounds and this fear is rational. UNHCR will submit that a claimant for refugee status need only show that he has "good reason" to fear persecution for the stated reasons: in other words, that on

the basis of objective facts his fear is reasonable and plausible. Such an interpretation is based on the legislative history of the 1951 Convention, the interpretation given to a similar term in the Constitution of the International Refugees Organisation (IRO), from which the 1951 Convention definition derives, the stated objectives of the Convention and the plain meaning of the words themselves. UNHCR will further submit on English and other authority that the Respondents' burden of proof may be discharged even if it cannot be shown that there is a more than even chance of the persecution actually occurring, and that in this respect the Court of Appeal's judgment was correct.

6. However, UNHCR will respectfully submit that the Court of Appeal was incorrect in stating that Article 33(1) requires an "objective test" and does not prohibit the return of a refugee recognised under Article 1 to a territory where he has a well-founded fear of persecution. UNHCR will submit that its construction of Article 33(1) is supported by the legislative history and the primary purpose of the Convention as well as State practice, and is consistent with UK policy as stated in the Immigration Rules (para.165).
7. UNHCR will further submit that the Secretary of State is entitled to take into account all facts known to him in order to determine whether or not a fear is well-founded. However, if a claimant has established that his fear is reasonable on objective facts, then the Secretary of State may find that the fear is nevertheless ill-founded if there is clear evidence to the contrary. This would be in keeping with the general objectives of the 1951 Convention which is to ensure that an individual who has a well-founded fear of persecution is protected from the possibility of persecution. Where a person fears for his life and liberty and there is some objective evidence to support that fear, then only clear evidence to the contrary should deny him protection under the 1951 Convention.

ARGUMENT

THE INTERPRETATION OF THE 1951 CONVENTION MUST BE CONSISTENT WITH ITS FUNDAMENTAL HUMANITARIAN PURPOSE

It is a well-established principle of the law of treaties that a treaty provision is to be interpreted in its context and in the light of the object and purpose of the treaty (Article 31 of the Vienna Convention on the Law of Treaties). The first international agreements and arrangements on refugees were entered into by States at the close of the First World War to cope with the exodus of persons seeking asylum and protection in countries other than their own. These persons were foreigners in the country which received them, but differed from other foreigners of the same origin in that they did not enjoy the protection of their country and they could not or did not want to return to their country for fear of persecution.

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With the end of the Second World War, the problem of refugees assumed far greater dimensions. The newly created United Nations perceived a need to adapt existing conventions to the new refugee problems created after the war and to the development of international law under the United Nations. Thus an effort commenced which was to result in the establishment in 1950 of the Office of the United Nations High Commissioner for Refugees and the subsequent elaboration of the 1951 Convention relating to the Status of Refugees.

The reasons for adopting the 1951 Convention were expressed in its preamble in which the High Contracting Parties considered, inter alia, that:

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

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

and

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

11. These basic human rights considerations accounted for the formulation of the definition contained in Article 1 of the Convention. Similarly, the protection of the human rights of refugees constituted the main objective of the 1951 Convention, and its articles provide, as pointed out by the Court of Appeal in this case "something in the nature of a "Bill of Rights" for those who have refugee status". The definition of a refugee used in the Convention therefore reflects international recognition of the right of a certain class of persons to be protected in such a manner that they may enjoy fundamental human rights, including the right to life, liberty and security of the person. (Ex Parte Sivalumani of Appeal Oct. 87 at App, Pckt)
12. It is submitted therefore that the fundamental humanitarian purpose of the 1951 Convention must be kept foremost in mind when applying its various provisions. The provisions of the 1951 Convention should be interpreted liberally, rather than restrictively, in the light of the broad humanitarian objective underlying the instrument. Such an objective justifies a liberal application of the relevant criteria for the determination of refugee status.

THE TERM "WELL-FOUNDED FEAR OF BEING PERSECUTED" IN THE 1951 CONVENTION MEANS THAT IN ORDER FOR A PERSON TO QUALIFY FOR REFUGEE STATUS IT MUST BE SHOWN THAT HIS SUBJECTIVE FEAR OF PERSECUTION IS BASED UPON AN OBJECTIVE SITUATION WHICH MAKES THE FEAR REASONABLE AND PLAUSIBLE UNDER THE CIRCUMSTANCES.

The Drafters of the 1951 Convention agreed that fear should be considered well-founded when a person can show "good reason" why he/she fears persecution.

It is a well-established principle of the law of treaties that recourse may be had to the travaux préparatoires in order to confirm the meaning of treaty provisions (Article 32, Vienna Convention on Treaties). The term "well-founded fear of being persecuted for reasons of race, religion, nationality...or political opinion" originated with the United Nations Ad-Hoc Committee on Statelessness and Related Problems. It appears for the first time in the Draft Convention relating to the Status of Refugees adopted by the Ad-Hoc Committee at its first session in January and February 1950.

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This Committee, consisting of the representatives of thirteen governments, had been appointed in August 1949 by the United Nations Economic and Social Council (ECOSOC) to consider whether it was desirable to prepare a "revised and consolidated convention relating to the international status of refugees" and stateless persons, and if so to draft such a convention. When it was convened on January 16, 1950 the Ad-Hoc Committee had before it a memorandum from the U.N. Secretary-General submitting a preliminary draft convention. This draft did not contain a definition of "refugee" but rather, in Article 1, a description of three options for the formulation of such a definition.

15. At the beginning of the session, draft proposals for Article 1 of the Convention - the definition of a refugee - were submitted by the United Kingdom, France and the United States (U.N. Docs. E/AC.32/L.2, E/AC.32/L.3 AND E/AC.32/L.4 and Add.1). While the drafts differed as to the categories of persons to be covered by the convention, they all included persecution or the fear of persecution as the basic element of the refugee definition.

16. The United Kingdom's proposal, which was originally drafted in terms wide enough to include both refugees and stateless persons, referred to "good reasons" for being unwilling to return to one's country of origin "such as, for example, serious apprehension based on reasonable grounds of.....persecution". The original French draft proposal for Article 1 provided that, subject to certain qualifications, the parties to the convention would recognise the refugee status of any person "...who has left his country of origin and refuses to return thereto owing to a justifiable fear of persecution...". The United States proposal applied the term "refugee" to persons defined as such in the various pre-war arrangements and conventions and also to "any person who is and remains outside his country of nationality or former habitual residence because of persecution or fear of persecution on account of race, nationality, religion or political belief", provided such person also belonged to one of certain specified categories.

17. On January 19, 1950, the United Kingdom submitted a revised draft proposal for Article 1 (U.N. Doc. E/AC.32/L.2/Rev.1) in which the term "well-founded fear of persecution" appears for the first time:

"In this Convention, the expression "refugee" means, except where otherwise provided, a person who, having left the country of his ordinary residence on account of persecution or well-founded fear of persecution, either does not wish to return to that country for good and sufficient reason or is not allowed by the authorities of that country to return there and who is not a national of any other country".

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Simultaneously, the Ad-Hoc Committee appointed a working group composed of the representatives of four countries - France, Israel, the United Kingdom and the United States - to draft a definition that would obtain general approval, using the United States proposal as the basic working document. On January 23, 1950, the working group presented a provisional draft which employed, for persons who became refugees as a result of events in Europe after September 3, 1939, and before January 1, 1951, the term "owing to persecution, or a well-founded fear of persecution, for reasons of race, religion, nationality or political opinion". With certain stylistic modifications, but with no disagreement as to the substance, this was accepted as the central element of the definition applicable to post-war refugees in the Draft Convention which was adopted by the Ad-Hoc Committee and transmitted to the Economic and Social Council. In its report to ECOSOC, the Ad-Hoc Committee provided comments on the provisions of the Draft Convention. With regard to the element of the definition which is of concern in the present case, the Committee's comment was as follows:

"The expression "well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion" means that a person has either been actually a victim of persecution or can show good reason why he fears persecution...." (emphasis supplied) (U.N. Doc. E/1618 at 39)

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Following the adoption of the Draft Convention by the Ad-Hoc Committee, the Secretary-General invited governments to comment on it. None of the comments received suggested any disagreement as to the use of the specific term "well-founded fear of persecution" in the definition. The definition was discussed extensively in the Economic and Social Council at its 11th Session, in the United Nations General Assembly (Fifth Session), and in the Conference of Plenipotentiaries which met in Geneva in July 1951 to consider and adopt the 1951

Convention in its definitive form. However, these discussions, like those in the Ad-Hoc Committee, focused almost exclusively on such questions as date-lines, categories of persons to be included, criteria for exclusion, and the geographical limitation on the persons covered by the Convention. The basic definition of a refugee adopted by the Ad-Hoc Committee, and in particular the reference to a "well-founded fear of being persecuted" for specific reasons, was not questioned. After undergoing additional stylistic changes, it emerged substantially unaltered, for present purposes, in the 1951 Convention. The comment of the Ad-Hoc Committee therefore remains the final statement by the framers of the 1951 Convention interpreting the term "well-founded fear of being persecuted".

B. The term "well-founded fear of being persecuted" in the 1951 Convention was based on the Constitution and practice of the International Refugee Organisation (IRO), which required no more than that an applicant show plausible reason for fearing persecution.

20. The Ad-Hoc Committee on the Draft Convention included the following general observation:

"In drafting this convention the Committee gave careful consideration to the provisions of previous international agreements. It sought to retain as many of them as possible in order to assure that the new consolidated Convention should afford at least as much protection to refugees as had been provided by previous agreements...." (emphasis supplied) (U.N. Doc. E/1618 at 37)

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21. One of these "previous international agreements" was the Constitution of the International Refugee Organisation. Under this document, the determination of whether a refugee or displaced person was of concern to the Organisation involved an evaluation of the validity of their objections to returning to their country of origin. The term

"well-founded fear of persecution" in the first drafts of the 1951 Convention derives from one of the three "valid objections" in the IRO Constitution:

"The following shall be considered as valid objections: (1) Persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinion, provided these opinions are not in conflict with the principles of the United Nations, as laid down in the Preamble of the Charter of the United Nations" (emphasis supplied).

(Constitution of the International Refugee Org., Annex I, Part 1, Sec. C(1)(a)(i)) App, Cont'd Item 85

The clear similarity between this language and that used in the United Kingdom and other draft proposals is obvious. The term used in the official French version of the IRO Constitution as the equivalent of "fear, based on reasonable grounds of persecution" is "crainte fondée de persecution". This precise phrase was used in the draft proposal submitted by the representative of France to the Ad-Hoc Committee, and was translated from the original French on that occasion as "justifiable fear of persecution". The original United Kingdom proposal to the Ad-Hoc Committee had also used a term, "serious apprehension based on reasonable grounds.....of persecution", very close to the IRO terminology. Finally, the term used in the revised United Kingdom proposal (and eventually adopted by the Committee), "well-founded fear", is so close to the French "crainte fondée" as to appear to be a re-translation. Thus it is evident that the members of the Ad-Hoc Committee were willing to adopt, for the basic definition of a refugee in the Draft Convention, an expression which was in effect a rephrasing of the term used in the IRO Constitution.

23. The close connection between the terms "fear, based on reasonable grounds of persecution" in the IRO Constitution and "well-founded fear of being persecuted" in the 1951 Convention is significant for an understanding of the latter term inasmuch as the meaning of the earlier phrase had been clearly established through the eligibility decisions made by the IRO. The Manual for Eligibility Officers published by the IRO includes the following comments on the meaning of the term "persecution or fear based on reasonable grounds of persecution":

"Fear of persecution is to be regarded as a valid objection whenever an applicant can make plausible that owing to political convictions or to his race, he is afraid of discrimination, or persecution, on returning home. Reasonable grounds are to be understood as meaning that the applicant can give a plausible and coherent account of why he fears persecution. Since fear is a subjective feeling the Eligibility Officer cannot refuse to consider the objection as valid when it is plausible...."

IRO Manual of
Eligibility
Officers at
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24. Although the IRO Eligibility Manual was prepared for use by the Organisation's eligibility officers rather than by government officials, it was based on eligibility decisions of which governments were well aware. The representatives of the United Kingdom on the Ad-Hoc Committee referred explicitly to the IRO eligibility practice as having built up "a body of interpretive [sic] decisions" and considered that "the U.S. draft proposal was intended to be interpreted in the light of these precedents". The U.S. delegate for his part referred to the established meaning of the IRO terminology used in the U.S. proposal and stated that the definition of "neo-refugees" (i.e., those included in the general post-war definition) had "already appeared in the IRO Constitution where its meaning was quite clear. It would have to have an identical meaning in the Convention".

5. The travaux préparatoires thus contain no suggestion or hint of an intention that the criteria of eligibility under the 1951 Convention definition were to be narrower than those which prevailed under the IRO. On the contrary, since the expressed intention of the Ad-Hoc Committee was "to provide at least as much protection to refugees" as previous international instruments, the definition in the 1951 Convention must be interpreted in a manner similar to that adopted for the IRO Constitution. It is to be construed as requiring no more than that the applicant give a reasonable and plausible account of why he or she fears persecution.

UNHCR Handbook, prepared for and at the request of States, provides guidance to States on the Interpretation of the term "well-founded fear".

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, September 1979, hereinafter referred to as the Handbook) was prepared at the request of States members of the Executive Committee of the High Commissioner's Programme, for the guidance of governments. The Handbook is based on UNHCR's experience, including the practice of States in regard to the determination of refugee status, exchanges of views between the Office and the competent authorities of Contracting States, and the literature devoted to the subject over the last quarter of a century. It has since been widely circulated and utilised by governments and cited in many judicial decisions.

The phrase "well-founded fear of being persecuted" has been explained in the Handbook in the following way:

"The phrase "well-founded fear of being persecuted" is the key phrase of the definition.Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin".
(para.37)

(Ex Parte
Silvermaster,
Ort. of Appeal
12 Ct. 271 et
seq.)

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"To the element of fear - a state of mind and a subjective condition - is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and objective element, and in determining whether well founded fear exists, both elements must be taken into consideration". (para.38)

"Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences - in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified". (para.41)

"As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgment on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the background situation. A knowledge of conditions in the applicant's country of origin - while not a primary objective - is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there". (para.42)

It appears from the foregoing that "a well-founded fear" involves an assessment of both subjective elements and more objective factors in the situation of the individual applicant, but because the noun "fear" is predominant in Article 1 A(2) and fear is a state of mind, UNHCR agrees with the words of the Court of Appeal that: "Fear is clearly an entirely subjective state experienced by the person who is afraid. The adjectival phrase "well-founded" qualifies, but cannot transform, the subjective nature of the emotion". In a recent decision of the United States Supreme Court, Immigration and Naturalisation Service -v- Luz Marina Cardoza-Fonseca - a case in which UNHCR submitted an amicus curiae brief, Blackmun, J., concurring with the majority opinion, stated that:

(Ex Parte Sivakumaran, Crt. of Appeal, 12 Oct.87 at 7) App, Pckt B App, Cont'd Item 87

"The very language of the term "well-founded fear" demands a particular type of analysis - an examination of the subjective feelings of an applicant for asylum coupled with an enquiry into the objective nature of the articulated reasons for the fear".

The subjective orientation of the definition is also evident from other parts of the UNHCR Handbook, for example:

"Whether.....prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraphs.

The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to the variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary".
(para.52)

"Where measures of discrimination are in themselves not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence". (para.55)

30. The need to assess the case "looking at the situation from the point of view of one of reasonable courage circumscribed as the applicant" as indicated by the Court of Appeal, becomes even more important when one considers the evidential difficulties in the special situation in which an applicant for refugee status finds himself. Thus, the so-called "subjective" and "objective" elements of the term "well-founded fear of persecution" are not independent criteria, to be determined in two separate stages, but interact with each other, and must be considered together to determine whether the individual has good reason to fear persecution.

31. This interpretation of the term "well-founded fear" is not inconsistent with the judgment in Queen -v- Secretary of State Ex Parte Gurmeet Singh on which the Appellant relies (Queen's Bench Division, 22 May, 1987, unreported). In that case the Court stated that "A well-founded fear involves both a subjective element and an objective element. The individual whose status is under consideration must in fact have the fear and that fear must be one which from an objective standpoint would be regarded as well-founded". It is submitted that this dictum is correct and in no way implies that an applicant must show more than good reason to for persecution.

D. The subjective element in "well-founded fear" is not qualified or reduced by subsequent Articles of the 1951 Convention

32. It is submitted by the Appellant that other Articles of the 1951 Convention provide for an objective standard and thereby colour the meaning of Article 1 A(2), giving emphasis to the objective element therein. However in Article 1(A)2 the 1951 Convention replaces an earlier method of defining

refugees. Previously, as for example in the 1938 Convention concerning the Status of Refugees coming from Germany, refugees were defined by reference to (a) groups and categories and (b) factual elements -being outside their country of origin and being without protection. On the other hand, Article 1 A(2) of the 1951 Convention is based on fear of persecution for specified reasons. Thus, in contrast to the antecedent conventions, the subjective element assumes special significance.

Article 1 A extends to any person who is unable or unwilling to avail himself of the protection of his country, owing to well-founded fear of persecution for stated reasons. The use of the word "unable" does not transform the nature of the definition into one of an entirely objective nature. The word "unable" does not appear on its own, but together with the words "or, owing to such fear, unwilling..." (emphasis added). The word "unwilling" implies a subjective criterion. The Ad-Hoc Committee agreed that "unable" refers primarily to stateless refugees but also includes refugees possessing a nationality who are refused passports or other protection by their Government, whilst "unwilling" applies to refugees who refuse to accept the protection of the Government of their nationality. (U.N. Doc. E/1618 at 39)

Similarly, the cessation clauses contained in Articles 1 C(5) and (6) do not contain exclusively objective criteria.

There is for example a subjective element in Article 1 C(5) in the reference to an inability of the refugee to "continue to refuse" to return home because of a change in such fundamental circumstances.

UNHCR further contends that Articles 31, 32 and 33, the other relevant articles of the Convention in this regard, also contain subjective and objective elements. In view of the primary importance of Article 33, it will be dealt with separately in the following section.

III ALL PERSONS DEFINED AS REFUGEES UNDER ARTICLE 1 OF THE 1951 CONVENTION BENEFIT FROM THE PROTECTION AGAINST REFOULEMENT PROVIDED FOR IN ARTICLE 33

A. The legislative history of the 1951 Convention clearly indicates that all persons who are determined to be refugees under Article 1 are also protected from refoulement under Article 33.

36. Prior to the 1951 Convention, the expulsion and return of a refugee to a territory where his life or freedom might be endangered was dealt with in Article 3 of the 1933 Convention relating to the International Status of Refugees and Article 5 of the 1938 Convention concerning the Status of Refugees coming from Germany. In the 1951 Convention, the issue was addressed in the following terms:

"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".

37. Throughout the discussions in the Ad-Hoc Committee and at the Conference of Plenipotentiaries, it was clear that the non-refoulement provision in Article 33 was intended to apply to all persons determined to be refugees under Article 1 of the 1951 Convention.

Thus, for example, when debating whether persons who had committed acts contrary to the principles of the United Nations should benefit from protection under Article 33, the delegate from the United States pointed out that such persons were already excluded from the scope of Article 1 and therefore also from Article 33 (U.N. Doc. E/AC.32/SR 20. at 5). A more detailed discussion on the scope of Article 33 took place at the Second Session of the Ad-Hoc Committee where the delegate of the United Kingdom questioned if provisions

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ought not to be introduced to permit the authorities to expel a refugee who was inciting disorder. The delegate of the United States responded that delegates "would not wish to impair the principle of non-refoulement" and that "it would be highly undesirable to suggest in the text of that article that there might be cases, even if highly exceptional cases, where a man might be sentenced to death or persecution" (emphasis supplied). The French delegate, on his part, "considered that any possibility, even in exceptional circumstances, of a genuine refugee, that was to say, a person coming under the well-pondered definitions contained in Article 1, being returned to his country of origin would not only be absolutely inhuman, but was contrary to the very purpose of the Convention." (emphasis supplied). He went on to state that "reference to the definition of "refugee" in Article 1 would suffice to show how psychological factors had been taken into account even in a legal text. To take such factors into consideration in a definition, on the one hand, and to allow for the possibility, even in exceptional circumstances, of returning a refugee to his country of origin on the other, were obviously quite contradictory". (U.N. Doc. E/AC.32/SR.40 at 30-34). As a result of these various interventions, it was decided not to amend the text of the article.

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38. At the subsequent Conference of Plenipotentiaries in 1951 when the present Article 33 was first discussed, the Swedish delegate stated that his Government's amendment, which would have introduced the words "membership of a particular social group" as one of the criteria, should be discussed only after the same amendment had been discussed in relation to Article 1 since it was intimately linked with that article. At a later stage, the Swedish delegate pointed out that the words "membership of a particular social group" should be inserted before the words "or political opinion" also in Article 31 to bring it into conformity with Article 1 A(2). (U.N. Doc. A/Conf.2/SR. 35 at 20-21). Thus, the criteria of Article 33 were assimilated to those of Article 1 and not vice-versa.

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39. The non-refoulement rule was therefore clearly designed to benefit the refugee, defined as a person who, in the sense of Article 1, had a well-founded fear of being persecuted on grounds of race, religion, nationality, membership of a particular social group or political opinion. The rule was considered so fundamental that no Contracting State to the 1951 Convention is allowed to make a reservation towards this Article (Article 42(1) of the 1951 Convention). As was seen from the debate which took place when the article was drafted, the "psychological" element of Article 1 -the subjective element of the refugee definition -was considered as included in Article 33 although not explicitly referred to in the text of that article.

B. The wording of Article 33 in no way minimises the significance of the subjective element in the refugee definition.

40. The words "where his life or freedom would be threatened" were employed in the memorandum submitted by the Secretary-General to the Ad-Hoc Committee on Statelessness and Related Problems, (U.N. Doc.3E/AC.32/2 at 45) and came to be used in both Articles 33 and 31 (Article entitled "Refugees unlawfully in the country of refuge" where the terms "where his life or freedom was threatened" was used). In the travaux préparatoires to Article 31 the words "country of origin", "territories where their life or freedom would be threatened" and "country in which he is persecuted" were used interchangeably thereby indicating that there was no intention to introduce criteria more restrictive than that of "well-founded fear of persecution" as that expression was used in Article 1. (U.N. Doc. A/CONF.2/SR.35 at 18). This view is also confirmed by the specific reference to Article 1 in Article 31, viz. "where their life or freedom was threatened in the sense of Article 1".

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41. The words "where his life or freedom was threatened" were expressly introduced into Article 31 to replace the words "country of origin" so that this provision would apply in respect of any country where persecution was feared. The French representative had originally proposed to replace the words "country of origin" with the words "country in which he is persecuted". This proposal was not accepted, however, by the delegate of the United Kingdom who stated that he could not vote for the French amendment, "because the Conference had already accepted the definition of the term "refugee" given in Article 1. There might also be cases where a refugee left a country after narrowly escaping persecution but without having actually being persecuted. Such a case would not be covered by the French amendment." (U.N. Doc. A/CONF.2/SR.35 at 19). In other words, the chosen words were intended to widen the application of the provision, not to introduce any new restrictive element.

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42. In his commentary on Article 33, the Secretary General stated that "the turning back of a refugee to the frontier of the country where his life or liberty is threatened on account of his race, religion, nationality or political opinion, if such opinions are not in conflict with the principles set forth in the United Nations Charter, would be tantamount to delivering him into the hands of his persecutors". (U.N. Doc. E/AC. 32/2 at 46). The report of the Ad-Hoc Committee on Statelessness and Related Problems contained an identically worded commentary on Article 33 and added that "in the present text reference is made not only to the country of origin but also to other countries where the life or freedom of the refugee would be threatened for the reasons mentioned". (U.N. Doc. E/1618, E/AC.32/5 at 61). Moreover, the expression "threat to life or freedom" was used to illustrate persecution in the sense of Article 1. During the debate in the Ad-Hoc Committee the delegate from the United Kingdom stated that threat to freedom was a relative term and might not involve severe

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risks. (U.N. Doc. E/AC.32/SR.20 at 14). UNHCR therefore contends that the expression "threat to life or freedom" was used to indicate "well-founded fear of persecution" and that the latter expression is not only composed of an objective element, as held by the Court of Appeal, but also of a subjective element.

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C. The UK policy, as stated in the Immigration Rules, also supports UNHCR's understanding of Article 33.

43. Rule 165 of the Immigration Rules states that:

"In accordance with the provisions of the Convention and Protocol relating to the Status of Refugees, a deportation order will not be made against a person if the only country to which he can be removed is one to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group of political opinion".

44. Although the above rule is in the context of deportation, it implies that the United Kingdom's understanding of Article 33 conforms with that of UNHCR, so that a person who is recognised as a refugee under Article 1 cannot be returned to a country where he fears persecution.

IV FEAR OF PERSECUTION MAY BE WELL-FOUNDED EVEN IF IT CANNOT BE SHOWN THAT IT IS MORE LIKELY THAN NOT THAT "ACTUAL" PERSECUTION WILL OCCUR. THIS IS IN ACCORDANCE WITH INTERNATIONAL STANDARDS AND ENGLISH JUDICIAL DECISION.

45. To require a claimant to show that it is more likely than not that he would be persecuted would not be in conformity with the 1951 Convention and the 1967 Protocol because it would result in a standard more stringent than the term "well-founded fear" as used in the international refugee instruments. Paragraphs 195-202 of the UNHCR Handbook which deal with the principles and methods of determining a claim for refugee status therefore indicate a lower standard.

There is authority in the case of Fernandez -v- Government of Singapore [1987] 1 W.L.R. 987 to sustain the point that a lower standard of proof may be sufficient in a situation which involves the prediction of a future eventuality, as in an asylum application. Although the Fernandez case was decided by the House of Lords in the context of section 4(1)(c) of the Fugitive Offenders Act 1967, the statutory language is strikingly similar to Article 1. In that case Lord Diplock said:

"It only leads to confusion to speak of "balance of probabilities" in the context of what the court has to decide under section 4(1)(c) of the Act. It is a convenient and trite phrase to indicate the degree of certitude which the evidence must have induced in the mind of the court as to the existence of facts, so as to entitle the court to treat them as data capable of giving rise to legal consequences. But the phrase is inappropriate when applied not to ascertaining what has happened, but to prophesying what, if it happens at all, can only happen in the future. There is no general rule of English law that when a court is required, either by statute or at common law to take account of what may happen in the future and to base legal consequences on the likelihood of its happening, it must ignore any possibility of something happening merely because the odds on its happening are fractionally less than evens...."

"Paragraph (c) of section 4(1) of the Act....calls upon the court to prophesy what will happen to the fugitive in the future if he is returned...The degree of confidence that the events, specified will occur which the court should have to justify refusal to return the fugitive...should, as a matter of common sense and common humanity, depend upon the gravity of the consequences contemplated by the section on the one hand of permitting and on the other hand of refusing, the return of the fugitive if the court's expectation should be wrong...My Lords, bearing in mind the relative gravity of the consequences of

case was the interpretation of a statutory provision of Canadian law on the criteria governing the grant by the Immigration Appeals Board of leave to proceed for a full hearing. Under Section 71(1), Immigration Act of 1976, the Board had to allow the case to proceed to a full hearing where there were "reasonable grounds to believe that a claim could, upon the hearing of the application, be established". The appeal therefore did not deal with the standard of "well-founded fear" which the individual must establish once the case has been allowed to proceed. Indeed, Wilson, J., expressed reservations on part of the reasoning of the Court of Appeal, and said that: "To the extent, if any, that Justice Pratte's use of the expression of 'will be able' (to establish his claim at the hearing) without qualification imports a higher test than a mere balance of probabilities, it does not square with the test in Lugano, and in my opinion would have to be rejected". Furthermore, the Canadian Supreme Court in the more recent case of Re Singh and Minister of Employment and Immigration declared section 71(1) of the Canadian Immigration Act to be inoperative on grounds of natural justice.

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V THE EXAMINING AUTHORITY MUST DETERMINE WHETHER IN THE LIGHT OF ALL AVAILABLE EVIDENCE THE APPLICANT HAS ESTABLISHED THAT HE HAS A WELL-FOUNDED FEAR OF PERSECUTION FOR THE REASONS SPECIFIED IN ARTICLE 1 A OF THE CONVENTION, AND IF THERE IS CLEAR AND UNEQUIVOCAL EVIDENCE TO THE CONTRARY, MAY FIND THAT THE FEAR IS ILL-FOUNDED.

51. In this passage UNHCR addresses the issue raised in the example given by Sir John Donaldson, M.R., in his judgment herein when he illustrated the court's conclusion that fear may be well-founded although objectively baseless. The example given is that of a bank cashier who has a well-founded fear of being shot by a raider even though it transpires that the raider's gun was an imitation. UNHCR submits that in assessing well-founded fear, it is necessary to have regard to such objective evidence as exists at the time when the application for recognition as a

refugee fails to be determined. A fear which was reasonable and plausible at the time when the applicant fled his country of origin may, in an exceptional case, cease to be reasonable and plausible in the light of fresh evidence of objective facts which become available between that date and the date when the application falls to be considered.

52. In an asylum application, the very nature of the case may preclude the possibility of submitting documentary evidence to support or corroborate the applicant's statements. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner (Handbook para.196). The examiner should use all means at his disposal to obtain objective evidence on the situation, but there may also be statements that are not susceptible to proof. In such a case, if the applicant's account appears generally credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt (Handbook, paras.203-204). Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant, or if there is clear and unequivocal evidence available to the examiner which would appear to make the applicant's fear unreasonable or implausible.

[1984] A.R.10

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53. In evaluating the evidence, the examiner is entitled to take into account facts known to him, but which may not have been known to the applicant at the time of departure from his country of nationality or thereafter, and which, if known, would have made his fears unreasonable or implausible.

54. According to the Handbook:

"A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined.

Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee". (para.28)

5. However, the 1951 Convention recognises also that refugee-creating situations are dynamic and a change in events may lead to the loss or cessation of refugee status: See Article 1 C of the 1951 Convention. It should be accepted, therefore, that a person who believes he has good reason to fear persecution may have a "well-founded fear of persecution" at a particular point in time, but unfolding events or information which becomes available at a later stage could show that the fear is no longer well-founded.

6. In concurrence with the Appellant UNHCR submits that the Appellant is entitled, in evaluating an asylum application, to consider evidence which would establish that the individual's fear of persecution, though appearing reasonable to the claimant at the time of departure from his country of origin, is ill-founded. It will be ill-founded if the disclosure of such evidence to a person of reasonable courage in the claimant's circumstances would allay his or her fears or make any continuing fears unreasonable or implausible.

7. Such evidence should however be clear and unequivocal. Evidence of a lesser standard would not be consistent with Article 1 of the Convention, particularly the term "well-founded fear of persecution". Furthermore, the serious harm likely to befall someone erroneously excluded from refugee status is analogous to that caused to the wrongfully convicted and in some cases, the consequences can be even more severe than the deprivation of liberty. As Lord Diplock stated in Fernandez -v- Government of Singapore, the degree of likelihood to be established "should as a matter of common sense and common humanity, depend upon the gravity of the consequences contemplated by the section on the one hand of permitting, and on the

[1971] 1 W.L.R.
987 at 994

other of refusing, the return of the fugitive if the Court's expectation should be wrong". In In Re Musisi, Lord Templeman expressed the opinion that "where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision making process". There is a corresponding responsibility on the Secretary of State to adduce clear evidence in support of an ascertainment that a fear is not well-founded although it is otherwise reasonable and based on objective facts.

[1987] A.C.
514 at 537

CONCLUSION

58. For these reasons, the Office of the United Nations High Commissioner for Refugees respectfully submits that the Court of Appeal was right in holding that "well-founded fear" is demonstrated by proving (a) actual fear and (b) good reason for this fear, looking at the situation from the point of view of one of reasonable courage circumstanced as was the applicant for refugee status; and that, this test does not exclude the consideration of objective information available to the Secretary of State. UNHCR further submits however that the Court of Appeal erred in holding that Article 33 of the 1951 Convention requires an "objective test" so that all persons recognised as refugees under Article 1 of the Convention may not be protected from forcible return to a territory where they have a well-founded fear of persecution. Your Lordships' Intervener therefore submits that the judgment of the Court of Appeal herein should be affirmed not for the reasons given by the Court of Appeal but for the following, among other,

REASONS

BECAUSE the interpretation of the 1951 Convention must be consistent with its fundamental humanitarian purpose;

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- BECAUSE the term "well-founded fear of being persecuted" in the 1951 Convention means that in order for a person to qualify for refugee status it must be shown that his subjective fear of persecution is based upon an objective situation which makes the fear reasonable and plausible under the circumstances;
- BECAUSE all persons defined as refugees under Article 1 of the 1951 Convention benefit from the protection against refoulement provided for in Article 33;
- BECAUSE fear of persecution may be well-founded even if it cannot be shown that it is more likely than not that actual persecution will occur. This is in accordance with international standards and English judicial decision;
- BECAUSE the examining authority must determine whether in the light of all available evidence the refugee applicant has established that he has a well-founded fear of persecution for the reasons specified in Article 1 A of the Convention, and if there is clear and unequivocal evidence to the contrary may find that the fear is ill-founded.

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